Approved:3-11-04
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 p.m. on February 17, 2004 in Room 313-S of the Capitol.

All members were present except:
Representative Dale Swenson- excused
Representative Dan Williams- excused
Representative Kevin Yoder- excused

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

Conferees appearing before the committee:
Mike Kerr, National Conference of Commissioners on Uniform State Law
Ron Nelson, Attorney at Law, Nelson & Booth
Sandy Barnett, Kansas Collation against Sexual & Domestic Violence
Ron Nelson,
Joseph Booth, Drafting Committee, NCSL
Mark Stafford, Kansas Board of Healing Arts
Tom Bell, Kansas Hospital Association
Christina Collins, Kansas Medical Society
Beatrice Swoopes, Kansas Catholic Conference
Representative Jeff Jack

The hearing on **HB 2697 - uniform enforcement of domestic violence act**, was opened.

Mike Kerr, National Conference of Commissioners on Uniform State Law (NCCUSL), appeared as a proponent of the original uniform bill which establishes uniform procedures that will enable courts to recognize and enforce valid domestic protection orders issued in other jurisdictions & states. Eleven states have adopted the legislation and it has been introduced in two others this year. Domestic violence victims need protection regardless of where a protection order was issued and the uniformity will ensure protection across state lines. (Attachment 1)

Ron Nelson, Attorney at Law, Nelson & Booth, explained that the proposed bill has amendments requested by the Kansas Collation Against Sexual & Domestic Violence which makes the act non-uniform. They prefer the uniform act.(Attachment 2)

Sandy Barnett, Kansas Collation against Sexual & Domestic Violence, agreed to work with the NCCUSL to make the bill more uniform. She requested that the form be removed from the bill (Attachment 3).

Staff was directed to redraft the bill to make it the original uniform bill as provided by NCCUSL.

The hearing on **HB 2697** was closed.

The hearing on **HB 2874 - uniform interstate family support act**, was opened.

Mike Kerr, National Conference of Commissioners on Uniform State Law, was a proponent of the bill which would limit child and family support orders to a single state, eliminating interstate jurisdictional disputes, and clarifies many of the provisions of the Act. (Attachment 4)

The hearing on **HB 2874** was closed.

The hearing on **HB 2813 - disposition of records of deceased physician,** was opened.

Mark Stafford, Kansas Board of Healing Arts, appeared as the sponsor of the proposed bill. It would provide

a procedure for the appointment of a records' custodian in those instances where patient records have been abandoned. The reason for the request is due to instances in which physicians have had their licenses revoked, died or have left their practices and the patients have been left without a way to retrieve their records. (Attachment 5)

Christina Collins, Kansas Medical Society, supported the concept of the bill but had concerns regarding the taking possession of health care professional's records and the law and factors leading up to the distribution of records. (Attachment 6)

The hearing on **HB 2813** was closed.

The hearing on **HB 2741 - health care decisions made by a surrogate when agent is not available**, was opened.

Tom Bell, Kansas Hospital Association, appeared in favor of the proposed bill. It considers the best way to make decisions for those who are incapacitated when they don't have a living will or durable power of attorney. Kansas currently does not have a statute on proxy decisions for medical care when an individual lacks capacity. (Attachment 7) He suggested that section 2 needed work.

Christina Collins, Kansas Medical Society, suggested an amendment in which language mirrors statutes governing similar legal health care documents. (Attachment 8)

Olathe Medical Center did not appear before the committee but requested their written testimony in support of the bill be included in the minutes. (Attachment 9)

Beatrice Swoopes, Kansas Catholic Conference, expressed concerns with the bill.(Attachment 10) Some of which were:

- language is confusing and needs to be clarified
- definition section contains many subjective factors
- the priority list of those who serve as surrogates for health care decisions, all could stand to inherit from the patient

The hearing on **HB 2741** was closed.

The hearing on **HB 2577 - authorized representatives for health care records included deceased patients spouse or heirs at law**, was opened.

Representative Jeff Jack appeared as the sponsor of the bill which would allow that if there is no surviving spouse, the heirs of a deceased patient would be considered to be the authorized representative of the deceased patient for purposes of obtaining medical records. (Attachment 11)

The hearing on **HB 2577** was closed.

SB 324 - concerning appellate jurisdiction of supreme court

Representative Patterson made the motion to report **SB 324** favorably for passage. Representative Jack seconded the motion. The motion carried.

HB 2655 - civil procedure for limited actions; request for admissions; judicial discretion to allow withdrawal of amendment of admission

Representative Jack made the motion to report **HB 2655** favorably for passage. Representative Owens seconded the motion.

Representative Jack made the substitute motion to amend in subsection (d) line 4 by adding "made by non-response when the party to whom the admissions were sent shows good cause for failure to respond and shows

evidence that the admission is not true" and on line 9 by adding "In the event such withdrawal or amendment is made by the party to whom the admissions were sent trial, the party who obtained the admissions shall be allowed a continuance of the trial setting." (Attachment 12) Representative Owens seconded the motion. The motion carried.

Representative Jack made the motion to report **HB 2655** favorably for passage, as amended. Representative Mast seconded the motion. The motion carried.

The committee meeting adjourned. The next meeting was scheduled for February 18, 2004.

WHY STATES SHOULD ADOPT THE UNIFORM INTERSTATE ENFORCEMENT OF DOMESTIC VIOLENCE PROTECTION ORDERS ACT

The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act, promulgated in 2000 and amended in 2002, establishes a uniform system for the enforcement of domestic violence protection orders across state lines. The uniform act furthers the purpose of the "full faith and credit" provision of the Federal Violence Against Women Act of 1994 regarding protection orders issued by states. Although the federal provision was an important step toward protection, it left open some crucial questions regarding procedural aspects of enforcement that the uniform act helps to answer.

In addition, while some states have enacted their own legislation, these statutes greatly vary from one another, especially in their methods of enforcement and the extent to which each will enforce foreign protection orders. Therefore, the uniform act should be enacted to ensure that full faith and credit is effectively given to protection orders.

The act has two purposes: 1) to define the meaning of full faith and credit as it relates to the interstate enforcement of domestic violence protection orders, and 2) to establish uniform procedures for effective interstate enforcement. The act accomplishes these purposes through provisions that are broad enough to ensure that basically any domestic violence protection order is enforced. The act's provisions include:

- **Judicial enforcement of order.** Courts must enforce the terms of valid protection orders of other states as if they were entered by the enforcing state, until the order expires.

- **Terms of the order.** All terms of the order are to be enforced, even if the order provides for relief that would be unavailable under the laws of the enforcing state. Terms that concern custody and visitation matters are enforceable if issued for protection purposes and if the order meets the jurisdictional requirements of the enforcing state. Terms of the order made with respect to support are enforceable under the Uniform Interstate Family Support Act.

- **Non-judicial enforcement of order.** A law enforcement officer, upon finding probable cause that a valid order has been violated, must enforce the order as if it were an order of the enforcing state.

- **Registration of order.** An individual may, but is not required to, register a foreign protection order with the enforcing state. Registration will help set aside possible challenges to an order as well as facilitate effective enforcement of an order.

- **Immunity.** Law enforcement officers, governmental agencies, prosecuting attorneys, clerks of court, or other officials are protected from civil and criminal liability for enforcement of a protection order in good faith.

UNIFORMITY

It is important for each state to enact the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act. The act provides for uniform procedures for effective interstate enforcement. Domestic violence victims need protection regardless of where a protection order was issued. The uniform act helps to ensure protection across state lines. Effective interstate enforcement of protection orders can be achieved only if every state enacts the uniform act.

National Conference of Commissioners on Uniform State Laws
211 E. Ontario Street, Suite 1300, Chicago, IL 60611
312-915-0195, Fax 312-915-0187, www.nccusl.org

Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act

(Last revised or amended in 2002)

- A Summary -

Domestic violence is a concern in every state in the United States. The sad historical legacy of death and personal injury have led every state to provide for domestic violence protection orders. Protection orders are meant to prevent domestic violence by putting an enforceable shield around its potential victims against those who would harm them. The order, which generally prohibits the victimizer's personal contact and proximity to potential victims, gives law enforcement and the courts a means of either warning off victimizers by weight of the law or by getting them into custody before actual harm occurs.

The Violence against Women Act of 1994 provides a federal component of law against domestic violence. One of its provisions clarifies the status of such orders under the Full Faith and Credit Clause of the U.S. Constitution. It makes it abundantly clear that domestic violence protection orders from one state are entitled to full faith and credit in another state. Entitlement to full faith and credit means, generally, that an order from one state must be enforced in another state as if it is an original order issued by the enforcing state.

Interstate enforcement of orders always encounters some difficulties, however. Domestic violence protection orders are no different in this respect from other judgments and official acts entitled to full faith and credit. Until there is in each state a set of recognizable, uniform procedures and authorities, the implementation of full faith and credit suffers. States have addressed enforcement of foreign (meaning other state) protection orders, but have done so in non-uniform ways that obscure interstate enforcement rather than promote it. The result is confusion rather than enforcement.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has had success over many year in addressing issues that arise in the context of interstate enforcement of judgements. The Uniform Enforcement of Foreign Judgments Act, the Uniform Interstate Family Support Act, and the Uniform Child Custody Jurisdiction and Enforcement Act have been successful efforts at solving interstate enforcement problems and in implementing the mandate of full faith and credit. In 2000, NCCUSL promulgated the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act to address the interstate enforcement

of protective orders arising from a domestic-violence and family-violence context; in 2002, in consultation and cooperation with the U.S. Department of Justice's Violence Against Women Office, the Act was substantively amended to also cover orders arising under an issuing state's anti-stalking laws.

Because domestic violence and stalking protection orders are not necessarily uniform in character (as is the usual case with other judgments and orders of courts from state to state), an enforceable order must be defined broadly enough to ensure that any kind of order that prohibits personal contact or proximity when there is a threat of domestic violence is enforced. The Act defines "protection order" to be "an injunction or other order, issued by a tribunal under the domestic-violence, family-violence, or anti-stalking laws of the issuing State, to prevent an individual from engaging in violent or threatening acts against, harassment of, contact or communication with, or physical proximity to another individual." The fact that the order has terms and conditions that are different from orders issued in the enforcing state, or come from tribunals that are not organized in the same fashion as the tribunals of the enforcing state, does not mean that the enforcing state may refuse enforcement. Any kind of a foreign order that is intended to prevent violence must be enforced.

There are essentially three enforcement tracks which a foreign protection order may take in any enforcing state under the Act. There is direct enforcement by a tribunal, direct enforcement by law enforcement officers, and there is registration of foreign protection orders as a prelude to enforcement. The term 'tribunal' is used in the Act, consistent with the usage of the Uniform Interstate Family Support Act, which has been enacted in every U.S. jurisdiction. Whether the enforcing body is a court or an agency, the term tribunal includes both within its scope.

A "tribunal" with jurisdiction to enforce may enforce a foreign protection order without any other prior perfecting or validating procedure. A valid foreign protection order must be enforced. A valid protection order is one that identifies the protected individual (the potential victim) and the respondent (the potential victimizer), is currently in effect, and was issued by a tribunal with full jurisdiction. An order must meet due process standards. An ex parte order is enforceable if the respondent was provided notice and has had or will have opportunity to be heard within a reasonable time after the order was issued. Terms of an order respecting custody and visitation must be enforced, if the issuing state has jurisdiction. An order valid on its face establishes a prima facie case for its validity.

However, it is not necessary to petition a tribunal to enforce a valid foreign protection order. A law enforcement officer with "probable cause to believe that a valid foreign protection order exists and that the order has been violated," must enforce the order "as if it were the order of a tribunal of this State." The presence of an order that identifies the protected individual and the respondent that is current constitutes probable cause to believe that a valid foreign protection order exists. Law enforcement officers who are not presented with an actual order, may still act to enforce upon other information that provides probable cause to believe that a valid order

exists. Even if an order appears not to have been served on the respondent, a law enforcement officer must inform the respondent of the order and make a reasonable effort to serve it. The respondent must then have a reasonable time to comply, before further enforcement is initiated. Registration is not a pre-condition for enforcement by a law enforcement officer.

Registration of orders and judgments for enforcement purposes has long been a part of American law. Registration is provided for in the Uniform Enforcement of Foreign Judgments Act and the Uniform Interstate Family Support Act. Registration is an assist to enforcement. A registered order, that is certified in the issuing state, sets aside possible challenges to the order. A registered order provides substantial assurance to a tribunal or law enforcement officer in an enforcing state that the order is valid. Registration allows a protected individual to prepare for enforcement of an order before there is any actual threat from the named respondent.

The Act provides for registration—a fairly simple procedure that requires a certified order and an affidavit from the protected individual that the order is current. The protected individual may receive a certified copy of the order which then may be presented for enforcement either in a tribunal or by a law enforcement officer.

The last important provision of the Act is an immunity provision that provides a liability shield for any agency, law enforcement officer, prosecuting attorney, clerk of court, or other official who enforces an order under the Act in good faith.

The Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act is an important step towards improving the interstate enforcement of protection orders. A uniform act will make enforcement more efficient and certain. It will make implementation of full faith and credit for these orders more feasible. This Act does not attempt to solve all the problems of domestic violence. It takes on only the interstate enforcement aspect, and NCCUSL's intention is to make prevention of violence a greater reality as a result. Every state should give this Act serious and immediate consideration in its legislature.

The National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 113th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law. The organization comprises more than 300 lawyers, judges, and law professors, appointed by the states as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands, to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical. Conference members must be lawyers, qualified to practice law.

FAMILY LAW

Protection Orders

By Mary Kay Kisthardt and Barbara Handschu

THE INCIDENCE OF domestic violence continues to be widespread. The likelihood of a client coming to you with an existing order of protection issued in another state is likely to increase. This client may tell you that she is afraid that her former boyfriend who is prohibited from initiating any contact with her or their child will figure out that she has moved close to her family. She is concerned that he will hurt her or attempt to take their child.

The possibility of this is real, especially since she reports that her former boyfriend has sufficient money to hire a private investigator and that they can probably locate the child. In addition, he may have the address of her family from prior communications. You have to decide what to do with the foreign order of protection. Can you simply file it in your state's domestic violence registry, if your state has such a registry? Do you have to have the foreign order authenticated or certified in the issuing state? Can you have your client go to the local police station and ask that the sister state order be put on file? Will the police arrest someone based on the foreign order? Can you file a new proceeding in your state to get the order enforced absent any new contact in your state?

These are not mere abstract, intellectual questions. We live in a mobile society and changing residences is not an uncommon event. People who have been abused may be even more apt to change residences and move from state to state since such moves may give them a sense of comfort when they are not in close geographic proximity to the abuser.

Complexities of out-of-state orders of protection

A number of practical and legal problems exist when one is confronted with enforcement of an out-of-state order. Both state and local law enforcement agencies have been reluctant to enforce such orders unless their own state gave specific directives for enforcement. These types of concerns were heightened when the out-of-state order had been obtained on an ex parte basis.

In addition, questions concerning the types of orders covered may be raised. Some jurisdictions issue orders of protection only to spouses or people with a child in common. Other states issue orders for a broader range of domestic disputes, including those between unrelated or nonfamily members. How will your jurisdiction handle an extant foreign order when the parties are different than those eligible to receive such an order in your state?

Congress recognized the concerns raised by these questions when it enacted the Violence Against Women Act (VAWA) in 1994. The act was designed to emphasize the serious nature of violence directed against women and to provide remedies for such acts. The centerpiece of the act was the "civil rights" section that allowed women to sue in federal or state court for damages resulting from gender-motivated violence. In 2000, the U.S. Supreme Court struck down the civil rights remedy section of VAWA in *United States v. Morrison*, 120 S. Ct. 1740. The court concluded that Congress had exceeded its power under the commerce clause in enacting the statute because the requisite connection to interstate commerce had not been met.

The court did, however, leave intact other important provisions of VAWA, including the enforcement of out-of-state orders of protection. Under Title II of VAWA, entitled "Safe Homes for Women," the act expressly requires that each state give full faith and credit to orders of protection entered by a sister state. This was a critically needed remedy for women who suffer from domestic violence.

A number of practical and legal problems exist when one is confronted with enforcement of an out-of-state protection order.

Prior to the act, many states required women to obtain new orders of protection, triggering notice to the abuser and revelation of the victim's whereabouts. In other states, victims were forced to wait until abuse occurred within the boundaries of the new state before they could seek protection.

In order for enforcement under the full faith and credit clause to take place, several requirements must be met. First, the issuing state must have had subject-matter jurisdiction and personal jurisdiction over the abuser. Ex parte orders are covered but again the person wishing recognition must show that the defendant was given adequate notice and an opportunity to be heard.

This generally can be shown by establishing compliance with the time limits set out under the issuing state's law. Under the full faith and credit clause, the enforcing state must give the order the same effect it would have in the issuing state. This would include the length of time during which the order is valid. It also requires enforcement of provisions that could not have been entered by the court in the enforcing state.

While federal law requires the states to extend full faith and credit to sister-state orders, the full faith and credit clause is not self-executing and VAWA does not provide a procedural mechanism for implementation. This job was left to the states. The problems encountered in enforcing these types of orders are similar to those in other areas where state laws, procedures and forms of orders differ.

In order to ensure uniformity and thereby to expedite the enforcement of these orders across state lines, the National Conference of Commissioners on Uniform State Laws established a drafting group and ultimately proposed the Uniform Interstate Enforcement of Domestic-Violence Protection Orders Act (UIEDVPA). It was approved and recommended for enactment by the national conference in 2002 and approved by the American Bar Association in February 2003. The stated purposes of the act are: "1) to define the meaning of full faith and credit as it relates to the interstate enforcement of domestic violence protection orders, and 2) to establish uniform procedures for effective interstate enforcement."

The UIEDVPA creates a specialized recognition and enforcement statute for orders issued under a state's domestic violence, anti-stalking or family violence laws. The act has been adopted by Alabama, California, Delaware, Idaho, Indiana, Montana, Nebraska, North Dakota, South Dakota, Texas and the District of Columbia.

There are basically three mechanisms for enforcement provided by the act. The first is direct judicial enforcement. The act allows a tribunal to enforce an order without any prior validating procedure. A tribunal is a court, agency or other entity authorized by law to issue or modify a protection order.

The second method allows for registration of the sister-state order. This is similar to the registration provisions of the Uniform Child Custody Jurisdiction and Enforcement Act. The fact that registration is optional is important because making registration mandatory could result in additional expense and the possibility of jeopardizing the victim's anonymity.

As a practical matter, registering the order should be encouraged where appropriate because it allows the police to verify the validity of an order when the woman does not have one in her possession. The registration provision under the act is a procedure whereby the protected individual provides a certified copy of the order along with an affidavit attesting to the fact that the order is current.

Crucial provision: immunity for law enforcement

The third, and perhaps most useful, method of enforcement is by law enforcement officers. It is to these individuals that victims most often turn when confronted by their abusers. Under the act a law enforcement officer who has probable cause to believe a valid order is in effect in another state must enforce the order as if it were an order of the officer's state. An order that adequately identifies the party and is current constitutes probable cause. Even without the order, a law enforcement officer may enforce an order if there is other information that constitutes probable cause to believe an order is in effect. The act specifically states that a certified copy of the order is not required for enforcement.

Another important provision of the act provides for immunity for law enforcement officers and other governmental officials. These individuals are protected from both civil and criminal liability for enforcement of out-of-state orders of protection as long as they acted in good faith.

Many orders of protection also contain provisions relating to custody and visitation of children. Under the UIEDVPA, these terms are enforceable as long as they were ordered for protection purposes and not simply as part of a child-custody proceeding. The order must also meet the jurisdictional requirements of the enforcing state. The order may also contain support provisions that are in turn enforceable under the Uniform Interstate Family Support Act.

Consistent with the requirements of the full faith and credit clause, the act requires a state to enforce even those provisions of an order that the state court would not have the authority to impose. This again is important because the requirements for obtaining an order vary from state to state. The out-of-state order will also remain valid for the period of time initially set by the rendering court even if it exceeds the time limits provided under the enforcing state's law.

Some states have enacted procedures that are similar to the UIEDVPA. Other states are currently considering its adoption. Even if a jurisdiction has not adopted the act, attorneys should be familiar with it as it provides excellent background on the issues that may arise when enforcement becomes an issue. NLJ

Mary Kay Kisthardt *is a professor of law at the University of Missouri-Kansas City.* **Barbara Handschu** *is a solo practitioner with offices in New York City and Buffalo, N.Y., and is president-elect of the American Academy of Matrimonial Lawyers.*

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

Commission on Domestic Violence
740 15th Street, NW, 9th Floor
Washington, D.C. 20005-1022
(202) 662-1737/1682/1744/8637
Fax (202) 662-1594
E-Mail: abacdv@abanet.org
Internet World Wide Web:
http://www.abanet.org/domviol/home.html

May 10, 2002

K. King Burnett
President, NCCUSL
211 East Ontario Street, Suite 1300
Chicago, Illinois 60611

Dear Mr. Burnett,

At our spring meeting in San Francisco on April 8, the American Bar Association Commission on Domestic Violence discussed the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act. Your Deputy Executive Director, Michael Kerr was very helpful in explaining the purpose and content of the act to the Commissioners, as well as explaining the deliberate process undertaken by NCCUSL members, advisors, and observers in drafting the act. Mr. Kerr also shared information with us about the concerns expressed by the Department of Justice Violence Against Women Office regarding the act, and the resulting proposed amendments that will be presented for vote at NCCUSL's meeting this summer that will satisfy VAWO's concerns.

After thoroughly discussing this matter, the Commission on Domestic Violence voted unanimously to endorse the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act as amended and commends your organization for work well done.

Best of luck in your endeavors to have this important law enacted throughout the United States.

Sincerely,

Bette J. Garlow
Director, American Bar Association Commission on Domestic Violence

1-7

TESTIMONY OF RONALD W. NELSON
Nelson & Booth, Overland Park, Kansas

Members of the Committee: Good afternoon. My name is Ronald W. Nelson. I am a lawyer practicing exclusively in the area of domestic relations law in Overland Park. I am also the current chair of the Family Law Section of the Kansas Bar Association. My clientele is fairly evenly split between representation of men and women and I have handled a significant number of matters, both in the trial and appellate courts regarding issues surrounding protection orders.

Today I am testifying in favor of passage of the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (UIEDVPA), which is the subject of House Bill No. 2697.

The Uniform Act is an important bill to provide a uniform method by which the states can meet the requirements of federal law (as found in the Federal Violence Against Women Act of 1994) for registration and enforcement of protection orders issued in other states. At the current time, there is no easy method by which the orders of other states may be registered or enforced in the state of Kansas and, as a result, persons seeking to enforce those orders must use other provisions of Kansas law that are ill-suited to the specific facts existing in these cases, such as the Uniform Enforcement of Foreign Judgments Act (K.S.A. 60-3001 et seq., which relates to enforcement of money judgments).

Provision of an easy manner by which orders from other states may be registered and enforced is an improtant advance for victims of domestic violence. Too often victims are required to seek multiple orders by filing multiple actions in various states because they are not provided with a simple method by which the orders they have obtained elsewhere may be enforced. The Uniform Act provides that simple method and guidelines by which the courts may evaluate which orders should be granted enforcement under federal law and procedural guidelines set by the states. One of the important goals of legislation in this area is clarity and direction to those parties who will be using the Act. In this increasingly complex area in which federal law intersects with state law, it is best to provide a roadmap in the statutes by which correct procedures can be completed.

Having said that, my review of the House Bill indicates that it is *not* the Uniform Act and that there are important provisions of the Uniform Act (as that Act was amended in 2002) lacking from the bill. I urge that the Committee, and the legislature, adopt the Uniform Act as it has been amended in 2002, and that kansas not adopt a "non-uniform" version of the Act. The advantages of passing a purely uniform act are manifest: in interpreting the act a court may look to interpretations made by courts of other states under the same or similar circumstances and there is little danger that the court will interprete the act in an improper manner using its non-uniform nature as a reason for that deviation. The Uniform Act has had a thorough airing nationally and it is best to take advantage of that fact in consideration of this legislation.

Those areas of HB2697 that are different from the Uniform Act and which should be modified back to that language are:

1. Restore the Short Title.

House Judiciary Committee
2-17-04
Attachment 2

2. Section 1(e) should read:

(e) "Protection order" means any injunction or other temporary or final order, issued for the purpose of preventing violent or threatening acts against, harassment of, contact or communication with or physical proximity to another individual. ~~This includes any temporary or final order issued by a civil or criminal court whether obtained by filing an independent action or as part of another proceeding if any civil order issued was in response to a complaint, petition or motion filed by or on behalf of a person seeking protection~~;

American case law has generally prohibited the enforcement in one state the criminal laws and penalties of another state. The way in which the bill is presently worded would significantly alter current law and would, essentially, require that

3. The first sentence of Section 3(a) of the Uniform Act should be reinserted before the existing language in New Sec. 2(a) to read:

A person authorized by the law of this State to seek enforcement of a protection order may seek enforcement of a valid foreign protection order in a tribunal of this State. The tribunal shall enforce the terms of the order, including terms that provide relief that a tribunal of this State would lack power to provide but for this section. The tribunal shall enforce the order, whether the order was obtained by independent action or in another proceeding, if it is an order issued in response to a complaint, petition, or motion filed by or on behalf of an individual seeking protection. In a proceeding to enforce a foreign protection order, the tribunal shall follow the procedures of this State for the enforcement of protection orders.

The first sentence of the uniform act is left out of the present bill and its omission makes clouds the meaning of the paragraph, since the rest of the sentence relies on the first as its object.

3. Section 3(b) of the Uniform Act should be restored after New Sec. 2(a). That subsection reads:

A tribunal of this State may not enforce a foreign protection order issued by a tribunal of a State that does not recognize the standing of a protected individual to seek enforcement of the order.

This section provides that only those persons who were granted standing to enforce the protection order in the state in which that order was issued may seek enforcement of the order. Thus, if a state obtained the order, only the state can enforce that order, unless that order provides the provision may be enforced by the individual seeking to enforce it.

4. The bill removes the uniform procedure for enforcement. That procedure should be restored to the bill. A major purpose of the bill is *registration* of foreign court orders. Without a provision stating how those orders are to be registered, the bill leaves open to interpretation how that is to be accomplished. No other Kansas statute provides an adequate method by which foreign protection orders may be filed – the Uniform Enforcement of Foreign Judgments Act relates to money judgments and it is ill suited to the specific needs of orders of protection (e.g. confidentiality provisions, immediate enforceability of orders, provision that orders to be registered be final). Neither the UCCJEA nor the UIFSA provide any method for registration of orders not covered by their specific terms (i.e. custody and support).

While a protected individual is not required to register a valid foreign protection order in order for it be enforced, it is highly desirable that the state provide an manner by which that registration may be accomplished. The procedure set forth in the Uniform Act provides a clear and simple procedure to accomplish that registration. The purpose of these procedures is to make it as easy as possible for the protected individual to register the protection order and thus facilitate its enforcement. It also makes clear that there is no fee required to register those orders. The following should be inserted into the bill at an appropriate place:

SECTION 5. REGISTRATION OF ORDER.

(a) Any individual may register a foreign protection order in this State. To register a foreign protection order, an individual shall present a certified copy of the order to the district court.

(b) Upon receipt of a foreign protection order, the district court shall register the order in accordance with this section. After the order is registered, the district court clerk shall furnish to the individual registering the order a certified copy of the registered order.

(c) The district court shall register an order upon presentation of a copy of a protection order which has been certified by the issuing State. A registered foreign protection order that is inaccurate or is not currently in effect must be corrected or removed from the registry in accordance with the law of this State.

(d) An individual registering a foreign protection order shall file an affidavit by the protected individual stating that, to the best of the protected individual's knowledge, the order is currently in effect.

(e) A foreign protection order registered under this Act may be entered in any existing state or federal registry of protection orders, in accordance with applicable law.

(f) A fee may not be charged for the registration of a foreign protection order.

These changes would enhance the bill and provide a simplified manner by which these important orders may be enforced, consistent with federal law and requirements.

Thank you.

Ronald W. Nelson
NELSON & BOOTH
Suite 160; 10990 Quivira Road
Overland Park, Kansas 66210
Telephone: (913) 469-5300
Email: ronald.nelson@nelsonbooth.com

KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE
220 SW 33rd Street, Suite 100 Topeka, Kansas 66611
785-232-9784 • FAX 785-266-1874 • coalition@kcsdv.org
UNITED AGAINST VIOLENCE

House Judiciary Committee
HB 2697
February 17, 2004

Chairman O'Neal and Members of the Committee:

House Bill 2697 clarifies the provisions of full faith and credit of foreign protection orders that is currently codified in several places: Kansas law, law enforcement agency policy and officer training, Kansas Attorney General opinions, and Federal law. This fragmentation of the full faith and credit provisions in Kansas is confusing to those who need to enforce protection orders granted from other jurisdictions.

HB 2697 simply clarifies the provisions of full faith and credit by using the Uniform Interstate Enforcement of Domestic Violence Protection Orders model code provided by the National Conference of Commissioners on Uniform State Laws, and by adding a few updates recommended by the National Center on Full Faith and Credit.

Amendments requested:

1) **Omit Section 3**. This section contains a certification form to be attached to the front of each protection order issued by Kansas. This form is not necessary, could cause confusion, and, if removed, could appear to invalidate the order.

   The term certification means different things in different states. For example, in Kansas it means a one that is date stamped and signed by the court clerk's office. Other states may consider certification to require verification of the petition and be signed by a judge for an order to be certified.

   Additionally, the Office of Judicial Administration, in collaboration and conjunction with a national project (the Passport Project), is developing a face page that will be part of the Kansas order and that is similar to face pages being developed or already in use in many states across the nation.

   Finally, the certification form does not reflect the changes that were made to the original uniform code and is only applicable to protection from abuse orders.

2) **Omit the term "Domestic Violence" from the title**. Some states and jurisdictions do not use the term domestic violence in their protection order titles and some protection orders covered by full faith and credit are related to stalking or other issues. It would be less confusing to use the more universal title of "Enforcement of Foreign Protection Orders."

The Kansas Coalition Against Sexual and Domestic Violence supports HB 2697 and requests that you pass this Bill favorably.

House Judiciary Committee
2-17-04
Attachment 3

Current Full Faith and Credit Provisions in Kansas (February, 2004)

K.S.A. 22-2307 (a) (7) requires law enforcement agencies to have policies that direct officers on how to handle the enforcement of foreign protection orders.

K.S.A. 22-2308 provides immunity for law enforcement officers who take action to enforce a foreign protection order that is later determined to be invalid.

Kansas law enforcement officers are trained about their department policies and told to enforce the terms and conditions of the foreign protection order.

Kansas Attorney General Opinions 94-74 and 95-107 specifically address protection orders and the immunity of law enforcement officers.

K.S.A. 2001 Supp. 21-3843, Violation of a Protection Order was amended to cover a "protection order issued by a court of any state or an Indian tribe that is consistent with the provisions of 18 U.S.C. 2265, and amendments thereto."

18 U.S.C. 2265 is the full faith and credit provision of the federal Violence Against Women Act. This provision directs states, tribes, and territories to treat foreign protection orders as if they were their own.

18 U.S.C. 2266 applies to "any injunction or other order, issued for the purpose of preventing violent or threatening acts or harassment against, or contact or communication with or physical proximity to, another person, including temporary and final protection orders issued by civil or criminal courts ..."

The enforcing jurisdiction must follow three rules: (1) it must honor the foreign protection order, even if the protected party would not have been eligible for a protection order in that jurisdiction; (2) it must enforce all terms of the foreign protection order, even if the order provides for relief that would be unavailable under the laws of the enforcing jurisdiction; (3) it must treat the foreign protection order as though it were issued in that (non-issuing) jurisdiction and apply whatever sanction or remedy is available under the laws of that (enforcing) state, tribe, or territory for violations of the foreign protection order.

Amendments to the Uniform Interstate Family Support Act (2001)

- A Summary -

In 1992, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Interstate Family Support Act (UIFSA), which replaced the Uniform Reciprocal Enforcement of Support Act (URESA). URESA, was originally promulgated in 1950, and was adopted by every state. UIFSA has now replaced URESA in every American jurisdiction.

UIFSA provides universal and uniform rules for the enforcement of family support orders, by setting basic jurisdictional standards for state courts, by determining the basis for a state to exercise continuing exclusive jurisdiction over a child support proceeding, by establishing rules for determining which state issues the controlling order in the event proceedings are initiated in multiple jurisdictions, and by providing rules for modifying or refusing to modify another state's child support order.

The adoption of UIFSA in all American jurisdictions in some respects tracked the development of welfare reform efforts in the mid-1990s. Certain provisions of UIFSA were amended in 1996 following a review and analysis requested by state child support enforcement community representative. A month after these adoptions were promulgated by NCCUSL, Congress enacted the Personal Responsibility and Work Opportunity Reconciliation Act, the last major expression of child support enforcement reform from the Congress. As a result, federal grants to a state for child support enforcement became partially dependent upon the enactment of UIFSA.

The 2001 Amendments to UIFSA again follow a review and analysis requested by representatives of the state child support enforcement community. While some of these changes are procedural, and others substantive, none make a fundamental change in UIFSA policies and procedures. UIFSA continues to serve the basic principle of one order from one state that will be enforced in other states. The amendments are meant to enhance that basic objective.

The 2001 Amendments

One of the most important accomplishments of UIFSA was the establishment of bedrock jurisdictional rules under which a tribunal in one state only would issue or modify one support order only. That order would be the order any other state would enforce and would not modify. Further, if more than one state tribunal issues an order pertaining to the same beneficiary, one of those would become *the* enforceable, controlling order. The 2001 amendments clarify jurisdictional rules limiting the ability of parties to seek modifications of orders in states other than the issuing state (in particular, that all parties and the child must have left the issuing state and the petitioner in such a situation must be a nonresident of the state where the modification is sought), but allow for situations where parties might voluntarily seek to have an order issued or modified in a state in which they do not reside. The amendments also spell out in greater specificity how a controlling order is to be determined and reconciled in the event multiple orders are issued, and clarify the procedures to be followed by state support enforcement agencies in these circumstances, including submission to a tribunal where appropriate.

The amendments give notice that UIFSA is not the exclusive method of establishing or enforcing a support order within a given state – for example, a nonresident may voluntarily submit to the jurisdiction of a state for purposes of a divorce proceeding or child support determination, and seek the issuance of an original support order at that tribunal. The

House Judiciary Committee
2-17-04
Attachment 4

amendments also clarify, however, that the jurisdictional basis for the issuance of support orders and child custody jurisdiction are separate, and a party submitting to a court's jurisdiction for purposes of a support determination does automatically submit to the jurisdiction of the responding state with regard to child custody or visitation.

The amendments also provide clearer guidance to state support agencies with regard to the redirection of support payments to an obligee's current state of residence, clarifies that the local law of a responding state applies with regard to enforcement procedures and remedies, and fixes the duration of a child support order to that required under the law of the state originally issuing the order (i.e., a second state cannot modify an order to extend to age 21 if the issuing state limits support to age 18).

The amendments incorporate certain technical updates in response to changes in the law in the intervening years since 1996 – specifically, the use of electronic communications in legal and other contexts (i.e. E-Sign and the Uniform Electronic Transactions Act) and the evolution of federal and state agency practice (including specifically the usage of certain forms and the sealing of records in connection with certain child custody action information), and make other nonsubstantive changes to grammar and organization in an effort to clarify certain provisions.

Finally, the amendments expand UIFSA to include coverage of support orders from foreign country jurisdictions pursuant to reciprocity and comity principles. While a determination by the U.S. State Department that a foreign nation is a reciprocating country is binding on all states, recognition of additional foreign support orders through comity is not forbidden by federal law. UIFSA clearly provides that a foreign country order may be enforced as a matter of comity. In the event a party can establish that a foreign jurisdiction will not or may not exercise jurisdiction to modify its own order, a state tribunal is also authorized to do so.

Why States Should Adopt

THE 2001 AMENDMENTS TO THE UNIFORM INTERSTATE FAMILY SUPPORT ACT

In 1992, the National Conference of Commissioners on Uniform State Laws promulgated the Uniform Interstate Family Support Act (UIFSA). UIFSA provides universal and uniform rules for the enforcement of family support orders. In 1996, certain provisions of UIFSA were amended following a review and analysis requested by state child support enforcement community representative.

In 2001, additional amendments to UIFSA were made following another review and analysis. Some of the 2001 amendments are procedural, while others are substantive. However, none are fundamental changes in UIFSA policies and procedures. UIFSA continues to serve the basic principle of one order from one state that will be enforced in other states. The amendments are meant to enhance that basic objective.

These amendments, which every state should adopt, include the following:

- **Jurisdictional rules.** The jurisdictional rules are clarified to limit the ability of parties to seek modifications of orders in states other than the issuing state. However, the rules also allow for situations where parties might voluntarily seek to have an order issued or modified in a state in which they do not reside.

- **Controlling order among multiple orders.** Greater specification is provided on how a controlling order is to be determined and reconciled in the event multiple orders are issued. In addition, the procedures to be followed by state support enforcement agencies in these circumstances, including submission to a tribunal where appropriate, are clarified.

- **UIFSA not to be exclusive.** UIFSA is not the exclusive method of establishing or enforcing a support order within a given state. Also, the jurisdictional basis for the issuance of support orders and that for child custody jurisdiction are separate.

- **Guidance regarding redirections of support payments.** Clearer guidance is given to state support agencies with regard to the redirections of support payments to an obligee's current state of residence.

- **Local law of a responding state.** The amendments clarify that the local law of a responding state applies with regard to enforcement procedures and remedies.

- **Duration of a child support order.** The duration of a child support order is to be that which is required under law of the state originally issuing the order.

UNIFORM INTERSTATE FAMILY SUPPORT ACT
1996 AMENDMENTS

In 1992, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Interstate Family Support Act (UIFSA), which replaces the Uniform Reciprocal Enforcement of Support Act, drafted by NCCUSL in 1950.

Since 1992, UIFSA has been adopted and successfully utilized by a significant majority of the states. Because UIFSA is new and proposes some wholly new rules governing interstate child support enforcement, it is inevitable that some clarification must be made in a few provisions. As a result of questions raised about interpreting the act, NCCUSL has amended UIFSA in 1996 to assure optimum child support enforcement. The majority of amendments are found in Article 5 on income withholding, and Article 6 on registration and modification of support orders. The amendments:

- Specify that the obligor's employer must comply with a withholding order from another state which is regular on its face and which expresses the amounts to be withheld as sums certain and as periodic payments. An employer who complies with this directive is granted immunity from liability.

- Provide that the law of the obligor's work state shall apply with respect to charging processing fees, determining garnishment limitations and establishing priorities if the employee has multiple support obligations. This was thought to be the rule under UIFSA before amendment. It is a specifically-stated rule now.

- Provide that if all parties reside in the same state which is not the issuing state a tribunal of that state has jurisdiction to enforce and/or modify the issuing state's child support order. However, a tribunal exercising such jurisdiction shall apply only the definitional and long-arm jurisdiction sections of UIFSA, the rest being inapplicable to an intra-state case. Otherwise, a tribunal shall apply the procedural and substantive law of that particular state.

The amendments should enable UIFSA to serve as the voice in the child support enforcement arena for years to come.

Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership is comprised of more than 300 practicing lawyers, judges, and law professors, who are appointed by each of the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, to draft uniform and model state laws and work toward their enactment.

UNIFORM INTERSTATE FAMILY SUPPORT ACT (1992)

- A Summary -

Introduction

In 1950, the Uniform Law Commissioners made the first major, indeed pioneering, effort at solving the problem of interstate enforcement of child support awards. This 1950 Act is called the Uniform Reciprocal Enforcement of Support Act (URESA). It was amended in 1951, 1958, and 1968. Every state has adopted a version of this Act, and it is the linchpin for child support enforcement efforts in the United States even as its successor is now ready, in 1992, for adoption by the states. The replacement for URESA is the Uniform Interstate Family Support Act (UIFSA), promulgated by the Uniform Law Commissioners in their centennial year, 1992.

The history of URESA indicates that the problem of child support enforcement is not a new problem. However, in 1992, it is apparent that the problem has grown beyond all expectations of earlier decades and that new solutions to interstate enforcement are necessary. It is also the fact that principles of law are now available, as they were not in prior decades, to better solve the interstate enforcement problem.

The Supreme Court of the United States has articulated principles of personal jurisdiction that make solution of the interstate enforcement of child support much easier. This has been done in a series of modern cases. These cases have been coupled with legal scholarship in the area of conflicts of law that have helped show the way to better solutions. And there is considerable experience, now, with legislation such as the Uniform Child Custody Jurisdiction Act, that indicates the real possibility of dealing with jurisdictional issues, successfully, in legislation.

URESA, as the pioneering effort, had none of the benefit of these developments. But it must now be replaced by UIFSA as quickly as possible. UIFSA is the product of all these developments.

URESA has been used universally across the United States when a child support award made in one state must be enforced in another. This occurs when parties to the award reside in different states, a not uncommon phenomenon. URESA depends upon the principle of reciprocity. Roughly, each state agrees to enforce the decrees of other states that agree to enforce decrees of the first state. Reciprocity is an accepted principle of conflicts of laws, but it is not entirely a satisfactory principle upon which to base a system of interstate enforcement.

The greatest weakness of the principle is its inability to prevent multiple modifications of child support awards. No child support award is regarded as a final judgment, because it is always subject to modification if the circumstances of a party to such an award change. A state may permit the enforcement of awards under the principle of reciprocity, but there is no inherent barrier to entertaining modification jurisdiction if a party alleges changed circumstances. If a second state takes modification jurisdiction and amends an award, the effect is to create two competing awards,

each enforceable within the boundaries of each initiating state, and each equally enforceable in yet other states. URESA has never been sufficient to cope with the multi-state award problem that results from exercise of modification jurisdiction by more than one state.

URESA is, also, not helpful when parties locate themselves in different states before there is any kind of child support award. Reciprocity, as a principle, simply does not help obtain jurisdiction over a person who is already gone from the forum state seeking an initial award.

UIFSA solves these problems. It does so by combining principles of "long-arm" jurisdiction with principles of continuing jurisdiction and "home-state" of the child. This combination has the effect of helping the forum, initially, take personal jurisdiction over the party absent from the jurisdiction. Then, by the set of rules that the states agree to apply, UIFSA locates modification jurisdiction in one and only one state at a time, thereafter. This coordinated scheme of jurisdictional principles solves the total multi-state problem.

How does all of this work? First, UIFSA sets basic jurisdictional standards for state courts. Second, it determines what permits a state to have continuing exclusive jurisdiction over an child support award that it has adjudicated. Third, it provides rules for determining which state gets to adjudicate a proceeding in the event simultaneous proceedings are filed in more than one state. Fourth, it provides rules for modifying existing child support awards when they are transmitted from one state to another for enforcement.

Long-Arm Jurisdiction

A court of any state must be able to obtain personal jurisdiction over the parties to a child support proceeding in order to adjudicate it. This is a due process requirement. The issue, as the U.S. Supreme Court has been primarily responsible for developing it, is the "connection" the party has with the state. No court is allowed willy-nilly to hail just anybody into court to be subject to a proceeding. Finding "connection" is easy if all the parties are within the geographic boundaries of the state when it serves notice of the pending proceeding upon them. Presence in a state is sufficient connection. Courts can adjudicate matters pertaining to such parties.

When a party is absent from the geographical area of a state, the issue of "connection" is different. It then becomes a question of acts and events within the state that connect the party with the state and the controversy, even though a party is not physically present. If a court can find "connection" in this sense, then it can serve process and take jurisdiction over the out-of-state party. This is what happens when a court takes "long-arm" jurisdiction. Over time, through case law and by statute, principles of connection that are appropriate to a child support proceeding have been worked out. They are distilled into a set of "long-arm" provisions in UIFSA. For example, UIFSA finds a "connection" if the individual ever resided with the child in the state. It finds "connection" if the child resides in the state as a result of acts or directives of the individual over whom it is necessary to obtain jurisdiction. Engaging in sexual intercourse in a state with the possibility that the child was conceived by that act of intercourse, is sufficient connection. In each of these instances

(and some relevant others) a court can take personal jurisdiction over the individual, even though the individual is somewhere else other than the state taking jurisdiction. All that is necessary to take that personal jurisdiction is to serve the individual with process informing him or her of the proceeding. The notion of the "long-arm" is the notion that a court of one state has powers over individuals that are not within the state, that the state can literally reach out with the arm of the law and legally bind such individuals.

The UIFSA long-arm provisions are designed to maximize the ability of a state to take personal jurisdiction over any individual whose connection to the state and the child is sufficient to make the state a fair forum to hear the child support matter. In the usual case, a child support proceeding is initiated in a state in which the child is found. It is obtaining jurisdiction over either parent in another state that is the problem. If the child is in a state and the out-of-state parent has had some relationship to that child within the contemplated forum state, there will be jurisdiction to adjudicate the child support award and to bind the out-of-state parent.

Continuing Exclusive Jurisdiction

The "long-arm" provisions make it easier and better for a state meeting the connections criteria to take jurisdiction over a child support proceeding. Once there is a child support award by a court in a state that has taken jurisdiction, then the problem is to limit modification jurisdiction to just one jurisdiction at a time.

UIFSA provides that a state that has taken jurisdiction has continuing, exclusive jurisdiction so long as one of the parties remains a resident of that state. The concept of continuing, exclusive jurisdiction will prevent other states with the ability to exercise jurisdiction from exercising it. They will defer to the state with continuing, exclusive jurisdiction. This means that one state will retain the power to modify the award.

Simultaneous Proceedings

In addition, if more than one state has the ability to obtain jurisdiction, and more than one simultaneously acts to exercise jurisdiction, then there is a kind of sorting out rule in UIFSA that permits only one of the competing states to exercise jurisdiction. The state that is the "home state" of the child is the preferred state, the one to which other states should defer. In the event there is no home state, or other ground to challenge jurisdiction, the first state to proceed past the time when jurisdiction may be challenged, gains priority. All other states should then defer to it.

Further Modification Limitations

UIFSA retains the URESA notions of initiating and responding states in an interstate enforcement proceeding. These concepts are part of the implementation of the reciprocity principle in URESA. Under UIFSA, these provisions outline a procedure for interstate cooperation in the establishment, enforcement and modification of child support awards. An initiating state is simply

one that forwards a proceeding to a responding state. An initiating state does not have to have jurisdiction, and it may even initiate an action to modify the responding state's own award to the responding state.

A responding state receives the proceeding from an initiating state. It has all manner of powers over such a proceeding, but it cannot act upon the petition of the initiating state unless it has continuing, exclusive jurisdiction over a support order. In particular, the responding state cannot modify an existing order unless it has continuing exclusive jurisdiction.

In addition, if a child support order from one state is registered for enforcement in another state, the second state can modify the registered order only if no party to the award resides in the state that has issued the order for child support, the petitioner for modification is not resident of the state in which the order has been registered, and the state in which the order is registered can get jurisdiction over the named respondent. Registration of an order for the purposes of enforcement materially limits modification in the state in which the order is registered.

Registration of a support award is common practice under URESA. The object of the registration provisions of URESA and of UIFSA is to make a judgment or award of the other state the same as a judgment or award of the state in which registration takes place. To treat the foreign judgment the same as a domestic judgment facilitates enforcement greatly. In UIFSA, the facilitation of enforcement is coupled with limitation upon modification, and serves the principle of keeping modification jurisdiction in one place.

The objective of these rules is to build a kind of fence around a child support award. Once a state has appropriate jurisdiction and issues an award, other states defer to the state that has continuing exclusive jurisdiction. If there are simultaneous proceedings to establish an award, the state with jurisdiction that is the home state of the child gets preference in adjudicating the child support award. Enforcement of awards takes place within the familiar context of initiating states and responding states, with registration of awards to expedite the process. Exercise of modification jurisdiction is further limited in responding states.

Conclusion

UIFSA is not just confined to child support awards. It can be used, also, to enforce spousal support awards. It, further, provides broadly for the kinds of actions which may be brought under its provisions. Initiating states can initiate parentage proceedings in responding states, for example. In this sense, UIFSA goes beyond the stated objectives and effect of the earlier URESA.

More can be accomplished under UIFSA than just the enforcement of existing child support awards. The overall effect of UIFSA is greater interstate cooperation in the whole spectrum of child support establishment and enforcement. It contemplates enhanced services by state agencies to implement the national campaign to assure that each child in the United States has adequate support. It is an essential piece of legislation for the decade of the 1990s.

KANSAS BOARD OF HEALING ARTS

LAWRENCE T. BUENING, JR.
EXECUTIVE DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

February 17, 2004

The Honorable Michael O'Neal
Chair, House Committee on the Judiciary
Room 170-W
Statehouse

Re: House Bill No. 2813

Dear Representative O'Neal:

Thank you for the opportunity to appear before the Judiciary Committee on behalf of the Board of Healing Arts. The Board supports House Bill 2813 as providing a procedure for the appointment of a records' custodian in those instances where patient records have been abandoned.

The common law establishes that patient records are the property of the entity that creates the records. But patients have a legal interest in the information contained in the record, and to that end this committee appropriately furthered patients' statutory right to obtain a copy of their records in 2002 by the adoption of K.S.A. 65-4970, *et seq.* Additionally, regulations adopted under the healing arts act require practitioners to forward patient records to another practitioner when requested by the patient so that the patient's care can be continued.

The law presently does not provide an adequate procedure for accessing records that have been abandoned. We have experienced instances in which physicians have had their licenses revoked, where they have died unexpectedly, and where they have simply walked away from their practices. In these instances, patients have been left without access to their records. These patients contact the Board for information on their records are being kept because they want those records forwarded to new health care providers. We have only been able to assist these patients in rare instances. As a result, patient records are lost, destroyed, damaged, and sometimes inappropriately disclosed.

House Bill 2813 protects the public health, safety and welfare. In those instances where the licensee is unable or unwilling to continue the duty to maintain the records confidentially, and to disclose them to the patient or to other health care providers upon the patient's request, a records custodian would be appointed to take physical custody of the records, and to act for the health care provider, at least on a temporary basis.

235 S. Topeka Boulevard, Topeka, Kansas 66603-3068
Voice 785-296-7413 Fax 785-296-0852 www.ksbha.or

The bill not only addresses the patients' interest, but it takes into account the due process rights of the practitioner who owns the records. The appointment of a records' custodian occurs as part of a judicial proceeding. When the owner of the records is ready to resume the duties of ownership, the order of appointment is terminated. Finally, the bill protects the person who is appointed as records custodian. That person is not responsible for the content of the records, and is given immunity except in cases where the custodian acts maliciously. The custodian is authorized to collect statutory fees from patients for copying.

The Board urges the committee to consider House Bill 2813 favorably.

Very truly yours,

Mark W. Stafford
General Counsel

KANSAS MEDICAL SOCIETY
KMS

623 SW 10th Avenue
Topeka KS 66612-1627
785.235.2383
800.332.0156
fax 785.235.5114

kmsonline.org

TO: House Judiciary Committee

FROM: Christina Collins
Director of Government Affairs
Associate General Counsel

DATE: February 17, 2004

RE: HB 2813, Abandoned Health Care Records

Chairman O'Neal and Members of the Committee:

Thank you for the opportunity to comment on HB 2813. The bill represents a needed change in the law governing the disposition of medical records in the event the responsible health care provider cannot be located or is otherwise unable to manage the oversight of health care records.

Mark Stafford, counsel to the Board of Healing Arts, has relayed several, albeit infrequent, instances to us where a licensee has abandoned their practice, has died intestate and without anyone to manage the estate or has become otherwise incapacitated and without anyone to manage their affairs. In the meantime, patients are left without access to necessary health care records. In these rare situations, the Board of Healing Arts apparently is forced to petition the district court to transfer possession of the records to another party. Judges have no explicit statutory authority to do so and must rely on common law equitable remedies. The subsequent custodian of the records is left with apparent authority over the physical records, a plethora of complicated statutory obligations relating to those records, and rather significant tort exposure for failure to comply with those obligations. The Kansas Medical Society supports the concept articulated in HB 2813 of creating a statutory right of action and granting the subsequent records custodian all of those rights and protections that should accompany the responsibility of maintaining health care records.

However, we would respectfully ask that the committee grant us some additional time to collaborate with the Board of Healing Arts to refine some of the bill's language. The bill draft has been available for less than a week and represents a change in the law governing health care records that may have ramifications in several contexts. Taking possession of a health care professional's records is an extraordinary remedy at law and the factors leading up to it should be carefully considered. At present, the bill does not explicitly

define all of the factors that might trigger such an action. Likewise, the bill could more clearly define what circumstances would lead the board and the court to conclude that records are abandoned. Similarly, the records custodian has immunity unless they maliciously breach confidentiality, which some might consider to be a rather high standard. The bill is also silent on remedies the health care professional may employ in the event records were inadequately maintained in their absence. These are just a few of the issues that we would like to analyze before fully endorsing the bill.

While we fully support the concept of HB 2813, we would respectfully request some additional time to work with representatives of the Board of Healing Arts to further refine the bill. Thank you for the opportunity to comment on HB 2813. I am pleased to stand for questions.

Memorandum

Donald A. Wilson
President

To: House Judiciary Committee

From: Thomas L. Bell, Executive Vice President

Re: HB 2741

Date: February 17, 2004

The Kansas Hospital Association appreciates the opportunity to comment in favor of the provisions of HB 2741. This bill would enact a new law in Kansas to provide guidance for patients, their families and health care providers when no advance directive has been made. As the attached document shows, most states have these types of statutes.

In part, HB 2741 is based on the Uniform Health Care Decisions Act. The Uniform Health Care Decisions Act was originally drafted in 1993 and aims at assisting individuals and the medical profession in better assuring a person's right to select or reject a particular course of treatment. The entire act is designed to replace existing living will, power of attorney for health care, and family health-care consent statutes.

Kansas, however, already has functional living will and durable power of attorney statutes. What Kansas is missing entirely is a statute on proxy decisions for medical care when an individual lacks capacity. In that instance, this bill would look first to whether the patient has previously designated someone to make their health care decisions for them. In the absence of such a designation, the bill establishes a hierarchy of individuals to look to in making health care decisions. Unfortunately, because the use of durable power of attorneys and living wills is not as prevalent as perhaps it should be, a statute such as HB 2741 can help to fill in the gaps.

It is important to note that under the Uniform Act language contained in this bill, the individual is always the dominant source for decision-making. The individual has the full ability to designate an agent or proxy to make decisions for him. The individual can even disqualify another, including a family member, from acting as the individual's surrogate.

Thank you for your consideration of our comments.

Kansas Hospital Association
215 SE 8th Ave. • P.O. Box 2308 • Topeka, KS • 66601 • 785/233-7436 • Fax: 785/233-6955 • www.kha-net.org

SURROGATE CONSENT IN THE ABSENCE OF AN ADVANCE DIRECTIVE

January 1, 2002

State & Citation	General Type of Statute	Priority of Surrogates (in absence of appointed proxy or guardian with health powers)	Limitations on Types of Decisions	Disagreement Process Among Priority Surrogates
1. ALABAMA Ala. Code 1975 §22-8A-11 and –6 (1997), enacted 1997	Comprehensive Health Care Decisions Act	• Spouse • Adult child • Parent • Sibling • Nearest relative • Attending physician & ethics committee	Patient must be in terminal condition or permanently unconscious	Consensus required
2. ARIZONA Ariz. Rev. Stat. Ann. §36-3231 (West 1998), enacted 1992	Comprehensive Health Care Decisions Act	• Spouse • Adult child • Parent • Domestic partner • Sibling • Close friend • Attending physician in consult with ethics committee or, if none, 2nd physician	N/A to decisions to withdraw nutrition or hydration	Majority rule
3. ARKANSAS Ark. Code Ann. §20-17-214 (1997)	Living Will Statute	• Parents of unmarried minor • Spouse • Adult child • Parents • Sibling • Persons in loco parentis • Adult heirs	Patient must be in terminal condition or permanently unconscious N/A if pregnant	Majority rule
4. CALIFORNIA Cal. Probate Code §4711 – 4727 (West 1999)	Comprehensive Health Care Decisions Act	An individual *orally* designated as surrogate. No others.	Effective "only during the course of treatment or illness or during the stay in the health care institution when the designation is made." N/A to civil commitment, electro-convulsive therapy, psychosurgery, sterilization, and abortion.	None listed
5. COLORADO Colo. Rev. Stat. Ann. §15-18.5-103 (West 1999)	Separate Surrogate Consent Act	The following "interested persons" must decide who among them shall be surrogate decision-maker: • Spouse • Either parent • Adult child • Sibling • Grandchild • Close friend	N/A to withholding or withdrawal of artificial nourishment and hydration unless specified conditions are met	Consensus required
6. CONNECTICUT Conn. Gen. Stat. Ann. §19a-571 (West 1998)	Comprehensive Health Care Decisions Act	Physician authorized in consultation with next of kin	Limited to the removal or withholding of life support systems, and patient is in terminal condition or permanently unconscious N/A if pregnant	None listed

State & Citation	General Type of Statute	Priority of Surrogates (in absence of appointed proxy or guardian with health powers)	Limitations on Types of Decisions	Disagreement Process Among Priority Surrogates
7. DELAWARE Del. Code Ann. tit. 16, §2507 (1998)	Comprehensive Health Care Decisions Act	• An individual orally designated as surrogate • Spouse • Adult child • Parent • Sibling • Grandchild • Close friend	Patient must be in terminal condition or permanently unconscious N/A if pregnant	If in health care institution, refer to •appropriate committee• for a recommendation
8. DISTRICT OF COLUMBIA D.C. Code 1981 §21-2210 (1998)	Durable Power of Attorney for Health Care Act	• Spouse • Adult child • Parent • Sibling • Religious superior if patient is member of a religious order or a diocesan priest • Nearest living relative	N/A to abortion, sterilization, or psycho-surgery, convulsive therapy or behavior modification programs involving aversive stimuli are excluded	None listed
9. FLORIDA Fla. Stat Ann. §765.401 and .404 (West 2001) Last amended 2000	Comprehensive Health Care Decisions Act	• Spouse • Adult child • Parent • Sibling • Close adult relative • Close friend	N/A to abortion, sterilization, electroshock therapy, psychosurgery, experimental treatment, or voluntary admission to a mental health facility. A decision to withhold or withdraw life-prolonging procedures must be supported by clear and convincing evidence. N/A if pregnant	Majority rule
10. GEORGIA Ga. Code Ann. §31-9-2 (1998)	Informed Consent Statute	• Spouse • Adult child • Parent • Sibling • Grandparent	Not explicitly applicable to refusals of treatment	None listed
Ga. Code Ann. • 31-36A-1 to A-7, enacted 1999	"Temporary Health Care Placement Decision Maker for an Adult Act"	Same as above but priority list continues with: • Adult grandchild • Uncle or Aunt • Adult nephew or niece	Applies only to decisions regarding admission to or discharge from one health care facility or placement, or transfer to another health care facility or placement. Excludes involuntary placement for mental illness.	None listed
11. HAWAII Hawaii Rev. Stat. •• 327E-1 to –16 (West 1999) Enacted 1999.	Comprehensive Health Care Decisions Act	• An individual orally designated as surrogate If none, the following "interested persons" must decide who among them shall be surrogate decision-maker: • Spouse • Reciprocal beneficiary • Adult child • Parent • Sibling • Grandchild • Close friend	None, except an "interested person" may make a decision to withhold or withdraw nutrition and hydration only if two physicians certify that providing it will merely prolong the act of dying and the patient is highly unlikely to have any neurological response in the future.	Consensus required

State & Citation	General Type of Statute	Priority of Surrogates (in absence of appointed proxy or guardian with health powers)	Limitations on Types of Decisions	Disagreement Process Among Priority Surrogates
12. IDAHO Idaho Code §39-4303 (Lexis 1998)	Informed Consent Statute	Either: • Parent • Spouse If none, then any relative or ... any other person representing himself or herself responsible for the health care of such person	None listed	None listed
13. ILLINOIS 755 ILCS 40/25 (Smith-Hurd 1998)	Separate Surrogate Consent Act	• Spouse • Adult child • Either parent • Sibling • Adult grandchild • Close friend • Guardian of the estate	N/A to admission to mental health facility, psychotropic medication or electo-convulsive therapy (see 405 ILCS 5/1-121.5; 5/2-102; 5/3-601.2, amended 1997) If decision concerns forgoing life-sustaining treatment, patient must be in terminal condition, permanently unconscious, or incurable or irreversible condition	Majority rule
14. INDIANA Ind. Code Ann. §16-36-1-1 to –14 (West 1998)	Health Care Agency and Surrogate Consent Act	Any of the following: • Spouse • Parent • Adult child • Sibling • Religious superior if the individual is a member of a religious order	None listed	None listed
15. IOWA Iowa Code Ann. §144A.7 (West 1998)	Living Will Statute	• Spouse • Adult child • Parent or both parents, if reasonably available • Adult sibling	Limited to the withholding or withdrawal of life-sustaining procedures, and patient is in terminal condition or comatose N/A if pregnant	Majority rule
16. KENTUCKY Ky. Rev. Stat. §311.631 (Baldwin 1999)	Living Will Statute	• Spouse • Adult child • Parents • Nearest relative	N/A to withholding or withdrawal artificial nutrition and hydration unless specified conditions are met	Majority rule
17. LOUISIANA La. Rev. Stat. Ann. §40:1299.58.1 to .10 (West 1999)	Living Will Statute	• Spouse • Adult child • Parents • Sibling • Other relatives	Limited to patient in terminal and irreversible condition and comatose	Consensus required
18. MAINE Me. Rev. Stat. Ann tit. 18-A, §5-801 to §5-817 (West 1999)	Comprehensive Health Care Decisions Act	• Spouse • Adult in spouse-like relationship • Adult child • Parent • Sibling • Adult grandchild • Adult niece or nephew • Adult relative familiar with patient's values • Close friend	If decision pertains to withdrawal or withholding of life-sustaining treatment , patient must be in terminal condition or persistent vegetative state N/A to denial of surgery, procedures, or other interventions that are deemed medically necessary.	Majority rule, although referral to dispute resolution assistance is mentioned as option

State & Citation	General Type of Statute	Priority of Surrogates (in absence of appointed proxy or guardian with health powers)	Limitations on Types of Decisions	Disagreement Process Among Priority Surrogates
19. MARYLAND Md. Health-Gen. Code Ann., §5-605 (Lexis 1998)	Comprehensive Health Care Decisions Act	• Spouse • Adult child • Parent • Sibling • Friend or relative who has maintained regular contact with the patient	N/A to sterilization or treatment for mental disorder Applicable to life-sustaining procedure only if the patient as been certified to be in a terminal condition, persistent vegetative state, or end-stage condition Applicable to DNR order only under certain conditions	If in hospital or nursing home, refer to ethics committee If elsewhere, consensus required
21. MISSISSIPPI Miss. Code 1972 Ann. §41-41-211, •41-41-215(9) (1998)	Comprehensive Health Care Decisions Act	• Individual orally designated by patient • Spouse • Adult child • Parent • Sibling • Close friend • Owner, operator, or employee of residential long-term care institution (but see limitations)	If surrogate is owner, operator, or employee of residential long-term care institution, then the authority does not extend to decisions to withhold or discontinue life support, nutrition, hydration, or other treatment, care, or support.	Majority rule.
22. MONTANA Mont. Code Ann. §50-9-106 (1997)	Living Will Statute	• Spouse • Adult child • Parents • Sibling • Nearest adult relative	Limited to withholding or withdrawal of life-sustaining treatment , and patient is in terminal condition N/A if pregnant	Majority rule
23. NEVADA Nev. Rev. Stat. §449.626 (1997)	Living Will Statute	• Spouse • Adult child • Parents • Sibling • Nearest adult relative	Limited to withholding or withdrawal of life-sustaining treatment, and patient is in terminal condition N/A if pregnant	Majority rule
24. NEW MEXICO N.M. Stat. Ann. 1978 •24-7A-5 (1998)	Comprehensive Health Care Decisions Act	• An individual designated as surrogate • Spouse • Individual in long-term spouse-like relationship • Adult child • Parent • Sibling • Grandparent • Close friend	None listed	Majority rule
25. NEW YORK N.Y. Pub. Health Law §2965 (McKinney 1999)	Specialized Surrogate Consent Statute (applicable only to DNR orders)	• Spouse • Adult child • Parent • Sibling • Close friend	Limited to consent to a DNR order, and patient is in terminal condition, or permanently unconscious, or where resuscitation is futile or extraordinarily burdensome	Refer to dispute mediation system
26. NORTH CAROLINA N.C. Gen. Stat. §90-322 (Michie 1997)	Living Will Statute	• Spouse • Majority of relatives of the first degree • Attending physician	Limited to the withholding or discontinuance of extraordinary means or artificial nutrition or hydration, and patient is in terminal condition, or persistent vegetative state, and meets other conditions	Majority rule

State & Citation	General Type of Statute	Priority of Surrogates (in absence of appointed proxy or guardian with health powers)	Limitations on Types of Decisions	Disagreement Process Among Priority Surrogates
27. North Dakota N.D. Cent. Code §23-12-13 (Michie 1997)	Informed Consent Statute	• Spouse • Adult children • Parents • Siblings • Grandparents • Adult grandchildren • Close adult relative or friend	Not explicitly applicable to refusals of treatment N/A to sterilization, abortion, psychosurgery, and some admissions to a state mental facility	None listed
28. Ohio Ohio Rev. Code Ann. §2133.08 (Baldwin 1999)	Living Will Statute	• Spouse • Adult child • Parents • Sibling • Nearest adult relative	Limited to consent for withdrawal or withholding of life-sustaining treatment, and patient is in terminal condition or permanently unconscious Nutrition and hydration may be withheld only upon the issuance of an order of the probate court N/A if pregnant	Majority rule
29. Oklahoma Okla. Stat. Ann. tit. 63 §3102A (West 1999)	Specialized provision (applicable only to experimental treatments)	• Spouse • Adult child • Parent • Sibling • Relative	Limited to experimental treatment, test or drug approved by a local institutional revew board.	None listed
30. Oregon Or. Rev. Stat. §127.635 (1998)	Comprehensive Health Care Decisions Act	• Spouse • Adult designated by others on this list, without objection by anyone on list • Majority of adult children • Either parent • Majority of siblings • Adult relative or adult friend • Attending physician	Limited to withdrawal or withholding of life-sustaining procedures, and patient is in terminal condition, or permanently unconscious, or meets other conditions	Majority rule
31. South Carolina S.C. Code 1976 Ann. §44-66-30 (1998)	Separate Surrogate Consent Act	• Person given priority to make health-care decisions for the patient by another statute • Spouse • Parent or adult child • Sibling, grandparent, or adult grandchild • Other close relative • Person given authority to make health-care decisions for the patient by another statutory provision	N/A if patient's inability to consent is temporary and delay of treatment will not result in significant detriment to the patient's health	None listed
32. South Dakota S.D. Codified Laws Ann. §34-12C-1 to -8 (1998)	Separate Surrogate Consent Act	• Spouse • Adult child • Parent • Sibling • Grandparent or adult grandchild • Aunt or uncle or adult niece or nephew	None listed	None listed
33. Texas Tex. [Health & Safety] Code Ann. §166.039 (West (1997)	Advance Directive Act	• Spouse • Reasonably available adult children • Parents • Nearest relative	N/A if pregnant	None listed

State & Citation	General Type of Statute	Priority of Surrogates (in absence of appointed proxy or guardian with health powers)	Limitations on Types of Decisions	Disagreement Process Among Priority Surrogates
Tex. [Health & Safety] Code Ann. • 166.081 to .101, specifically §166.088(b) (West (1997)	Specialized provision (applicable to DNR orders)	(Same as above. Incorporates the terms of §672.009)	(Same as above)	(Same as above)
34. UTAH Utah Code Ann. 1953 §75-2-1105, -1105.5, -1107 (Lexis 1998)	Comprehensive Health Care Decisions Act	• Spouse • Parents or surviving parent • Adult child • Nearest reasonably available relative When patient is terminal or in a permanent vegetative state: • Spouse • Parent • Adult children	N/A if pregnant	Majority rule
35. VIRGINIA Va. Code 1950 §54.1-2986 (Michie 1997)	Comprehensive Health Care Decisions Act	• Spouse • Adult child • Parent • Sibling • Other relative in the descending order or blood relationship	N/A to non-therapeutic sterilization, abortion, psychosurgery, or admission to a mental retardation facility or psychiatric hospital	Majority rule
36. WASHINGTON Wash. Rev. Code Ann. §7.70.065 (West 1998)	Informed Consent Statute	• Spouse • Adult children • Parents • Siblings	Not explicitly applicable to refusals of treatment	Consensus required
37. WEST VIRGINIA W. Va. Code 1966 §16-30-8 and –9 (2000) Last amended 2000	Comprehensive Health Care Decisions Act	• Spouse • Adult child • Parent • Sibling • Adult grandchild • Close friend • Any other person or entity according to DHHR rules If there are multiple surrogates at the same priority level, the attending physician must choose one who appears best qualified according to statutory criteria. May also choose lower level surrogate if deemed best qualified.	None listed	Conflict among multiple surrogates pre-empted by physician's authority to select one surrogate. Other permissible surrogates have a 72-hour window to seek court challenge of a decision made by selected surrogate.
38. WYOMING Wyo. Stat. 1997 §3-5-209 and §35-22-105(b) (1998)	Durable Power of Attorney Statute and Living Will Statute (Identical provisions)	• All family members who can be contacted through reasonable diligence	Limited to withholding or withdrawal of life-sustaining procedures, and patient is in terminal condition or irreversible coma	Consensus required

State & Citation	General Type of Statute	Priority of Surrogates (in absence of appointed proxy or guardian with health powers)	Limitations on Types of Decisions	Disagreement Process Among Priority Surrogates
UNIFORM HEALTH-CARE DECISIONS ACT	Comprehensive Health Care Decisions Act	• Individual orally designated by patient • Spouse • Adult child • Parent • Sibling • Close friend	None listed	Majority rule

KANSAS MEDICAL SOCIETY
KMS

623 SW 10th Avenue
Topeka KS 66612-1627
785.235.2383
800.332.0156
fax 785.235.5114

kmsonline.org

TO: House Judiciary Committee

FROM: Christina Collins
Director of Government Affairs
Associate General Counsel

DATE: February 17, 2004

RE: HB 2741, Act Concerning Health Care, Relating to Health Care Decisions

Chairman O'Neal and Members of the Committee:

Thank you for the opportunity to comment on HB 2741. The bill closes a gap in Kansas law governing who may consent to medical treatment in the event an incapacitated patient has neither a living will nor an advance healthcare directive.

Kansans do not avail themselves of the benefits of having living wills and advanced directives in place as frequently as we might hope. HB 2741 governs a far more common scenario, when a patient has done no advance planning and lacks capacity to communicate his or her health care wishes. This is frequently a time of some stress and chaos for the patient's family, some of whom may have differing motivations and opinions on what the optimal course of treatment may be for their loved one. This can occasionally create an awkward situation rife with legal uncertainty for the health care professional responsible for the patient's care. The philosophy governing the bill before you today for consideration focuses on the creation of an explicit chain of authority in such situations and creates guidelines for resolving disputes. The bill also allows for the health care surrogate to assume authority quickly and does not require an expensive and time-consuming court proceeding to establish that authority.

The Kansas Medical Society would, however, request an amendment to the bill which mirrors language found in the statutes governing similar legal health care documents, such as Do Not Resuscitate orders and advance directives. The language below is patterned after that found at K.S.A. 65-4944:

"No health care provider who relies in good faith on the apparent authority of a health care surrogate in accordance with the provisions of this act shall be subject to any civil liability nor shall such health care provider be guilty of a crime or an act of unprofessional conduct."

This provides the health care provider some measure of confidence in their reliance on the statute and protects them from the threat of legal action when acting in good faith.

Thank you for the opportunity to share our observations on HB 2741. I would be pleased to stand for questions.

Olathe Medical Center
20333 W. 151st Street, Olathe
Kansas 66061 913·791·4200

February 17, 2004

Representative Michael O'Neal
Chairman, House Judiciary Committee
State Capitol Building
Topeka, KS 66612

VIA FACSIMILE

RE: HB 2741 – Health Care Decisions

Dear Chairman O'Neal:

I am writing this letter in support of HB 2741, which is receiving consideration in the House Judiciary Committee.

I have reviewed the language of HB 2741. The proposed bill would address ambiguities in existing Kansas law, and would be of assistance to hospitals and medical providers. Accordingly, we support the passage of HB 2741.

Sincerely,

Murray E. Anderson
General Counsel

cc: Frank H. Devocelle, President/CEO
Sherry Rakes, Sr. Vice President/Nursing

House Judiciary Committee
2-17-04
Attachment 9

STATEMENT OF BEATRICE SWOOPES, ASSOCIATE DIRECTOR OF THE KANSAS CATHOLIC CONFERENCE, BEFORE THE HOUSE JUDICIARY COMMITTEE

Re: House Bill 2741
February 17, 2004

Chairman O'Neal and Members of the Committee:

My name is Beatrice Swoopes. I am the Associate Director of the Kansas Catholic Conference, having worked in various capacities for the Kansas Catholic Conference since its inception in 1967. The Kansas Catholic Conference was founded by the four Bishops of Kansas, who constitute its Board of Governors, and serves as the official voice of the Catholic Church in Kansas on matters of public policy.

I am here today to share our concerns about House Bill 2741, which attempts to create an additional mechanism to address the health care decisions of patients who are unable to communicate their own decisions concerning their health care. House Bill 2741 creates a new category of persons, designated as surrogates, who are authorized to make health care decisions for such individuals. Under the current Kansas statutes, a person already has the ability to give direction in advance concerning his or her own health care decisions by executing a declaration commonly called a living will. Additionally, a person also has the right to appoint another individual as his or her agent to make health care decisions when unable to do so personally. Kansas statutes allow for this appointment of an agent by authorizing the Durable Power of Attorney for Health Care Decisions. Under the present state of Kansas law, individuals already have the recognized right while competent to make their own health care decisions, the recognized right to give advance direction in writing concerning those health care decisions, and the recognized right to appoint an agent to make health care decisions for them in the event they are unable to do so for themselves. There is no need for House Bill 2741.

Concerns About House Bill 2741:

1. The language of House Bill 2741 is confusing. The term "individual" is used throughout the definition section to refer to both the patient and the surrogate decision maker, leading to some possible confusing or illogical conclusions. For example, in House Bill 2741, the definition of "Best Interest" provides in part that "'Best Interest' means that the benefits to the individual resulting from a treatment outweigh the burdens to the individual resulting from that treatment." The proposed statutory language takes on quite different meanings if the "individual" referred to is the surrogate decision maker rather than the patient.

2. The definition section also contains many subjective factors. In determining the "Best Interest" of an individual, one is to consider, among other factors, the "effect of the treatment on the physical, emotional and cognitive functions of the patient" and the "basic principles and core values of the individual receiving treatment, to the extent that these may assist the surrogate decision maker in determining the benefits and burdens." House Bill 2741 grants to a surrogate decision maker the authority to make the undeniably subjective determination of the effect of a proposed treatment on a patient's emotional function. Also, the language of the Bill apparently allows the surrogate decision maker to ignore a patient's "basic principles and core values" if the surrogate does not believe that those principles and core values will be of assistance to the surrogate.

3. "Health care decision" is defined to include the withdrawing of artificial nutrition and hydration. Essentially, House Bill 2741 allows a surrogate decision maker to sentence a patient to die by starvation and dehydration. Although the Catholic Church does not require anyone to undertake extraordinary means to prolong life unnecessarily, the Church does believe in protecting all life and does believe that taking any steps to hasten death is wrong.

4. "Physician" is defined to include anyone "authorized to practice medicine or osteopathy under the Kansas healing arts statutes." This definition differs from the definition of physician under the Kansas statutes pertaining to living wills, which define "physician" as someone "licensed to practice medicine and surgery by the

state board of healing arts."

5. "Primary physician" is defined to include not only a patient's primary care physician but also a physician who undertakes the responsibility for the patient's health care in the absence of the designated primary physician. Also, "supervising health care provider" may also mean the provider who undertakes the responsibility in the absence of the designated provider. In cases of emergency, does the "on call" doctor at the hospital by happenstance become the "primary physician" or the "supervising health care provider?"

6. House Bill 2741 incorporates a critical definition for "reasonably available" and defines the term to mean "readily able to be contacted without undue effort." What qualifies as undue effort? Is a long distance telephone call undue effort? In a matter of such importance as a patient's health care decisions, which could well include a life or death decision, it would seem that great care and effort should be undertaken in an attempt to contact an agent or possible surrogate. Dealing with a life or death decision and not having to exert undue effort is ridiculous. Society and our judicial system have built in many levels of inquiry and appeal and much effort is expended prior to executing a convicted criminal. It would seem appropriate that making a patient's life and death decision should require exercising a rather thorough effort.

7. Section 2(a) of the Bill would permit a surrogate to make decisions even if the patient has appointed an agent or has a court appointed guardian in place. The surrogate need only say that the agent or guardian is not "reasonably available" and need not exert undue effort to contact the agent or guardian. This section makes the surrogate more important than persons who have been authorized to make such decisions by the patient himself or herself or by the Court. What if a patient has appointed an agent with written authority under a valid Durable Power of Attorney for Health Care Decisions and the agent returning to the city from a trip and not immediately accessible by phone? Should the Kansas statute grant someone claiming the authority of a surrogate decision maker the power to make that patient's health care decisions in the place of that duly appointed agent who was specifically chosen by the patient? It would seem that the duly appointed agent would be much better equipped to make the patient's health care decisions.

8. Section 2(b) of the Bill would allow a patient to designate a surrogate decision maker by personally informing the supervising health care provider of such designation. The Kansas statutes already authorize the appointment of an agent for health care decisions under a Durable Power of Attorney for Health Care Decisions. If a patient has the capacity to inform someone of a choice of surrogate, then the patient should execute the already statutorily authorized Durable Power of Attorney for Health Care Decisions. All hospitals should have these forms available by virtue of the federal Patient Self-Determination Act. If physically weak, a patient could execute the form by a mark which could be witnessed by others. This section of the Bill attempts to duplicate legislation which already exists.

9. House Bill 2741 sets out a priority list of those individuals who are to serve as surrogates for health care decisions. The list, in descending order of priority, lists the spouse, an adult child, a parent, and then adult siblings. Depending on whether the patient is married or has children, all of these individuals could stand to inherit from the patient under the Kansas laws concerning intestate succession. In the statutes concerning Durable Powers of Attorney for Health Care Decisions and Living Wills, the legislature has included a requirement that the witnesses to the document or the notary be disinterested persons in order to insure that the person signing the document acted independently and without coercion. No such protection exists in House Bill 2741. A patient could be subject to the decision making authority of a relative who would prefer the benefit of an inheritance to the burden of having to pay for the care of an incapacitated relative.

10. Beyond the priority listing of relative, the Bill allows for any other person "who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available" to act as a surrogate. Such an individual could act as a surrogate for a patient by simply advising the supervising health care provider that the other listed family members are not "reasonably available." Again, the vague and ambiguous term "reasonably available" appears. If a person need not exert any undue effort to contact the relatives, almost any person who claims to have "special care and concern for the patient" could step in to make

life and death decisions for the patient, in lieu of relatives and in lieu of a duly appointed agent or guardian.

11. Section 2(d) of the Bill is also vague. It appears to allow the surrogate to swoop in and make a critical health care decision for the patient. Afterward, the surrogate would then need only notify the relatives who can be "readily contacted" that he or she has assumed the authority for making the patient's health care decisions. The Bill does not require that the surrogate confer with the family nor advise the family of the decisions made but merely requires that the surrogate advise those family members who are "readily available" that he or she has assumed authority. The Bill essentially allows the surrogate to ask forgiveness rather than permission. This proposed statute could lead to extremely difficult and possibly irreparable situations if a patient's family does not approve of the patient's significant other or if a falling out between those significant others occurs. The Bill makes it too easy for a surrogate to take control even if the patient had executed a Durable Power of Attorney for Health Care Decisions or had a court-appointed guardian.

12. In Section 2(e), the spouse is given absolute priority for health care decisions as a person can only have one spouse. Why should the spouse get the priority ? If House Bill 2741 had been Florida law, Terry Schiavo would now be dead. If a patient has not designated his or her spouse as the agent under a Durable Power of Attorney for Health Care Decisions, there may well be good reason for that decision. The Kansas legislature should not step in to dictate that the spouse has ultimate authority for a life and death health care decision. In the case of intestate succession, Kansas law provides that a spouse only inherits half the estate if the deceased had children. Why not also allow children or other relatives some say in what could be a life and death health care decision?

13. Section 2(f) appears to give the surrogate more authority than an agent under a Durable Power of Attorney for Health Care Decisions. An agent must follow the patient's instructions, but this section allows the surrogate the right to make a decision in the best interest of the patient as the surrogate sees it, unless the patient has provided "individual instructions." The definition of this authority is broad, and the surrogate appears to have unfettered discretion.

14. Why provide in Section 2(g) that a surrogate's health care decision "is effective without judicial approval?" In the matter of a life and death decision, why rush and allow a surrogate to claim authority for health care decisions, claiming that the patient's agent, guardian, or family are not "reasonably available" and then provide for no judicial review of such a decision. In a life or death situation, a surrogate's decision, without benefit of input from family, the agent, or a guardian, could have final consequences for the patient.

15. Section 2(h) seems contradictory. If a surrogate can trump a written document appointing an agent by saying that the appointed person is not readily available, then why does the patient - in advance - have to designate persons who are disqualified from acting as a surrogate. This section imposes on the patient a negative burden of ruling out those persons who the patient does not wish making his or her health care decisions. The implication is that anyone not disqualified is eligible to act as a surrogate for the patient. Is it not simpler to state that no one can act on my behalf except the person I designate? The presumption should be that an individual makes his or her own health care decisions. If unable, then that person should designate the preferred person to do so. Do not place a burden on the patient to come up with a black list of those who cannot act.

16. Again, Section 4(e) seems somewhat illogical. A surrogate can terminate life support for a patient but cannot commit the patient to a mental institution. Why would a surrogate have life and death authority and yet not have the authority to consent to admission to a mental institution?

17. The Kansas statute concerning Living Wills provides, "This act shall create no presumption concerning the intention of an individual who has not executed a declaration to consent to the use or withholding of life-sustaining procedures in the event of a terminal condition." House Bill 2741 does seem to create such a presumption that certain surrogates not designated by the patient will best know how to make the patient's health care decisions. House Bill 2741 also steps far outside of the present law by not limiting the surrogate's health care decision making to those cases in which the patient has a terminal condition.

Conclusion

House Bill 2741 does not seem to solve any health care decision making issues confronting patients. In fact, House Bill 2741 could well muddy the waters with respect to figuring out who is the appropriate party to make a health care decision for a patient. Sometimes health care decisions are truly a matter of life and death. Such decisions should be weighed carefully and considerately, and the wishes and opinions of the patient as well as the agent or guardian and the family should be given consideration. Present Kansas law already authorizes an individual to designate a person as his or her agent for health care decisions. House Bill 2741 does not further the goal of protecting the patient's best interests concerning health care decisions.

Thank you.

Patricia Savage

K0196462.DOC; 1

STATE OF KANSAS

JEFF JACK
REPRESENTATIVE, SEVENTH DISTRICT
LABETTE COUNTY
P.O. BOX 1166
PARSONS, KANSAS 67357
(620) 820-9269

STATE CAPITOL, ROOM 182-W
TOPEKA, KS 66612-1504
(785) 296-7678
1-800-432-3924

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: JUDICIARY
TAXATION
TRANSPORTATION
SELECT COMMITTEE ON KANSAS SECURITY

Testimony in support of HB 2577

Mr. Chair and members of the committee:

Thank you for the opportunity to testify today in support of HB 2577.

This bill provides that the surviving spouse, or if there is no surviving spouse, the heirs at law of a deceased patient will be considered to be the authorized or personal representative of the deceased patient for purposes of obtaining medical records under state and federal law.

Traditionally, a person has a right to access their medical records, or to authorize someone else to access their medical records for them. In the past, it was generally assumed that if a person died, their surviving spouse or heirs at law could obtain their medical records even if the deceased had not specifically authorized them to do so.

This all changed with the implementation of the federal Health Insurance Portability and Accountability Act of 1996, or HIPAA.. HIPAA increased the restrictions on the ability of health care providers to release medical records and other health information, and in compliance with HIPAA nearly all medical care providers re-examined their records policies.

Under HIPAA, a health care provider can release medical records to a living patient, or to an authorized representative, which means someone authorized in writing by the patient. In the case of a deceased patient, HIPAA provides that the health care provider may release medical records to the "personal representative" of the deceased, and the identity of that personal representative is determined by state law.

Unfortunately, current Kansas state law limits "personal representatives" to executors and administrators of the deceased. What that means is that for a surviving spouse to obtain the medical records of their deceased spouse, they have to file an action in the district court to be named the executor or administrator of the estate. For many people in Kansas, the expense of doing so is substantial, and it may be contrary to their estate planning, to other state laws that provide for disposition of property without filing with the court, or they simply may not have sufficient property to justify the expense. This bill would remedy that situation, by specifically providing under state law that, for purposes of obtaining medical records, the surviving spouse or the heirs at law are the authorized personal representatives of the deceased.

Imagine if you will a married couple whose only asset is their home, which they own jointly.

The husband dies in a hospital without a will. The wife asks the hospital for copies of her husband's medical records, but he never signed an authorization to release his medical records to her.

Under current law, to feel safe in releasing the records to this widow, the hospital may tell her that she has to file a petition for administration of the estate before they can release her husband's records to her. This may cost her hundreds or even thousands of dollars, and there is absolutely no reason to do so, other than to obtain the records.

With passage of HB 2577, the hospital's attorney will feel confident in advising it that it can release the records to her without the necessity of court action, simply by showing that she is the surviving spouse of the patient.

The death of a loved one is very painful, and the grieving process should not be complicated by government bureaucracy. This is a common sense bill that takes a little of the pain and stress out of at least one aspect of losing a loved one by meshing Kansas law with the federal law. I hope you will support passage of HB 2577.

(d) The judge may permit withdrawal or amendment of any admission made by non-response when the party to whom the admissions were sent shows good cause for failure to respond and shows evidence that the admission is not true and the party who obtained the admissions fails to satisfy the judge that withdrawal or amendment will prejudice such party in maintaining such party's action or defense on the merits. In the event such withdrawal or amendment is made by the party to whom the admissions were sent at trial, the party who obtained the admissions shall be allowed a continuance of the trial setting. Any admission made by a party under this section is for the purpose of the pending action only and is not an admission by such party for any other purpose nor may it be used against such party in any other proceeding.