Approved: February 1, 2005
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:30 A.M. on January 13, 2005, in Room 123-S of the Capitol.

Committee members absent: Barbara Allen- excused

Committee staff present: Mike Heim, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Nancy Lister, Committee Secretary

Conferees appearing before the committee:
Ron Hein, Kansas Restaurant and Hospitality Association
Stanton Hazlett, Office of Disciplinary Administrator
Kathleen Taylor Olsen, Kansas Bankers Association
Judge Nancy Parrish, Shawnee County District Court
Judge Tom Foster, Johnson County District Court
Judge Meryl Wilson, Riley County District Court

Others attending: See attached list

Chairman Vratil called the meeting to order. Ron Hein requested introduction of a bill known as the "obesity frivolous lawsuit act". The bill's intent is to prohibit civil liability for claims arising out of weight gain, obesity, or other generally known conditions allegedly caused or likely to result from long-term consumption of food. (Attachment 1) Senator Donovan moved to introduce the bill, seconded by Senator Betts, and the motion carried.

Stanton Hazlett requested introduction of a bill that would allow the Supreme Court and the State Board of Law Examiners to require applicants to practice law to be fingerprinted and submit to a national criminal history record check. (Attachment 2) Senator O'Connor moved to introduce the bill, seconded by Senator Umbarger, and the motion carried.

Kathleen Taylor Olsen requested introduction of a bill to amend K.S.A 60-1101, which established the basis for determining priority of claims against property under construction. The amendment would clarify the rule that allows a mortgagee to ensure the priority of the recorded mortgage against unknown lienholders by providing that those who have been paid in full and who no longer have a claim on the property cannot establish the priority date for subsequent lienholders; and requiring that the work done on the property which establishes the priority date for all subsequent lienholders be visible. (Attachment 3) Senator Goodwin moved to introduce the bill, seconded by Senator Donovan, and the motion carried.

Chairman Vratil introduced and welcomed Judges Nancy Parrish, Tom Foster and Meryl Wilson. The Judges were present to share their thoughts on the state of the judiciary in Kansas. Judge Parrish provided a summary of statewide caseload filings and full time equivalent positions. (Attachment 4) She gave a brief overview of trends and changes from previous fiscal years. Increasing caseloads but minimal increases in judges have prompted the courts to look for innovative changes in order to handle caseloads. She highlighted some of these innovations.

Senator Goodwin asked Judge Parrish if she felt that there was a need for more court service officers throughout the state. Judge Parrish deferred to Kathy Porter (Office of Judicial Administration), who was in the audience. Ms. Porter stated that there was a need for more court service officers and that ten new officers were added last year.

Senator Donovan noted that according to the summary, civil cases have increased at a faster rate than criminal cases, and asked if there was a specific reason for the difference. Judge Parrish indicated that there has been

a huge increase in limited action and collection cases, because it is now easier to collect in cases, such as for bad check debts.

Judge Foster spoke about Johnson County case filings which are up in almost every type of case. As a result, the court is using trained mediators to resolve issues out of court whenever possible. In house, the judges, including criminal judges, act as mediators and do mediation conferences for other judges. Although divorce cases have not increased, motions to modify custody have increased. Judge Foster also described an educational course developed to educate parents and provide them with skills for resolving issues. (Attachment 5) Senator O'Connor asked if the course is required. Judge Foster indicated that the court is required to identify families in conflict and may order the parents to participate in a course.

Senator Betts inquired if there were identifying factors that require a family to attend courses. Judge Foster indicated that usually a court service officer might be the first to identify a problem. Everyone divorcing who has children has to attend a basic class and some go on to mediation. If mediation is not successful, then home study and custody evaluation is ordered. If conflict issues are identified, a program may be recommended to the court.

Judge Wilson addressed a program known as the Parent Ally Project. The 21st Judicial District was one of two areas selected for a pilot project for one rural and one urban judicial district that allows parents in child in need of care proceedings to designate up to two people to be in court with them during hearings in the case involving their children. The Judge shared a handbook and two forms that were developed for the parents and potential allies to read and fill out. (Attachments 6 through 8) Since the program was initiated, there have been 68 child in need of care cases. Of these, 50 percent did not need the parent advocate project because children were not initially removed from the home. In 18 percent, the parent was not available. Another six percent of parents were already in state custody. In approximately 20 percent of the cases, parents were provided information about this project. Of those, only in two situations did a parent request a parent ally. Judge Wilson indicated that Sedgwick County's urban pilot program requires some type of formal training for the parents and the allies that are allowed into the courtroom.

Judge Wilson also talked about the protection from abuse filings (PFAs) and stalking. Judge Wilson shared that Riley County had 122 PFA filings last year. Of that number, 94 were dismissed. The dismissals were the result of victims not coming back to court, requests for PFAs to be dismissed, and a small percentage who were not eligible for PFAs. The large number of dismissals is frustrating to the courts since PFAs require a lot of paperwork and time, and a judge is required to be on duty whenever there is need for emergency orders. Additionally, the judges must set aside time on the court docket to hear these cases. On the issue of stalking, 28 cases were filed, and 22 were dismissed for the same reasons. The Office of Judicial Administration recently received a grant to make information more accessible and understandable for victims of domestic violence. A website is available to provide information on services available regarding emergency shelters and help for victims of domestic violence.

Senator Goodwin asked if any legislators have wanted to sit in Judge Wilson's court as a supporter of a child in need of care case. Judge Wilson responded, "no."

Chairman Vratil asked about the rate of compliance in PFAs and stalking cases. Judge Wilson shared his perception that often both parties either ignore the order or the victim asks the spouse to come back, so the parties violate the order. When asked if cases come back from enforcement, Judge Wilson indicated that they do. Chairman Vratil asked if there was anything that the legislature could do to improve or enhance the ability of courts and law enforcement officers to enforce PFAs or stalking orders. The Judge indicated that abusers are arrested on the spot and are unable to bond out for 48 hours. He indicated that the issue was a societal problem. Frequently, after the initial battering takes place, the victims (usually women) start asking themselves how they are going to survive, economically, without their partner. Judge Wilson indicated that it is important to make information more accessible to victims of abuse so they may obtain help to survive.

Chairman expressed appreciation to all the Judges for being present and sharing with the Committee.

Judge Parrish then recognized Art Thompson, Office Judiciary Administration (OJA), who provided a few

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

facts regarding dispute resolution cases. Mr Thompson said OJA is expanding the use of dispute resolution, and mediation is the primary form of dispute resolution. Civil cases are the fastest growing group where dispute resolution is used. Almost all cases settle, and few cases go to a judge and jury. OJA is trying a number of different kinds of programs. In child in need of care cases in Wichita and other judicial districts, facilitators are used to deal with cases where children are removed from the home. More children are placed with the extended family, which helps the state, because the children are not placed in foster care. OJA is also working with the Kansas Water Office and a number of the natural resource agencies to try and resolve a number of public policy disputes. It is working with the Department of Administration on employment disputes. Wichita has also been experimenting in probate to have parties resolve issues rather than the courts.

Jill Wolters then continued to review her memorandum, "The Death Penalty, from *Kleypas* to *Marsh*." (Attachment 9) The central issue reviewed by the memo is whether the weighing equation set forth in K.S.A. 21-4624 (e) violates the Eighth and Fourteenth Amendments to the United States Constitution because it mandates death when aggravating and mitigating circumstances are equal. A tie would go to the state when aggravating and mitigating circumstances are equal. Ms. Wolters also discussed how two death penalty cases reviewed by the Kansas Supreme Court, *State v. Kleypas* and *State v. Marsh*, have impacted the Kansas death penalty statute interpretation.

Chairman Vratil said there are seven people on death row in Kansas, and the Attorney General has indicated he plans to appeal the *Marsh* decision to the U.S. Supreme Court, but he was far from certain that the Court would grant certiorari. The Chairman posed the question if the legislature were to adopt legislation fixing the problem the court identified in *Marsh,* would it not have the affect of mooting an appeal to the U.S. Supreme Court. Ms. Wolters gave a personal opinion that it might. Judge Foster indicated that a legislative fix would most likely correct the problem going forward but would not impact the seven people currently on death row. Senator O'Connor raised the question whether all seven were in "equipoise". Judge Wilson stated that the verdict form does not indicate whether or not there is a tie, so we'd have no way of knowing whether the jury found the aggravating and mitigating circumstances equal.

Additional discussion ensued regarding what penalty might be imposed on the seven people on death row should the death penalty not be imposed. Chairman Vratil summarized by saying even though the legislative action can only be prospective, the Supreme Court's action was retrospective. It voids the sentencing portion of the statute which allows a sentence of death to be imposed. At the time these seven people were sentenced, there was no death penalty statute which allowed them to be sentenced to death, because of the Supreme Court's decision, which is retroactive. Chairman Vratil indicated the seven would be re-sentenced with whatever law was in effect on the date that they committed the crime in question, so it could be a "hard 40" or "hard 50" years, or life imprisonment.

Chairman Vratil adjourned the meeting at 10:30 A.M. The next meeting is scheduled for January 18, 2005.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-13-2005

NAME	REPRESENTING
Bill Lucas	MVFR
Donna Schneweis	Amnesty Internat'l
Art Thompson	Office of Judicial Adm.
Mark Gleeson	Judicial Branch
Kathy Porter	Judicial Branch
Nancy Parrish	" "
Meryl Wilson	" "
Thomas Foster	" "
Jim Clark	KBA
Sandy Barrett	KCSDV
Robin Jennison	Kansas District Judges Assn.

Submitted by
RON HEIN

Obesity Frivolous Lawsuit Draft Legislation

Sec 1. This act shall be known as the "obesity frivolous lawsuit act."

Sec. 2. (a) Except as exempted in subsection (b) below, a manufacturer, producer, packer, distributor, carrier, holder, seller, marketer, or advertiser of a food (as defined at Section 201(f) of the Federal Food Drug and Cosmetic Act (21 U.S.C. 321(f) as of the effective date of this act), or an association of one or more such entities, shall not be subject to civil liability for any claim arising out of weight gain, obesity, a health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food.
(b) Subsection (a) above shall not preclude civil liability where the claim of weight gain, obesity, health condition associated with weight gain or obesity, or other generally known condition allegedly caused by or allegedly likely to result from long-term consumption of food is based on (i) a material violation of an adulteration or misbranding requirement prescribed by statute or regulation of this State or of the United States of America and the claimed injury was proximately caused by such violation; or (ii) any other material violation of federal or state law applicable to the manufacturing, marketing, distribution, advertising, labeling, or sale of food, provided that such violation is knowing and willful (as defined below), and the claimed injury was proximately caused by such violation.
(c) For purposes of this Act:
(1) "Claim" means any claim by or on behalf of a natural person, as well as any other claim lawfully asserted by or on behalf such person
(2) "Generally known condition allegedly caused by or allegedly likely to result from long-term consumption" means a condition generally known to result or reasonably likely to result from the cumulative effect of consumption, and not from a single instance of consumption.
(3) "Knowing and willful" means that (i) the conduct constituting the violation was committed with the intent to deceive or injure consumers or with actual knowledge that such conduct was injurious to consumers; and (ii) the conduct constituting the violation was not required by state, federal, or local laws, regulations, or ordinances.
(d) In any action exempted under subsection (b)(i) above, the complaint initiating such action shall state with particularity the following: the statute, regulation or other law of this State or of the United States that was allegedly violated; the facts that are alleged to constitute a material violation of such statute or regulation; and the facts alleged to demonstrate that such violation proximately caused actual injury to the plaintiff. In any action exempted under subsection (b)(ii) above, in addition to the foregoing pleading requirements, the complaint initiating such action shall state with particularity facts sufficient to support a reasonable inference that the violation was with intent to deceive or injure consumers or with the actual knowledge that such violation was injurious to consumers.
(e) In any action exempted under subsection (b) above, all discovery and other

proceedings shall be stayed during the pendency of any motion to dismiss unless the court finds upon the motion of any party that discovery is necessary to preserve evidence or to prevent undue prejudice to that party. During the pendency of any stay of discovery pursuant to this paragraph, unless otherwise ordered by the court, any party to the action with actual notice of the allegations contained in the complaint shall treat all documents, data compilations (including electronically recorded or stored data), and tangible objects that are in the custody or control of such party and that are relevant to the allegations, as if they were the subject of a continuing request for production of documents from an opposing party under the code of civil procedure of this State.

Sec. 3. The provisions of this Act shall apply to all covered claims pending on the effective date of this act and all claims filed thereafter, regardless of when the claim arose.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

A-2

STATE OF KANSAS

OFFICE OF
THE DISCIPLINARY ADMINISTRATOR

701 SW Jackson, 1st Floor
Topeka, Kansas 66603

January 13, 2005

Senate Judiciary Committee

Request for Bill Introduction

Stanton A. Hazlett
Office of Disciplinary Administrator

The Kansas Supreme Court, Kansas Board of Law Examiners and the Disciplinary Administrator's Office request introduction of a bill which would allow the Supreme Court and the State Board of Law Examiners to submit fingerprints to the Kansas Bureau of Investigation and the Federal Bureau of Investigation for the purposes of obtaining a state and national criminal history record check. The information obtained from the fingerprinting could only be used by the State Board of Law Examiners and the Kansas Supreme Court to verify the identification of any applicant and for use in determination of character and fitness of the applicant to take the bar in this state. Currently, without statutory authority by a state the Federal Bureau of Investigation will not conduct a national criminal history record check.

A proposed statute has been given to the Reviser of Statutes Office. Thank you for the opportunity to request that this bill be introduced. I would be glad to answer any questions.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

January 13, 2005

To: Senate Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: Proposed Amendments to the Materialman's Lien Statutes

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today to request amendments to several statutes that relate to the priority of Kansas materialman's liens. These amendments are the result of a collaborative effort among the Kansas Land Title Association, the Heartland Community Bankers Association and the Kansas Bankers Association. This bill draft represents this group's attempt to address a recent Kansas Court of Appeals decision, *Mutual Savings Assoc. v. Res/Com Prop.*, 32 Kan. App. 2d 48, 79 P.3d 184 (2004).

K.S.A. 60-1101, establishes the basis for determining priority of claims against property under construction. We believe that this statute, provides that all unpaid materialmans' liens relating to the same improvement have equal rank with one another, and that all have priority over any other lien that is recorded subsequent to the commencement of visible work on the property.

There are two very important keys to this law: 1) that the priority for materialmans' liens over other liens is measured from the date that the earliest **unpaid** lienholder began work on the property, and not the date work began by some party who has been paid in full; and 2) that the work establishing the priority date for all other lienholders must be something that is **visible** at the property site.

The Court in the *Mutual Savings* case cast doubt on the reliability of the law as we know it to be. The Court decision indicates that the priority date for all subsequent lienholders under this law can be established by a contractor or subcontractor who has been paid in full and no longer has a claim on the property; and that work that is not visible can establish the priority date for all other subsequent lienholders under this law.

We believe that these amendments are necessary to re-establish the long-understood rule that allowed a mortgagee to ensure the priority of the recorded mortgage against unknown lienholders under this law by: 1) providing that those who have been paid in full and who no longer have a claim on the property cannot establish the priority date for subsequent lienholders; and 2) requiring that the work done on the property which establishes the priority date for all subsequent lienholders be visible, thereby giving notice to the world that there may be lien claims on the property.

Thank you for allowing us to present this bill introduction and we would respectfully request that the Committee act favorably.

610 SW Corporate View 66615 • P.O. Box 4407, Topeka, KS 66604 • (785) 232-3444 • FA
email kbaoffice@ink.org

PROPOSED AMENDMENTS TO KANSAS MATERIALMAN'S LIEN STATUTES

60-1101. Liens of contractors; priority.

Any person furnishing labor, equipment, material, or supplies used or consumed for the improvement of real property, under a contract with the owner, **an owner contractor,** or with the trustee, agent or spouse of the owner, shall have a lien upon the property for the labor, equipment, material or supplies **visibly** furnished **at the site of the property subject to the lien**, and for the cost of transporting the same**; however, a notice of intent to perform, if required pursuant to KSA 60-1103b., must have been filed as provided by that section**. The lien shall be preferred to all other liens or encumbrances which are subsequent to the commencement of the **visible** furnishing of such labor, equipment, material or supplies **by such claimant** at the site of the property subject to the lien. When two or more such contracts are entered into applicable to the same improvement, the liens of all claimants shall be similarly preferred to the date of the earliest unsatisfied lien of any of them, **as long as such earlier unsatisfied lien remains unsatisfied. If an earlier unsatisfied lien is paid in full, the preference date for all claimants shall be the date of the next earliest unsatisfied lien. The placement of a sign or survey stakes at the site shall not constitute the "visible furnishing" of labor, equipment, material or supplies.**

60-1103b. **Subcontractors' liens; new residential property.**

(a) As used in this section, "new residential property" means a new structure which is constructed for use as a residence and which is not used or intended for use as a residence for more than two families or for commercial purposes. "New residential property" does not include any improvement of a preexisting structure or construction of any addition, garage or outbuilding appurtenant to a preexisting structure.

(b) A lien for the furnishing of labor, equipment, materials or supplies for the construction of new residential property may be claimed pursuant to **K.S.A.60-1101 or** 60-1103 and amendments thereto after the passage of title to such new residential property to a good faith purchaser for value only if the claimant has filed a notice of intent to perform prior to the recording of the deed effecting passage of title to such new residential property. Such notice shall be filed in the office of the clerk of the district court of the county where the property is located.

(c) The notice of intent to perform and release thereof provided for in this section, to be effective, shall contain substantially the following statement, whichever is applicable:

KSA 60-1103b(c), cont.

NOTICE OF INTENT TO PERFORM

"I __________ (name of supplier, subcontractor or contractor) __________ (address of supplier, subcontractor or contractor) do hereby give public notice that I am a supplier, subcontractor or contractor or other person providing materials or labor on property owned by __________ (name of property owner) and having the legal description as follows: __________."

RELEASE OF NOTICE OF
INTENT TO PERFORM NO. ___
AND WAIVER OF LIEN

"I __________ (name of supplier, subcontractor or contractor) of __________ (address of supplier, subcontractor or contractor) do hereby acknowledge that I filed notice of intent to perform no. _____ covering property owned by __________ (name of property owner) and having the legal description as follows: __________."

In consideration of the sum of $ __________, the receipt of which is hereby acknowledged, I hereby direct the clerk of the district court of __________, Kansas to release the subject notice of intent to perform and do hereby waive and relinquish any statutory right to a lien for the furnishing of labor, equipment, materials or supplies to the above-described real estate under the statutes of the state of Kansas."

(d) When any claimant who has filed a notice of intent to perform has been paid in full, such claimant shall be required to file in the office in which the notice of intent to perform was filed, and to pay any requisite filing fee, a release of such notice and waiver of lien which shall be executed by the claimant, shall identify the property as set forth in the notice of intent to perform, and state that it is the intention of the claimant to waive or relinquish any statutory right to a lien for the
furnishing of labor or material to the property. Upon such filing, the notice of intent to perform previously filed by such claimant shall be of no further force or effect, and such claimant's right to a lien under K.S.A. 60-1101 and 60-1103, and amendments thereto, shall be extinguished.

(e) Any owner of the real estate upon which a notice of intent to perform has been filed, or any owner's heirs or assigns, or anyone acting for such owner, heirs or assigns, and after payment in full to the claimant, may make demand upon the claimant filing the notice of intent to perform, for the filing of a release of the notice and waiver of lien as provided for in subsection (d), unless the same has expired by virtue of the provisions set forth in subsection (f).

(f) Notwithstanding the requirements of subsections (d) and (e), a notice of intent to perform shall be of no further force or effect after the expiration of 18 months from the date of filing the same, unless within such time the claimant has filed a lien pursuant to K.S.A. 60-1101 and 60-1103, and amendments thereto.

***60-1106.* Parties.**

In such actions all persons whose liens are filed as herein provided, and other encumbrancers of record, **except those encumbrancers whose lien has priority over the claim of the plaintiff,** shall be made parties, and issues shall be made and trials had as in other cases. Where such an action is brought by a subcontractor, or person other than the original contractor, such original contractor shall be made a party defendant, and shall at his or her own expense defend against the claim of every subcontractor, or other person claiming a lien under this article, and if he or she fails to make such defense the owner may make the same at the expense of such contractor; and until all such claims, costs and expenses are finally adjudicated, and defeated or satisfied, the owner shall be entitled to retain from the contractor the amount thereof, and such costs and expenses as he or she may be required to pay. If the sheriff of the county in which such action is pending shall make return that he or she is unable to find such original contractor, the court may proceed to adjudicate the liens upon the land and render judgment to enforce the same with costs.

***60-1110.* Bond to secure payment of claims.**

The contractor or owner may execute a bond to the state of Kansas for the use of all persons in whose favor liens might accrue by virtue of this act, conditioned for the payment of all claims which might be the basis of liens in a sum not less than the contract price, **or to any person claiming a lien which is disputed by the owner or contractor, conditioned for the payment of said claim in the amount thereof. Any such bond shall have** ~~with~~ good and sufficient sureties, ~~to~~ be approved by a judge of the district court and filed with the clerk of the district court. When such bond is approved and filed, no lien **for the labor, equipment, material or supplies under contract or claim described or referred to in the bond** shall attach under this act, and if when such bond is filed liens have already been filed, such liens are discharged. Suit may be brought on such bond by any person interested**, but no such suit shall name as defendant any person who is neither a principal or surety on such bond, nor contractually liable for the payment of the claim**.

Submitted by Judge Nancy Parrish

Senate Judiciary
1-13-05
Attachment 4

STATEWIDE
SUMMARY OF CASELOAD FILINGS AND FTE POSITIONS

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96	87 to 96 % CHANGE	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04	87 to 04 % CHANGE
CIVIL CASES																				
Regular Actions	26,385	25,237	24,041	25,733	23,751	23,735	22,347	23,287	21,831	20,539	(22.2)	21,192	21,427	22,554	22,199	21,167	23,522	24,265	25,684	(2.7)
Domestic Relations	23,497	25,351	26,404	29,486	30,210	30,717	33,124	36,469	38,099	38,588	64.2	38,105	39,321	38,002	34,989	33,188	35,114	37,785	37,222	58.4
Limited Actions	54,526	57,070	62,051	68,525	77,480	84,514	80,404	90,044	99,030	104,752	92.1	115,764	121,463	124,820	125,995	120,391	149,553	155,080	152,878	180.4
TOTAL, CIVIL	104,408	107,658	112,496	123,744	131,441	138,966	135,875	149,800	158,960	163,879	57.0	175,061	182,211	185,376	183,183	174,746	208,189	217,130	215,784	106.7
CRIMINAL CASES																				
Felonies	11,500	12,188	12,631	12,197	11,436	13,412	13,229	14,423	15,267	17,150	49.1	17,832	17,653	19,007	17,234	16,876	17,437	18,527	19,308	67.9
Misdemeanors	13,369	13,234	14,171	15,362	16,919	16,986	16,386	17,762	18,850	18,523	38.6	18,395	18,553	19,977	21,259	20,947	19,854	18,914	19,386	45.0
TOTAL, CRIMINAL	24,869	25,422	26,802	27,559	28,355	30,398	29,615	32,185	34,117	35,673	43.4	36,227	36,206	38,984	38,493	37,820	37,291	37,441	38,694	55.6
TOTAL CIVIL AND CRIMINAL CASES	129,277	133,080	139,298	151,303	159,796	169,364	165,490	181,985	193,077	199,552	54.4	211,288	218,417	224,360	221,676	212,566	245,480	254,571	254,478	96.8
LESSER JURISDICTION Without Traffic	54,143	54,632	54,807	56,808	56,647	57,224	53,186	54,285	56,317	56,539	4.4	57,361	58,470	59,252	56,945	54,707	51,580	48,601	47,588	(12.1)
GRAND TOTAL WITHOUT TRAFFIC	183,420	187,712	194,105	208,111	216,443	226,588	218,676	236,270	249,394	256,091	39.6	268,649	276,887	283,612	278,621	267,273	297,060	303,172	302,066	64.7
DISTRICT COURT JUDGES (FTE)	216	216	217	218	218	218	218	218	221	225	4.2	225	225	228	233	234	234	234	234	8.3
DISTRICT NONJUDICIAL FTE	1,301	1,341	1,395	1,402	1,404	1,349.50	1,348.50	1,367	1,380	1,387	6.6	1,389	1,404	1,419	1,434	1,433	1,433	1,433	1,433	10.1

"87 to 96" column reflects the statistics used in the 1997 Legislative Post Audit report, "Reviewing the Kansas Court System's Allocation of Staff Resources to the District Courts."

Submitted by Judge Foster

Higher Ground: Skills for Cooperative Parenting

A Parent Education Program for High Conflict Families

Brief Description of Program

- Educates parents about creating healthy restructured homes
- Offers concrete information about raising children in two homes
- Provides learning opportunities to apply conflict resolution skills to parenting decisions.

Six biweekly sessions focus on reducing the harmful effects of conflict on children and children's needs' for strong bonds and regular contact with both parents.

To meet adult learning needs, parents are exposed to cooperative parenting information in a variety of formats, using teaching resources from model parenting programs.

Eligibility: Parents must be ordered by the court to complete the program. Usually parents will participate together. When recommended by staff, attorneys or judges, individual parents may participate on their own.

Upon receipt of the order, families will be contacted immediately by DCCS staff and will participate in an intake and orientation process.

Some parents may not be suitable for the program if mental health issues, substance abuse or domestic violence prevent positive participation .

Format: Six biweekly sessions of 2 ½ hours each on 1st, 3rd and 5th Tuesday evenings each month. Sessions are highly structured with assigned groups and strict ground rules. Each session will include written materials, topics and presentations with videos and speakers, small group discussion and skill practice with large group debriefing. The program will be offered quarterly. There is a fee of $30 per parent for materials (scholarships are available).

For Information: Contact Domestic Court Services, 913-324-6900
Gary Kretchmer 913-324-6937or Christina Jordan, 913-324-6977
http://courts.jocoks.com Christina.jordan@jocogov.org

Senate Judiciary
1-13-05
Attachment 5

Shared Parenting Resources

Local Programs

Higher Ground: Skills for Cooperative Parenting: by court order for high conflict families ordered, through Johnson County Domestic Court Services, offered quarterly (6 classes per session) on 1st and 3rd Tuesdays 4:30-7:00-m at Court Services, 1255 East 119th Street, Olathe, 913-324-6977 for information http://courts.jocoks.com/cs_dom.htm

Parenting Forum: Drop in resource for separated parents, 1st Monday of each month from 11:30-1:00 at Johnson County Court Services. Parents and stepparents may bring questions and concerns about parenting. Several times a year, presentations will be made on pertinent shared parenting topics. 913-324-6977 for information. http://courts.jocoks.com/cs_dom.htm

A House Divided: Co-Parenting After Divorce: 3-hour workshops by Sheryl Porter PhD. 8001 College Blvd., Suite 220, 913-451-8550

CASA Kids' Voice, 6-sessions on Mondays 6:30-8:00pm at Dorothy Moody Elementary, 10101 England, Overland Park. Pre-registration required, 715-4040 http: //www.jococasa.org

web sites

www.divorcecare.com

www.activeparenting.com

www.divorcesource.com

www.parentingafterdivorce.com

www.timetoparent.com

http://www.divorce-education.com

http://www.divorcetransitions.com

www.mediate.com

Http: //www.oznet.ksu.edu/library/famlf2

Http: //www.cooperativeparenting.com

Http: //www.uptoparents.com

http: //www.kidsneedbothparents.org

http://www.tnpc.com

http://www.info4parents.com

Books

How to Avoid the Divorce from Hell and Dance Together at Your Daughter's Wedding, M. Sue Talia

The Complete Divorce Recovery Handbook, John P. Splinter

Getting to Yes: Negotiating Agreement Without Giving In, Roger Fisher and William Ury

Make Peace With Anyone, David J. Lieberman, Ph.D.

The Best Parent is Both Parents, David L. Levy

Mom's House, Dad's House: Making Two Homes for Your Child, Isolina Ricci

Joint Custody with a Jerk, Julie A. Ross

Getting Divorced Without Ruining Your Life, Sam Margulies

Difficult Conversations: How to Discuss What Matters Most, Douglas Stone, Bruce Patton & Sheila Heen

Parenting After Divorce: A Guide to Resolving Conflicts and Meeting Your Children's Needs, Philip M. Stahl Ph.D.

Higher Ground Class Syllabus

Winter 2005

5-3

Date	Session	Topic	Tasks for Parents	Resources for Parents
Individual Appointments	**By Appoint-ment**	**Orientation to Higher Ground** **Family Background** Parents must be able to participate positively in a group setting to be in class	Provide background Be open minded Make arrangements to attend all meetings	What About the Children: A Guide for Divorced and Divorcing Parents booklet Cooperative Parenting Resources list
February 1st Group A - Gary Group B - Chris	**Session 1**	Introduction and Ground Rules **Child Focused or Out of Focus** Commitment to Caring "Children, The Experts on Divorce" video	Be a Student Abide by Ground Rules Review Materials Bring Pre-Test Pay $30 in cash or check How do our fights hurt our kids? What do I need to change?	Chapter 1, Cooperative Parenting & Divorce (CP & D) (pp3-20) Handouts on Cooperative Parenting
February 15th Group B- Gary Group A - Chris	**Session 2**	**Plan for Peace of Tug of War** Allowing My Child to Love Both Parents "Children in the Middle" video	Be a Student Abide By Ground Rules Review Materials What do our children need from us?	Chapter 2, CP & D (pp 26-39) Children in the Middle booklet Handouts on Children's Developmental Needs
March 1st Group A - Gary Group B - Chris	**Session 3**	**Letting Go or Holding On** Guest Speakers: Jan Fountain and Terry Dichiser Relationship Closure	Be a Student Abide by Ground Rules Review Materials How can I create the right boundaries for my family? Let go of assumptions.	Chapter 3, CP & D (pp 46-61) Handouts on Moving On, Taking Care of Yourself, Boundaries, Forgiveness, Single Parenting, Blending Families and Step-parenting

March 15th Group B - Gary Group A - Chris	**Session 4**	**Make it Better or Keep It Bitter** **Choosing My Personal Path** **Neither Take Fight Nor Take Flight** Managing My Anger "After the Storm" video	Be a Student Abide by Ground Rules Review Materials How can I best handle my own emotions? How can I ask for what I want?	Chapter 4, CP & D (pp 68-78) Chapter 5, CP & D (pp 84-103) Handouts on Managing Anger, Emotion, Letting Go, Setting Boundaries and Moving On After the Storm booklet
March 29th Group A - Gary Group B - Chris	**Session 5**	**Defuse or Light the Fuse** **Taking Control of Conflict** "Cooperative Parenting & Divorce" Video Scenarios	Be a Student Abide By Ground Rules Review Materials How can I reduce our conflict?	Chapter 6, CP & D (pp 116-126) Chapter 7, CP & D (pp 141-142) Handouts on Effective Communication and Conflict Management Skills
April 5th Group B - Gary Group A - Chris	**Session 6**	**Cooperation or Conflict** **Parenting is Forever** Post-Test Conclusion	What have I learned? What will I do differently? Schedule a coaching session? Schedule mediation? Go to co-parenting counseling?	Chapter 8, CP & D (pp 156-181) Handouts on Parenting Planning, Parenting Plans, Calendars, The "Business of Raising Children"
Joint Appointments with Parents With Gary and/or Chris or other mediator	**De-Briefing, Coaching and/or Mediation**	What are the ground rules for our business relationship? How will we communicate as parents? What do we need to resolve? What is our plan? What other resources do we need?	Use the information Create business protocol Develop business relationship Mediate if needed Use other resources Focus on my children Focus on the future Be positive Expect the best	List of books, websites, organizations and other resources for cooperative parenting Referrals by staff to other resources

Inclement Weather: Call 913-324-6977 at 2:00pm for a message for class cancellation due to severe weather (make up April 19th)

Parents **MUST** pay the $30 fee and attend all 6 class sessions to a receive a letter for the judge confirming successful completion of Higher Ground.

If extraordinary events require you to be late or miss a class, you must call Chris **IN ADVANCE** at 913-324-6977 to arrange to make up the materials. All material must be made up prior to April 5th.

Submitted by
Judge Wilson

PARENT SUPPORT PROGRAM

TWENTY-FIRST JUDICIAL DISTRICT

STATE OF KANSAS

Pilot Project Version 1.0
March 23, 2004

Office of Judicial Administration
Kansas Judicial Center
301 SW 10th Avenue
Topeka, Kansas

Senate Judiciary
1-13-05
Attachment 6

Children in Need of Care:

Information for Parents and Designated Parent Supporters

ıt is a Child in Need of Care Case?

Normally, parents raise their children at home without involvement . state agencies or the court. Sometimes, however, things happen that lead e filing of a case with the court that claims that a child, or children, are in of care. Most often the County Attorney files these cases, based on mation that comes to him from one or more sources, including law rcement, schools, social service agencies, health care providers, or iduals.

A petition identifies the person who is filing it with the court, the child lved, the parents, and the information that supports the belief that the child need of care. The petition asks that the court hear evidence from the es and decide that the child is in need of care. If the court eventually agrees, :ourt will take control of the children and make decisions about the child's including whether, and when, the child may return home. **What Happens Child in Need of Care Case?**

Protective Custody

In many cases, either law enforcement officers or social services personnel remove children from the home before the court holds a hearing. This is ıitted if a judge reviews the petition that was filed, along with the reasons for ɔving the children. The judge has to find probable cause to believe that the l is likely to be harmed in some way if not put in protective custody. If the l is taken into custody, all of the parties will be summoned to court for a **porary custody hearing**.

Temporary Custody

A temporary custody hearing will be held within 72 hours (excluding kends and holidays) after the time the child is placed into custody. The :t can order temporary custody out of the home for the child, or can return :hild to the home while the case is pending. Attorneys will be present to 'esent the parents, and the best interests of the child. The attorney for the l's interest is called a guardian ad litem, meaning a guardian appointed for

ıancial information through their attorney, which will be considered by in setting the amount that they must pay. The parties will next come 'or a **pretrial hearing.**

rial hearing

purpose of a pretrial hearing is to see what the parties agree about and isputed. If the parties agree that the child is a child in need of care, they ıe court and judge will ask them questions to make sure they ıd their right to have a hearing on that question. If the parties do not 'ormally agree that the child is in need of care, but agree that some goals e set and, if it would be helpful, some services should be arranged to t the goals, the parties may propose to the judge that the case be ɔy **informal supervision**. If the parties do not agree the child is in :are, and do not agree to handle the case through informal supervision, : will set a date for the **adjudication hearing**.

ırmal supervision

rmal supervision means that the case remains on the court docket, but have regular hearings and there is no decision by the court that the ı need of care. In other words, the parties work together to propose a eal with the problems that led to the case without having the court's full tion and review. If the parties propose informal supervision, and the :ees, an order will be prepared that sets the goals, services and bilities. The period of informal supervision can last up to 6 months. nonths, the court must approve extending the informal supervision for nonths, or order the case to go back into the formal process, or order to be dismissed. After two 6 month periods of informal supervision, must either end and be dismissed from the court's docket, or it must go nal proceedings, with the scheduling of an adjudication hearing.

'udication Hearing

: adjudication hearing is the hearing at which evidence is presented for nst the petition to find the child to be in need of care. The court will evidence and argument from the attorneys on behalf of their clients. It ıat the court will speak with the child. Because of the obvious emotions ıld be felt by a child, and the harmful effects, it is even rarer that a child e called upon to testify in court. In certain, limited circumstances, where : neglect is alleged, testimony from young children may be presented by ık using a strictly controlled method. In general, the court will not allow o be present in the courtroom during hearings. In that way, all parties

petitioner has shown the child to be a child in need of care. If so, the case will continue by setting a date for a **disposition hearing**. If not, the case is over.

- ***Disposition hearing***

The disposition hearing normally is set within 30 days after the adjudication hearing, although that may vary if there is a good reason. At that hearing, the court will hear from witnesses, if any, review reports, and hear recommendations from the parties on what course of action should be followed for the benefit of the child. Notice of the hearing must be given to the parties, as well as to the grandparents of the child. After considering all the evidence and recommendations from the parties, the court will order placement of the child at home with parents, or outside the home, with SRS or with relatives or others who may be recommended to the court. If the court finds that return of the child to the parents remains a possibility, the court will order preparation of a permanency plan. A reintegration plan outlines the specific steps needed to move toward the time when the child could appropriately be returned home. The court will then set a date for the next hearing, which will normally be a **review hearing**.

- ***Review hearings***

A review hearing is held for the court and parties to follow up on the progress in the case. Although the date for the next review hearing is usually set at the end of the most recent hearing, the judge may order a review hearing sooner, or delay the hearing, at the request of one of the parties, or on his own. As one would expect, a review hearing is held to review the status of a case, and what progress has, or has not, been made. The judge and the lawyers will usually have the benefit of some written reports, and the judge will hear the reports and recommendations from the lawyers, who may also want to present witnesses. After considering all that evidence, the court may, or may not, make changes to the previous orders. The court will order a **permanency hearing** when a child has been out of the parents' home for a year.

- ***Permanency hearing***

A permanency hearing is different from a review hearing in that the judge is required to make some specific decisions concerning the progress of the case toward its goal, whether that is reintegration of the child with the parents, or some other goal. If reintegrating the child with the parents was the goal for the case, and because of the lack of adequate progress the judge decides that goal is no longer a workable option, he will consider whether the parents have had services made available to them that would have reasonably helped them to move toward having the child returned to their home. If so, and if the judge finds that either adoption or permanent guardianship might be in the child's best

interest, the county attorney is required to file a motion, within 30 days, to **terminate parental rights** or establish a **permanent guardianship** for the child outside the home. When that motion is filed, the court will set it for hearing within 90 days. If the judge finds that reintegrating the child with one or both of the parents should still be considered as the goal, he can change the previous orders or leave them the same, and will set another hearing date for another review of progress.

- ***Termination or Permanent Guardianship hearing***

In some cases, after a variety of services, counseling and other assistance have been offered and tried, the judge may decide that it is not only in the child's best interest to be out of the home temporarily, but permanently. That decision is one of the most serious and important that a judge is called upon to make. Because of that, it is only made after one of the parties files a motion asking either that the right of the parents be terminated, or that the child be placed with another party, who will be named the permanent guardian for the child, with all the rights and responsibilities of a parent. All of the parties to the case will have notice of the hearing on that motion, and will have the opportunity to present evidence and state their positions at the hearing. All parties are best served if they work closely with their attorneys to become well-informed about all relevant facts and legal issues. Parents have a right to a hearing on a motion to terminate their parental rights, and have a right to have their attorney represent their interests at that hearing. Sometimes, however, parents choose to relinquish, or give up, their parental rights so the child may be moved toward a permanent placement in another home. In other cases, parents may agree on another person, or another couple, who they propose as permanent guardians for the child. Permanent guardians must be approved by the court. If the court terminates parental rights, the court will hold later hearings on placement of the child for adoption or permanent guardianship. If the court grants a motion for permanent guardianship, the court must review a report on the proposed permanent guardian and, after hearing recommendations, must approve the particular guardian or guardians. If the court denies the motion to terminate parental rights or to appoint a permanent guardian, a new permanency plan will be prepared and the court will continue to supervise the case.

Supporting Agencies

In many cases, three agencies or organizations play important roles. They are usually referred to by their initials: SRS, KCSL, and CASA. These are the Kansas Department of Social and Rehabilitation Services (SRS), the Kansas Children's Service League (KCSL), and Court Appointed Special Advocates (CASA).

;

:n children are removed from their parents' home, they may be placed
lative or some other appropriate person with whom the child has a
ıtionship. In most cases, however, when a child is removed from his or
e, the child is placed in the custody of the Kansas state agency
ɔle for caring for children, SRS. When a child goes into custody with
ıy health care, counseling and other services are made available, as well
ıent in a foster home, or group home. The foster homes, group
nd services are provided through a contract that SRS has with KCSL.
:hild is placed outside the home, parents have an obligation to provide
support in an amount set by the court. The court requires attorneys for
ıts to ask for financial information the judge will need to decide on the
amount.

;L

;L is a social services organization that has entered into a contract with
rovide services related to the care of children placed by the court into
ody. Social workers from KCSL are in direct contact with the children
families as they supervise care of the children and work with the family
ıe possibility of the return of the child to the parental home. Social
from KCSL report to SRS and the court and make recommendations
enefit of the children.

;A

rt appointed special advocates, or CASAs, are volunteers trained to
formation and make recommendations for the benefit of the children.
ı the child has an attorney, the guardian *ad litem*, appointed to represent
's best interest in court, a CASA usually has no more than two or three
d can devote more time and individual attention to the child's needs
guardian *ad litem*. To do their job effectively, CASAs are authorized to
e parties and attorneys, and to other information sources such as health
viders and schools, and meet often with the children who they are
to help. They often work closely with SRS and KCSL in helping
e a child's and family's needs, and assist in a variety of other ways to
ıe children.

Parents:

The 2003 Kansas Legislature established a pilot project to allow parents
ı need of care proceedings to designate up to two people to be in court
n during hearings in the case involving their children. The 21st Judicial

t. The new law requires that these parent supporters be provided with
ıation on the child in need of care process. While that law does not
e that parents get the same information, the court feels it is important that
.so have the opportunity to learn about the process in which they and their
ɜn are involved.

It is important that you cooperate fully with your attorney and respond
r attorney's requests for information or meetings. Experience has shown
ıese cases are most likely to reach a satisfactory conclusion for the children
all the parties and the supporting agencies work together to resolve the
ːms that brought the case to the court. If you have problems completing
ʼurt orders, those problems should be discussed with your attorney as
ıs they are known.

esignated Parent Supporters:

If you are to be helpful in your role as a parent supporter, you should
e knowledgeable about how these cases come to the court, what happens
they do, and what can move the case to a conclusion that is beneficial to
ildren involved.

Role of a Parent Supporter

nay:

: present in the gallery in court during hearings. Child in need of care cases
e emotional issues concerning children and their families. You should
ɔt to assist the parent who has designated you by carefully paying attention
at is said, and what is not said, in court or in other meetings in the case.
arent may benefit from the "second set of ears" to clarify or fill gaps in the
's recollection.

: informed about how child in need of care cases are conducted, about the
ses of the hearings, and the roles of the various parties.

nay not:

: at counsel table in front of the bar

epresent" the parent who designated you; the parent has an attorney

ːesent your opinion to the court

You need to:

- observe appropriate courtroom decorum
- maintain the confidentiality of the proceedings

To Parents and Designated Supporters:

Communications

Communication between a party and his or her attorney that relates to the attorney's representation is confidential. A client may lose that protection if he or she reveals that information to some other person.

You should also know that the judge is not permitted to speak to you about the case, or to hear from you, other than in court, with the other parties present. If you have something you feel the judge needs to know, you should make that known to your attorney. If you telephone the judge, or go to his office to ask to see him, he is not allowed to speak with you. If you write to the judge, he is required to provide a copy of that to the attorneys for the other parties to the case. This protects all parties by making sure that no person is allowed to privately "lobby" the judge with one point of view, placing other points of view at a disadvantage.

Confidentiality

Finally, the important subject of confidentiality needs to be mentioned. Child in need of care cases are confidential, meaning they are private and may not be disclosed or made public. This includes not only the details of what happens in court, but the fact that the case exists and the identity of the parents and children involved.

All those involved in a case, including parents and parent supporters, must understand the role of confidentiality, and obey this requirement. All hearings are closed to the public. The court file is not available to the public. Only the judge and the attorneys may see the file, unless there is a specific court order. The case is kept confidential to protect the interest of the child and the family. This lets them work through very difficult and sensitive problems without those problems being known by neighbors, co-workers, students in school with the children, or other members of the public. If, at any time during your case, you have a question about what may be disclosed to whom, you need to ask your attorney or make the question known to the court.

Submitted by
Judge Wilson

21st Judicial District
Child in Need of Care Case

Parent Supporter Acceptance and Acknowledgement

I, ______________________, having been designated by ________________________as a parent supporter in case involving _________________________ (child or children), accept that designation, as outlined in K.S.A. 38-1552.

- **I have read and understand the material contained in "*Information for Parents and Designated Parent Supporters*."**
- **I understand that if I have any questions about the information in that pamphlet, I should ask them now.**
- **I understand that if I need help reading that pamphlet, I may ask, and assistance will be provided.**
- **I understand that I will be bound by the confidentiality that applies to the case and must comply with the Court's rules for behavior. If I do not do so, the Court may revoke this designation.**

Signed: ________________________________ **Date:** ________________________

Printed name: ________________________________

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1-13-05
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Submitted by Judge Wilson

21st Judicial District
Child in Need of Care Case

Information for Parents and
Parent Supporter Designation

Information

Your child or children are the subject of a petition for the court to find that they are "in need of care." We understand this is a difficult time, and want you to understand what is involved in this process, so that you may make well-informed decisions. For that purpose, we are providing you with an information pamphlet to help get you oriented.

Please sign to show you have received this information:

________________________ **(signature)**

________________________ **(name printed)**

Parent Supporter Designation

The 2003 Kansas Legislature established a pilot project to allow parents in child in need of care proceedings to designate up to two people to be in court with them during hearings in the case involving their children, as outlined in K.S.A. 38-1552. The 21st Judicial District, in Riley and Clay Counties, is one of two areas selected for that pilot project. A parent supporter is just that, a person you may choose to be present in the courtroom during hearings. The role of a parent supporter is explained on page 6 of the information pamphlet you have been given. Parents and grandparents are entitled to be present during child in need of care hearings, so you do not need to designate them for them to be allowed into the courtroom.

If you want to designate a parent supporter, or supporters, at this time, please provide the information on the attached form. If you choose not to designate a parent supporter at this time, you may do so later.

I do/do not (circle one) want to designate a parent supporter at this time.

______________________ **(signature)**

______________________ **(name printed)**

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Attachment 8

21st Judicial District
Child in Need of Care Case

Parent Supporter Designation

I, ____________________, designate the person named below to be a parent supporter in the case involving my child or children:

Name: ________________________________

Address: ________________________________

____

____

Telephone: ________________________________

I understand that the person I have designated will not be permitted to be present as a parent supporter until he or she receives a copy of the "Information for Parents and Designated Parent Supporters" prepared by the 21st Judicial District, and acknowledges by signature that he or she has read and understood that information and agrees to abide by the requirements for parent supporters. Parent Supporters are allowed as outlined in K.S.A. 38-1552.

Signed:

____

Office of Revisor of Statutes
300 S.W. 10th Avenue
Suite 322, Statehouse
Topeka, Kansas 66612-1592
Telephone (785) 296-2321 FAX (785) 296-6668

MEMORANDUM

To: Senate Committee on Judiciary

From: Jill Ann Wolters, Senior Assistant Revisor and Diana Lee, Assistant Revisor

Date: January 12, 2005

Subject: The Death Penalty, from *Kleypas* to *Marsh*

This memo is an overview of the Kansas death penalty statutes and a brief of *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001) and *State v. Marsh*, No. 81,135, Supreme Court of Kansas (December 17, 2004), specifically the weighing equation set forth in K.S.A. 21-4624(e). This memo does not cover other issues discussed in either decision.

Kansas Death Penalty Statutes

Kansas enacted the current capital murder/death penalty statutes in 1994. Capital murder is an off-grid person felony. The crime of capital murder is limited to seven specific crimes:

(1) Intentional and premeditated killing of any person in the commission of kidnapping or aggravated kidnapping when the kidnapping or aggravated kidnapping was committed with the intent to hold such person for ransom;

(2) intentional and premeditated killing of any person pursuant to a contract or agreement to kill such person or being a party to the contract or agreement pursuant to which such person is killed;

(3) intentional and premeditated killing of any person by an inmate or prisoner confined in a state correctional institution, community correctional institution or jail or while in the custody of an officer or employee of a state correctional institution, community correctional institution or jail;

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(4) intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, such crime: Rape, criminal sodomy or aggravated criminal sodomy or any attempt thereof;

(5) intentional and premeditated killing of a law enforcement officer;

(6) intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or

(7) intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping or aggravated kidnapping when the kidnapping or aggravated kidnapping was committed with intent to commit a sex offense upon or with the child or with intent that the child commit or submit to a sex offense. "Sex offense" means rape, aggravated indecent liberties with a child, aggravated criminal sodomy, prostitution, promoting prostitution or sexual exploitation of a child.

The sentencing procedures provide that a person under 18 or a mentally retarded person can not be sentenced to death or to life without the possibility of parole. K.S.A. 21-4622 and K.S.A. 2004 Supp. 21-4623.

If the county or district attorney (DA) intends to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death, the DA shall file written notice. Such notice shall be filed with the court and served on the defendant or the defendant's attorney not later than five days after the time of arraignment. If such notice is not filed and served as required by this subsection, the DA may not request such a sentencing proceeding and the defendant, if convicted of capital murder, shall be sentenced to life without the possibility of parole, and not to a sentence of death. K.S.A. 2004 Supp. 21-4624 (a).

The Court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If any person who served on the trial jury is unable to serve on the jury for the sentencing proceeding, the court shall substitute an alternate juror who has been impaneled for the trial jury. If there are insufficient alternate jurors to replace trial jurors who are unable to serve at the sentencing proceeding, the trial judge may summon a

special jury of 12 persons which shall determine the question of whether a sentence of death shall be imposed. The jury at the sentencing proceeding may be waived. If the jury at the sentencing proceeding has been waived or the trial jury has been waived, the sentencing proceeding shall be conducted by the court. K.S.A. 2004 Supp. 21-4624 (b).

In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 21-4625 and any mitigating circumstances. The aggravating circumstances are limited by statute to the following:

(1) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

(2) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

(3) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

(4) The defendant authorized or employed another person to commit the crime.

(5) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

(6) The defendant committed the crime in an especially heinous, atrocious or cruel manner.

(7) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

(8) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding.

Mitigating circumstances shall include, but are not limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbances.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under extreme distress or under the substantial domination of another person.

(6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

(7) The age of the defendant at the time of the crime.

(8) At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim.

(9) A term of imprisonment is sufficient to defend and protect the people's safety from the defendant.

Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the sentencing proceeding shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument. K.S.A. 2004 Supp. 21-4624 (c).

At the conclusion of the evidentiary portion of the sentencing proceeding, the court shall provide oral and written instructions to the jury to guide its deliberations. K.S.A. 2004 Supp. 21-4624 (d).

If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances in K.S.A. 21-4625 exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. The jury, if its verdict is a unanimous recommendation of a sentence of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it found beyond a reasonable doubt. If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose

a sentence of life without the possibility of parole. K.S.A. 2004 Supp. 21-4624 (e).

Notwithstanding the verdict of the jury, the trial court shall review any jury verdict imposing a sentence of death hereunder to ascertain whether the imposition of such sentence is supported by the evidence. If the court determines that the imposition of such a sentence is not supported by the evidence, the court shall modify the sentence and sentence the defendant to life without the possibility of parole, and no sentence of death shall be imposed. Whenever the court enters a judgment modifying the sentencing verdict of the jury, the court shall set forth its reasons for so doing in a written memorandum which shall become part of the record. K.S.A. 2004 Supp. 21-4624 (f).

A conviction resulting in a sentence of death is subject to automatic review by and appeal to the supreme court. The review and appeal shall be expedited and given priority. The supreme court shall consider the question of sentence as well as any errors asserted in the review and appeal and shall be authorized to notice unassigned errors appearing of record if the ends of justice would be served thereby. With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

(2) whether the evidence supports the findings that an aggravating circumstance or circumstances existed and that any mitigating circumstances were insufficient to outweigh the aggravating circumstances. K.S.A. 21-4627.

In the event a sentence of death or any provision of this act (1994 House Bill No. 2578) authorizing such sentence is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence and resentence the defendant as otherwise provided by law.

Article 40 of Chapter 22 of the Kansas Statutes Annotated provide for the execution of death sentences. The statutes cover how the death penalty is executed (intravenous injection); where the death penalty is inflicted (Lansing Correctional Facility, designated by the Secretary of Corrections); who will witness the execution; the Governor's use of military force, if necessary; notification by the Secretary to the district court when sentence of death has been carried out; a

procedure to determine if the convict is sane, if sanity is in question; a procedure to postpone execution if the convict is pregnant; a procedure to reissue the warrant if the convict has escaped and is gone at the time of the original execution; the issuance of the death order; the execution of the death sentence; the suspension of a death sentence and the execution thereafter. These statutes were amended in 1999 upon the request of the Secretary of Corrections to update and clarify the procedures.

***State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001)**

State v. Kleypas was the first death penalty case to be reviewed by the Kansas Supreme Court. In *Kleypas*, the Court affirmed the convictions of Kleypas and found no reversible error occurred in the guilt phase of the trial. However, the death sentence was vacated because of instructional error and remanded for another separate sentence proceeding to determine whether Kleypas should be sentenced to death.

The central issue to be reviewed in this memo is whether the weighing equation set forth in K.S.A. 21-4624(e) violates the Eighth and Fourteenth Amendments to the United States Constitution because it mandates death when aggravating and mitigating circumstances are equal.

K.S.A. 21-4624(e) states;

> " If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that **the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death**; otherwise, the defendant shall be sentenced as provided by law."

In Kleypas, a majority of the Kansas Supreme Court said that in order to satisfy the Eighth Amendment, the legislature must narrow the class of murderers who are eligible for the death penalty by guiding the jury' s decision making process through the specification of aggravating factors and give the jury the discretion to consider and give effect to the mitigating factors it finds. The Court said that the weighing equation in K.S.A. 21-4624(e) did not meet the latter requirement because a jury can find that one or more mitigating factors exists, but if the aggravating factors favoring death are equal to the mitigating factors favoring an alternate punishment (a result known as "equipoise"), death is imposed. In other words, in a tie between

aggravating and mitigating factors, the jury has no discretion because the result is always imposition of a death sentence. If the jury has no discretion, it is unable to give effect to the mitigating factors it finds, which is a violation of the Eighth Amendment.

After an exhaustive review of the pertinent case law, the Court concluded K.S.A. 21-4624(e) as applied in this case is unconstitutional.

"Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its "reasoned moral response" to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a "tie goes to the defendant" when life or death is at issue. We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional.

Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise." *Kleypas*, 272 Kan. at 1015, 1016.

The Court states supporting case law which allows the Court ". . .to construe and limit criminal statutes in such a way as to uphold their constitutionality by reading judicial requirements into statutes which otherwise were overbroad." *Kleypas*, 272 Kan.1016. And further states ". . . that a statute apparently void on its face may be constitutional when limited and construed in such a way as to uphold its constitutionality by reading the necessary judicial requirements into the statute. This has often been done when it is clear that such an interpretation will carry out the intent of the legislature." *Kleypas*, 272 Kan. 1017.

The Court held that by ". . .invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist,

the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner." The case was remanded for the jury to reconsider imposition of the death penalty.

Justice Davis wrote a dissenting opinion joining the majority with the exception of the issue of equipoise. He believes "the majority invades the province of the legislature" by adopting the language exactly opposite of the statute.

Justice Davis further states " More importantly, however, I respectfully dissent from the majority's conclusion that the weighing equation contained in K.S.A. 21-4624(e) is unconstitutional. Thus, I would conclude that there is no need to change the weighing equation in that it is constitutional under the Eighth Amendment as expressed by the Kansas Legislature in accordance with Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)." *Kleypas*, 272 Kan. 1125.

The dissent further states " While the Court has imposed numerous requirements on the guiding and channeling of the sentencer's discretion, the actual weighing of aggravating and mitigating circumstances has been left up to the states. In Zant v. Stephens, 462 U.S. 862, 890, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983), the Court stated that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Similarly, in Franklin v. Lynaugh, 487 U.S. 164, 179, 101 L. Ed. 2d 155, 108 S. Ct. 2320 (1988), the Court stated: "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." " *Kleypas,* 272 Kan. 1126, 1127.

The dissent refers to the United States Supreme Court decision in *Walton* which held "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" 497 U.S. at 651-52., *Kleypas,* 272 Kan. 1130.

In Justice Davis's opinion "the Court's decision in *Walton* settles the question of equipoise of aggravating and mitigating circumstances under the United States Constitution. Contrary to the majority, *Walton* makes it clear that as long as the statute does not preclude the sentencer from considering relevant mitigating evidence, the specific method of balancing the

aggravating and mitigating circumstances is left up to the States. See 497 U.S. at 650-52. *Kleypas,* 272 Kan. 1130. Thus, Justice Davis finds the weighing equation does not violate the United States constitution.

<u>*State v. Marsh*, No. 81,135, Supreme Court of Kansas (December 17, 2004)</u>

Marsh is the second death penalty case to be reviewed by the Kansas Supreme Court. In regard to the weighing equation, *Marsh* argues that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of *Kleypas* which made the statute constitutional by judicial construction must be overruled. The majority in *Marsh* agree.

In the opinion, the Court notes since the *Kleypas* decision, " there have been no persuasive Eighth or Fourteenth Amendment cases helpful to a resolution of the facial constitutionality questions." *Marsh,* p. 11.

The Court in *Marsh* is not persuaded that the *Kleypas* Court's ruling to uphold the constitutionality of the statute by reading the necessary judicial requirements into the statute, often referred to as the avoidance doctrine, is appropriate.

"In short, the United States Supreme Court is willing to exercise its power to construe statutes in a constitutional manner to save a legislative enactment rather than strike it down. However, both the United States Supreme Court and this court have acknowledged that the power to construe away constitutional infirmity is limited. 'Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.' *Salinas v. United States*, 522 U.S. 52, 59-60, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997). 'We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question.' *United States v. Locke*, 471 U.S. 84, 96, 85 L. Ed. 2d 64, 105 S. Ct. 1785 (1985). The maxim cannot apply where the statute itself is unambiguous. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001)." *Marsh,* p. 13.

The Court notes, that case law makes it "plain that the avoidance doctrine is applied appropriately only when a statute is ambiguous, vague, or overbroad. The doctrine is not an available tool of statutory construction if its application would result in rewriting an

unambiguous statute. The court's function is to interpret legislation, not rewrite it. State v. Beard, 197 Kan. 275, 278, 416 P.2d 783 (1966); Patrick v. Haskell County, 105 Kan. 153, 181 Pac. 611 (1919)." *Marsh*, p. 13.

Further, the Court states, "We agree with Justice Davis' reasoning and conclusion that the *Kleypas* majority erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature. The holding eviscerated the legislature's clear and unambiguous intent regarding equipoise and thus overstepped the judiciary's authority to interpret legislation rather than make it. Chief Justice McFarland's dissent, which argues that the legislature apparently did not mind the interference misses the point. (It also reads too much into its inaction when the court had removed its incentive to act.) Justice Davis had it exactly right: The appropriate, limited judicial response to the problem identified for the first time in Kleypas was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper." *Marsh,* p. 14.

"Our holding that K.S.A. 21-4624(e) is unconstitutional on its face presumptively requires that we overrule that portion of Kleypas upholding the statute through application of the avoidance doctrine. The only contrary argument left for our consideration is that the doctrine of stare decisis should prevent us from doing so." *Marsh,* p. 15.

In *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 356, 789 P.2d 541(1990), *overruled on other grounds Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991), the Kansas Supreme Court stated:

"It is recognized under the doctrine of stare decisis that, once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by this court. . . . The application of stare decisis ensures stability and continuity– demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law." *Marsh,* p. 15, 16.

The *Marsh* Court concludes, "that the second holding of Kleypas--that the equipoise

provision could be rescued by application of the avoidance doctrine--is not salvageable under the doctrine of stare decisis. That holding of Kleypas is overruled. Stare decisis is designed to protect well settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation like the one facing us here. Kleypas' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature.

"Our decision today to confine the application of the avoidance doctrine to appropriate circumstances recognizes the separation of powers and the constitutional limitations of judicial review and rightfully looks to the legislature to resolve the issue of whether the statute should be rewritten to pass constitutional muster. This is the legislature's job, not ours. This decision does more in the long run to preserve separation of powers, enhance respect for judicial review, and further predictability in the law than all the indiscriminate adherence to stare decisis can ever hope to do." *Marsh,* p. 17.

Justice Davis, in his dissenting opinion, writes, "I begin with the majority's conclusion that in order for the death penalty to be constitutional in Kansas, *a tie in the aggravating circumstances and mitigating circumstances must go to the defendant* under the Eighth Amendment. I agree with the majority that the Kansas Legislature consciously chose the weighing equation but strongly disagree that the language used is unconstitutional under the Eighth Amendment. I may personally disagree with the legislature's policy decision that a tie goes to the State but I cannot conclude that its enactment is unconstitutional because of that language unless the United States Constitution, as interpreted by the United States Supreme Court, supports such a conclusion. An analysis of the United States Supreme Court jurisprudence, as well as other decisions addressing this point, does not support such a conclusion and, in fact, supports the opposite conclusion." *Marsh*, p. 20.

As reviewed above in *Kleypas*, Justice Davis again concludes, " that K.S.A. 21-4624(e), as passed by the Kansas Legislature in 1994, was and is today constitutional under the Eighth Amendment to the United States Constitution." *Marsh* , p. 29.

Chief Justice McFarland and Justice Nuss joined the Davis dissent.