

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on January 30, 2008 in Room 313-S of the Capitol.

All members were present except:

- Representative Ben Hodge - Excused
- Representative Annie Kuether - Excused
- Representative Kevin Yoder - Excused

Committee staff present:

- Jerry Ann Donaldson, Kansas Legislative Research
- Athena Andaya, Kansas Legislative Research
- Jill Wolters, Office of Revisor of Statutes
- Jason Thompson, Office of Revisor of Statutes
- Cindy O'Neal, Committee Assistant

Conferees appearing before the committee:

- Marlee Carpenter, Kansas Chamber of Commerce
- Randy Hearrell, Kansas Judicial Council
- Chief Judge Merlin Wheeler, 5th Judicial District, Emporia
- Retired Judge Sam Bruner, Chair, of the Guardian & Conservator Advisory Committee, Kansas Judicial Council
- Jane Rhys, Kansas Council on Developmental Disabilities
- Tom Laing, InterHab
- Rocky Nichols, Disability Rights Center of Kansas

Marlee Carpenter, Kansas Chamber, requested two bill introductions regarding expert evidence reform and collateral source rule reform. Representative Watkins made the motion to have the request introduced as committee bills. Representative Roth seconded the motion. The motion carried.

Ron Hein, Midwest Transplant Network, requested a bill that would allow federally-authorized procurement facilities to be recipients of dead bodies. Representative Watkins made the motion to have the request introduced as a committee bill. Representative Davis seconded the motion. The motion carried.

Representative Davis requested four bills:

1. Compensation for families of law enforcement officers killed in the line of duty or seriously injured
2. Consumption of alcohol and micro-breweries minors
3. Exemption for life insurance policies

He made the motion to have his requests introduced as committee bills. Representative Watkins seconded the motion. The motion carried.

Chairman Michael O'Neal requested a bill on behalf of Deputy Randy Combs, DARE Instructor from Lakin, Kansas. It would amend the statute that allows for suspension of driving licenses or privilege upon certain school safety violations. Representative Watkins made the motion to have the request introduced as a committee bill. Representative Kinzer seconded the motion. The motion carried.

The hearing on **HB 2642 - commission on judicial performance; access to court records; immunity from liability**, was opened.

Randy Hearrell, Kansas Judicial Council, appeared before the committee as a proponent of the bill. The proposed bill would allow the Commission to access court records for the purpose of obtaining individual addresses. If a record is closed that information is not available to them.

He explained that the bill would also provide immunity from liability for any civil action related to any act, error, or omission occurring within the scope of their official duties related to the Commission. Because the Commission was created by statute, it was the opinion of the Judicial Performance Committee that immunity should be statutory and not by court rule.

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on January 30, 2008 in Room 313-S of the Capitol.

Mr. Hearrell requested an amendment, on page 1, line 19-22, that would give the Commission more flexibility. There was concern from some judges that if the evaluations are not conducted precisely as the statute contemplates, they could be subject to a challenge. ([Attachment #1](#))

Chief Judge Merlin Wheeler appeared before the committee in support of the concept of the proposed bill but had concerns with it granting immunity. He requested "agents" be deleted from the bill. The definition for "agents" is extremely broad. It does not seem to be correct to extend immunity to agents when the state does not extend immunity to those it contracts with. He did support immunity for the Commission and staff and suggested that the Kansas Judicial Council be included. ([Attachment #2](#))

The hearing on **HB 2642** was closed.

The hearing on **HB 2644 - revises sections of the guardianship & conservator act concerning the procedure for appointing a guardian or conservator**, was opened.

Retired Judge Sam Bruner appeared in support of the proposed bill. The Judicial Council studied the issue of restricting judicial discretion. They decided that additional protections relating to conflicts of interest could be implemented in a less restrictive manner. The bill includes education and training of guardians and conservators; requires reporting when a conflict of interest arises at the time or after the appointment; and strengthens pleading requirements to include the age, date of birth, gender and place of employment for the proposed guardian or conservator. ([Attachment #3](#))

Jane Rhys, Kansas Council on Developmental Disabilities, appeared as a proponent of the bill. She expressed pleasure that the Judicial Council studied the issue in depth and feels the recommendations are appropriate. ([Attachment #4](#))

Tom Laing, InterHab, urged the passage of the bill. He stated that the bill is enforceable, keeps the rights of individuals at the forefront and builds on current protections. ([Attachment #5](#))

Rocky Nichols, Disability Rights Center of Kansas, applauded the work of the Council and the outcome of the bill. He urged continued work to address other conflicts of interest which leaves people with disabilities vulnerable to exploitation. ([Attachment #6](#)) Mr. Nichols requested an amendment for clarification to make certain judges have the details they need, not just in the abstract.

Written testimony in support of the bill was provided by the Kansas Guardianship Program. ([Attachment #7](#))

Written testimony in opposition of the bill was provided by Southeast Kansas Independent Living ([Attachment #8](#))

The hearing on **HB 2644** was closed.

The hearing on **HB 2643 - resolving a conflict between two statutes concerning service of process for garnishment on insurance companies**, was opened.

Randy Hearrell, Kansas Judicial Council, explained that the bill would address conflicts between K.S.A. 40-218 and K.S.A. 60-736. It involves the amount of response time available to insurance companies when they are served with garnishment papers. 40-218 requires an answer within 40 days and 60-736 has the answer within 10 days. It's simply a cross-reference. ([Attachment #9](#))

The hearing on **HB 2643** was closed.

The committee meeting adjourned at 5:00p.m. The next meeting was scheduled for January 31, 2008.



KANSAS COMMISSION ON JUDICIAL PERFORMANCE

RICHARD F. HAYSE, Chair, Topeka
GARY ALEXANDER, Overland Park
SARA S. BEEZLEY, Girard
SEN. DONALD BETTS, Wichita
PROF. JAMES CONCANNON, Topeka
GLORIA FARHA FLENTJE, Wichita
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DR. RICHARD P. HEIL, Hays
NANCY KINDLING, Topeka
HON. LARRY McCLAIN, Overland Park
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MEMORANDUM

TO: House Judiciary Committee

FROM: Kansas Judicial Council - Randy M. Hearrell

DATE: January 30, 2008

RE: 2008 HB 2642

BACKGROUND

The 2006 Legislature created the Kansas Commission on Judicial Performance (Commission). Shortly after the effective date of the legislation on July 1, 2006, the Commission was appointed and it has met regularly since that time to perform its statutory duties. The Commission is working hard to provide the composite results from high quality judicial performance evaluations to voters to assist in their decision whether or not to retain the justices and judges subject to retention elections and also to provide the evaluations to elected judges for self-improvement.

In order to prepare the evaluations, it is necessary to survey persons who have observed the judge performing his or her judicial duties or had some other professional interaction with the judge on which to base an opinion. All states that perform judicial performance evaluations utilize surveys or questionnaires for this purpose, as does Kansas.

Because of the number of judges being evaluated, and the large number of persons being surveyed, the names and addresses of persons to be surveyed must be gathered electronically from court records. The Commission has encountered a number of challenges in performing this task and passage of 2008 House Bill No. 2642 will assist in this task by opening information from a number of court records that are not now available to the Commission. In addition HB 2642 contains sections relating to liability, the application of K.S.A. 25-4169a and a technical amendment to the Commission's statutes.

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ACCESS TO COURT RECORDS

Currently the court records in some court cases are closed and in some court cases that are otherwise open, the records relating to certain parties are closed. This prevents the Commission from obtaining addresses of persons who have had contact with the judges. In its discussions with the Supreme Court asking the Court to change the rules to allow the Commission bulk electronic access to court records, the Supreme Court expressed its support for the Commission to obtain this information. However, the Court was clear that, until the statutes were changed, the Commission could not have access to such records.

The reason access is important is that in urban districts, all or a substantial part, of some judges' dockets are made up of cases that are considered confidential. In smaller districts, especially rural districts, the judges' caseload may be small enough that without inclusion of these cases that are now considered confidential, there may be too few cases to properly evaluate some judges.

The amendment to K.S.A. 20-3205(b) in section 2 of the bill is a general statement allowing the Commission access to certain confidential information in all court records. In practice the only information the Commission will access is the names and addresses of the persons who have observed the judge in the case. The computer program used to access the information will not obtain the names and addresses of minors.

The amendments to sections 5 through 10 of the bill speak to Commission access to the following sections:

- Section 5 of the bill amends K.S.A. 38-2211 of the Kansas Code for Care of Children to allow the Commission access to the official file to obtain the address of persons who have had contact with the judges.
- Section 6 of the bill amends K.S.A. 38-2309 of the Kansas Juvenile Justice Code to allow the Commission access to the official file.
- Section 7 of the bill amends K.S.A. 59-2122 which is the section of the Probate Code relating to files and records in adoption. This will allow the Commission access to information.
- Section 8 of the bill amends K.S.A. 59-2979 of the Care and Treatment Code to allow the Commission access to information.
- Section 9 of the bill amends K.S.A. 60-3104 of the Protection from Abuse Act to allow the Commission access to information.
- Section 10 of the bill amends K.S.A. 60-31a04 of the Protection from Stalking Act to allow the Commission access to information.

IMMUNITY FROM LIABILITY

A new subsection 1(b) provides that the Commission, its staff, agent, and the Supreme Court will be immune from suit and liability in any civil action related to any act, error, or omission occurring within the scope of their official duties related to the Commission. There are examples of immunity in the Supreme Court Rules. Supreme Court Rule No. 206 provides immunity for the Commission on Judicial Qualifications for conduct in the course of its official duties and Supreme Court Rule 196(h) provides immunity for the Judicial Branch and its employees for unintentional disclosure of confidential information.

Because the Commission on Judicial Performance was created by statute, it is the opinion of the Commission that immunity should be statutory and not by court rule.

APPLICATION OF K.S.A. 25-4169a

Section 4 of HB 2642 amends a part of the campaign finance law relating to use of public funds to expressly advocate the nomination, election or defeat of a clearly identified candidate to state or local office. The amendment exempts the Commission from the application of the section when it is performing its statutory duties.

TECHNICAL AMENDMENT

The amendment in Section 3 is a technical amendment that strikes the word “adopt” and inserts the word “approve” in reference to the approval of the rules of the Commission by the Supreme Court. This change makes the language in K.S.A. 20-3206 (Section 3) consistent with the language in K.S.A. 20-3204(f).

ADDITIONAL AMENDMENT

The Commission additionally requests that HB 2642 be amended on page one, in lines 19 through 22 as follows:

~~(1) Create surveys of court users who have directly observed the judge's or justice's performance or interacted with the judge or justice, including attorneys, litigants, jurors and other persons the Commission deems appropriate. Conduct surveys of such persons as the Commission determines to be appropriate who have had sufficient experience with a judge or justice to form an opinion about the performance of the judge or justice, such as attorneys, litigants, jurors, witnesses, court staff and others.~~

While the proposed change may not appear to be significant it gives the Commission more flexibility. The Commission has heard from some judges that if the evaluations are not conducted precisely as the statute contemplates, they could be subject to challenge. Examples of how the amended language will be helpful:

- The Commission plans to survey court employees about trial court and appellate judges and plans to survey all district judges about appellate judges. The change avoids the question of whether these persons, who have interacted with the judge professionally, have “directly observed” the judge.
- Current statutory language seems to require surveys of all litigants (including appellate litigants). The Commission has discovered that few appellate litigants attend oral arguments and the addresses of appellate litigants are not in the appellate court records (all dealings are through counsel unless the litigant is *pro se*). Because the litigants do not sit at the counsel table it is difficult to know who they are if they do attend.

A balloon version of the proposed amendment is attached to this testimony at page 5.

The Commission respectfully requests that the Committee recommend HB 2642 be passed, with the requested amendment.

PROPOSED AMENDMENT TO K.S.A. 20-3204(a)

20-3204. Same; surveys; performance standards; plans and procedures; public recommendations; adoption of rules. On and after July 1, 2006, the commission shall, with the aid of professionals where appropriate:

~~(a)(1) Create surveys of court users who have directly observed the judge's or justice's performance or interacted with the judge or justice, including attorneys, litigants, jurors and other persons the Commission deems appropriate. Conduct surveys of such persons as the Commission determines to be appropriate who have had sufficient experience with a judge or justice to form an opinion about the performance of the judge or justice, such as attorneys, litigants, jurors, witnesses, court staff and others.~~

Fifth Judicial District Court
State of Kansas

MERLIN G. WHEELER
CHIEF JUDGE

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January 30, 2008

Members of the House of Representatives
Judiciary Committee

Re: HB 2642 concerning the Commission on Judicial Performance.

Members of the Judiciary Committee:

At the outset, I wish the Judiciary Committee to be aware that I do not appear on behalf of any group, organization or agency. The remarks and contents of this testimony are not intended to be on behalf of any organized group. I have, however, discussed the concepts represented in this statement with many fellow judges and believe that my opinion is shared by many.

The Committee should also know that I support, encourage and promote the concept of a fair and comprehensive judicial evaluation system that meets the needs of Kansas citizens for information regarding their judicial officers. Although there always may be differences of opinion regarding how to reach that goal, I do not wish that we become so focused on the details of the enabling legislation or the evaluation methodologies that we detract from the overall objective.

My specific comment regarding HB 2642 relates to the provisions of Section 1(b) insofar as it grants immunity to "agents" of the Commission on Judicial Performance (hereafter the Commission). The present draft of the Commission's operating rules being considered for approval by the Supreme Court define this term as a "...person or entity authorized to perform work for the Commission." This definition is sufficiently broad as to include consultants providing survey services. (Reference is made to Kansas Department of Administration contract number 10196 for survey services to Talmey-Drake Research & Strategy, Inc: as an example.)

It is my view that there is no reason for the Legislature to grant immunity from negligent or intentional acts or omissions to persons or organizations performing largely ministerial services pursuant to contract with the state of Kansas. Although there may be room for debate as to whether the work of the Commission is judicial in nature, I express no objection to extending immunity to members of the Supreme Court, the Commission or its staff for acts performed within the course of the Commission's charter. (In fact, I would suggest including the Kansas Judicial Council which appoints the Commission members within the grant of immunity.) However, extending immunity to contracting parties would be an unprecedented act which serves no useful purpose. I am aware of no contractual provision within the Commission contract referred to above that would make the contract subject to a subsequent grant of immunity by the Legislature or that the parties contemplated that this organization would receive immunity under the contract.

The Kansas Tort Claims Act, K.S.A. 75-6101, *et seq.*, makes it clear that the general policy is that the state, subordinate political subdivisions, and their employees are generally liable for intentional and negligent acts unless a specific exception granting immunity is made. In simple terms, liability is the rule and immunity is the exception. Making such a grant as would be authorized by the

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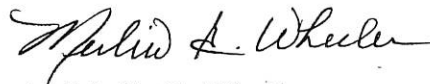
legislation in its present form would obviously be contrary to established Kansas policy.

My second comment stems from the contents of Opinion No. 2007-27 of the office of the Attorney General of the State of Kansas. This opinion was issued September 4, 2007, and was prepared at the request of Commission Chairman Richard Hayse. The Attorney General reached the conclusion that the statutory provisions which prohibit the Commission and elected judges from disclosing survey results of judges who are subject to partisan political elections but directs the disclosure (and permits the purchase of services to insure publication) of the survey results as to judges subject to retention vote are in violation of the First Amendment to the United States Constitution.

As I have discussed the enabling legislation and pending surveys with various judges and others who have become aware of the Commission's work, the inevitable question is why, if the Legislature feels strongly that our citizens should be informed as to the performance of its judicial officers, should there be any distinction based upon the method by which judges are selected or continue in office. Opinion number 2007-27 discussed several possible explanations for the distinction, but found all fall short of being compelling state interests sufficient for the distinction to pass Constitutional scrutiny.

Therefore it is my simple suggestion that this Committee recommend, using HB 2642 as a vehicle, that the Legislature address, and hopefully avoid future contentious constitutional debate, by changing the evaluation system to provide either for public disclosure of performance survey results as to all judges or non-disclosure as to all judges (with the survey results being intended for personal improvement or development of educational and training programs only).

Very truly yours,



Merlin G. Wheeler
Chief Judge

mgw/abm
cc: File

MEMORANDUM

TO: House Judiciary Committee
FROM: Kansas Judicial Council - Judge Sam Bruner
DATE: January 30, 2008
RE: 2008 HB 2644

In January 2007, Representative Lance Kinzer, as Chairman of the Special Committee on Judiciary, requested that the Judicial Council study 2005 SB 240, proposed balloon amendment version, relating to the appointment of guardians and conservators. (That bill is identical to 2007 HB 2509.) The Judicial Council assigned the study to its Guardianship and Conservatorship Advisory Committee in June 2007, and the Council approved the Committee's report in November 2007.

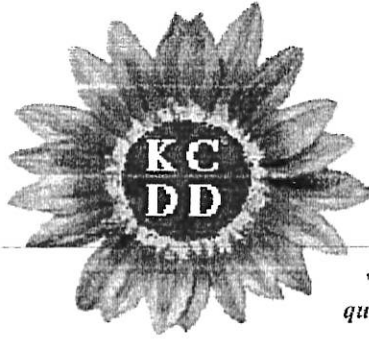
The issue before the Guardianship and Conservatorship Advisory Committee (Committee) was whether K.S.A. 59-3068 and 59-3075 should be amended, and if so, how the amendments should be phrased. In addition to other amendments, 2005 SB 240, balloon amendment version, (and HB 2509) would amend K.S.A. 59-3068(b) to prohibit a court from appointing an unrelated person as guardian or conservator if that unrelated person has any kind of conflict of interest.

The Committee was unanimously opposed to 2005 SB 240, proposed balloon amendment version, for several reasons. The Committee's primary concerns were that the prohibitions set forth in the bill were limited to "unrelated" guardians and that the bill would absolutely prohibit many qualified, competent appointees from serving as guardians who could otherwise be appointed with proper disclosures to the court.

The Committee agreed that, instead of restricting judicial discretion, additional protections relating to conflicts of interest could be implemented in a less restrictive manner. First, the Committee recommends that each of the six guardianship and conservatorship petition statutes (K.S.A. 59-3056, 59-3058, 59-3059, 59-3060, 59-3061 and 59-3062) be amended to strengthen pleading requirements by requiring the petitioner to state any potential conflicts of interest as well as the age, date of birth, gender, and place of employment of the proposed guardian or conservator. The latter information will be helpful if it ever becomes necessary to issue a bench warrant for the guardian or conservator. Second, the Committee recommends that K.S.A. 59-3083 be amended to require reporting when a conflict of interest arises at any time after appointment. Third, the Committee recommends the addition of a detailed conflict of interest analysis to K.S.A. 59-3068.

Finally, the Committee believes that education and training of guardians and conservators is essential and that completion of a basic instructional program concerning the duties and responsibilities of guardians and conservators, including conflict of interest issues, should be required of all first-time guardians and conservators. Accordingly, the Committee recommends the addition of a training requirement to K.S.A. 59-3069.

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Kansas Council on Developmental Disabilities

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Scott Shepherd, Chairperson
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"To ensure the opportunity to make choices regarding participation in society and quality of life for individuals with developmental disabilities"

HOUSE JUDICIARY COMMITTEE

Room 313-S

January 30, 2008

Mr. Chairperson, Members of the Committee, my name is Jane Rhys and I appear today on behalf of the Kansas Council on Developmental Disabilities to testify in favor of H.B. 2644 revising sections of the guardianship and conservator act concerning the procedure for appointing a guardian or conservator. The Council is federally mandated and funded – we receive no state funds. Our mission is to provide information to policymakers, promote systems change and innovation, and advocate for individuals with developmental disabilities.

I do have another role, that of member of the Kansas Judicial Council's Guardianship and Conservatorship Advisory Committee. As such I was present at the meetings in which we discussed procedures for appointments. We actually studied this issue in 2005 and again in 2007 so a considerable amount of time has been devoted to this topic. I am not an attorney so cannot provide a legal opinion but I can speak to some of the thoughts that went into this proposal.

Specific terminology and location of proposed changes are as follows.

On page 1, lines 26 and 27 the addition of *age, date of birth, gender and place of employment* is included as part of the information required of the person who wishes to become the guardian and/or conservator. The judges on this committee, who had many years of experience with guardians and conservators, asked for this information to aid in finding the appointed person if he or she did not file the required reports or did not adequately take care of the ward or conservatee. This is a sensible request to ask of those applying for legal control over another individual.

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Page 1, lines 29 - 31 involves the issue of conflict of interest. Providing information about any personal or agency interest of the proposed conservator assists the judge in determining if the proposed conservator has or might have a conflict of interest regarding this appointment. This is not to say that there is a conflict or that the person seeking appointment is not the best person to be appointed for the individual, it simply provides more checks and balances to the appointment procedure so that the judge can make a reasoned decision.

Both changes in language are repeated on page 4, lines 4-5 and lines 8-10, on page 6 lines 21-22 and lines 24-27, on page 8 lines 28-29 and lines 31-34, page 10 lines 35-36 and lines 38-41, and page 12 lines 18-19 and lines 21-23.

Page 13 lines 19 - 43 and page 14 lines 1 - 4 elaborate on the conflict of interest language and a requirement for guardians/conservators to complete a basic instructional program that is described on page 15 lines 30 - 38. "Employee" is defined on page 14 lines 10 - 12.

Finally, a change in the circumstance of the guardian or conservator that could result in a conflict of interest is added to the section requiring the filing of a special report or accounting to the court is described on page 16 lines 16 - 20. This will alert the court to the change and provide an opportunity for the court to review the change and determine if a new guardian/conservator should be appointed.

We believe that these changes provide a reasoned response to the concern about conflict of interest and additional information that will enable the court to better perform its oversight function. The Kansas Council on Developmental Disabilities supports these changes as do I as a member of the Kansas Judicial Council's Guardianship and Conservatorship Advisory Committee.

I appreciate the opportunity of providing this information and would be happy to answer any questions you may have to the best of my ability.

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TO: Representative Michael O'Neal, Chairperson, and
Members of the House Judiciary Committee

FR: Tom Laing, Executive Director
InterHab: The Resource Network for Kansans with Disabilities

RE: Testimony in support of HB 2644

Thank you, Mr. Chair and Committee members for this hearing on House Bill 2644.

I represent InterHab, the state's oldest and largest network of community service organizations serving persons with disabilities. In the work performed by our member organizations, many of the persons to whom we provide services also are wards who receive assistance and support from court appointed guardians and conservators. Our work, consequently, is often undertaken in close consultation with such appointees.

We share your goal that laws regarding guardians and conservators are appropriate, enforceable, and in keeping with a respect for, and vigilance on behalf of, vulnerable Kansans for whom such appointments are made.

Having reviewed House Bill 2644 and the report from the Judicial Council, the recommendations of which are herein incorporated, we endorse the bill, and urge its adoption, and offer the following two points of emphasis:

1. We agree with the findings of the Council that the heightened scrutiny proposed in this legislation includes family members whom are being considered by the court for appointment. We strongly endorse this provision. As was stated in the Council's report on this point: *"The assumption that potential conflicts of interest are not a concern for guardians who are related to the ward cannot be reconciled with reality. Family members who are guardians can have a myriad of conflicts. Financial conflicts of interest are particularly common in familial guardian/ward relationships"*.
2. We appreciate that the bill proposes additional training requirements for guardians and conservators. It is our hope that the Judiciary Council in developing curricula for such training will work closely with State and Community partners in the

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service delivery network to assure that such training is reflective of any issues that might be relevant in instructing guardians and conservators on the basic civil rights of persons for whom such appointments are made.

Finally, we add this thought:

While it is true that Courts are a sanctuary within which the rights of an individual person are to be held paramount, it is also true that Courts are not immune to the historic weaknesses of all human beings, and thus our society.

For decades, and still today, we have failed too often as a society to recognize the talents, the common sense and the decision-making capacity of many persons with cognitive impairments. Society's broad brush in this matter is just plain wrong; and taking decision-making rights away from anyone should never be done without building a strong set of protections.

For that reason, the Committee's diligence and the work of the Legislature, as protectors of the rights of all persons, is so important, and deeply appreciated. We look forward to every opportunity at which time this critical set of laws can be reviewed and improved.

House Bill 2644 does represent an improvement, and we encourage you to recommend it favorably for passage.

Thank you for your work on behalf of Kansans with disabilities. .



Disability Rights Center of Kansas

Rocky Nichols, Executive Director

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**House Judiciary Committee
Testimony in Support of HB 2644
(with a suggested clarification)
January 31, 2007**

Chairman O'Neil and the honorable members of the committee, my name is Rocky Nichols. I am the Executive Director of the Disability Rights Center of Kansas, formerly Kansas Advocacy and Protective Services (KAPS). The Disability Rights Center of Kansas (DRC) is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for Kansans with disabilities. As the state designated protection and advocacy system for Kansans with disabilities our task is to advocate for the legal and civil rights of persons with disabilities as promised by federal, state and local laws, including representing persons with disabilities to amend, reduce, or terminate unnecessary guardianship and conservatorships.

DRC supports the work of the Judicial Council on this incredibly important issue and applauds the outcome (HB 2644). Guardianships and conservatorships are creations of state law and by their very nature infringe upon the liberty interests of people with disabilities when a court appoints a guardian or conservator over them. Because of the delicate nature of this infringement, it must ensure that conflicts of interest are checked and prevented.

To give you a very brief history of this issue, the DRC Kansas requested bill introductions in 2005/2006 (HB 2307, SB 240) and in 2007 (HB 2509), which would have prohibited non-family members from being guardians/conservators if they had a conflict of interest with the person with a disability (ward). These bills received hearings in both the House and Senate Judiciary Committees. DRC educated committee members about the fact that Kansas law had substantial systemic flaws that allow conflicts of interests between guardians/conservators and wards (who are people with disabilities). Conflicts of interest arise whenever a guardian/conservator may have any personal or agency interest that may be perceived as being self serving or adverse to the interest of the person with a disability (ward). A number of examples were given regarding how conflicts of interest are allowed to continue and thrive under Kansas law.

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The issue was then assigned to and studied by the Judicial Council. The culmination of this Judicial Council study is HB 2644. DRC provided input to the Judicial Council in this process.

As an entity that has been calling for systemic changes in the area of conflict of interest with guardianship/conservatorship since 2005, DRC Kansas is extremely appreciative that the Judicial Council has endorsed making changes in this area. Though these changes do not eliminate conflicts of interest, the checks and balances in HB 2644 are dramatically better than current law, which leaves people with disabilities unfortunately vulnerable to exploitation.

Current law has a huge gaping hole regarding the unchecked allowability of conflicts of interests of guardians/conservators over people with disabilities. HB 2644, though it still allows conflicts of interest to exist and it does not prohibit conflicts, is an important positive step in the right direction. For these reasons, DRC supports HB 2644.

Current Kansas law, Kan. Stat. Ann. § 59-3068(b), requires the court, in appointing a guardian, to only “consider” the “potential conflicts of interest” of the proposed guardian or conservator. Current law does not require reporting or updating of these potential conflicts of interest to the court. Under current law, this “consideration” is only on the front end, standardized reporting is not required and the guardian/conservator does not have to update the court on any change in conflict of interest status, making it more of a don’t ask, don’t tell kind of a policy. There may be no conflict of interest today, but circumstances change and the conflict can arise in the future. Current law also does not require basic instruction or training for guardians to prevent potential conflicts of interest from becoming real problems that harm Kansans with disabilities. Current Kansas law has no real protections to safeguard people with disabilities or to provide guardians/conservators the tools they need to even manage potential conflicts of interest. Current Kansas law is significantly flawed in this regard.

A sampling of a few examples of how potential conflicts of interest can harm or exploit people with disabilities. We hear of many, many more than these:

- Guardian is employed by a service provider of Waiver services. Guardian decides to move the person with a disability for whom he is the appointed decision maker to the services of his employer. This creates a clear agency conflict of interest and a potential for financial gain (directly or indirectly).
- Another example with the same core conflict regarding an employee of a service provider who moves the person to their service provider. However, this time there are indications that other care givers at the service provider may be abusing or neglecting the person with a disability. This creates a huge conflict of interest for a good guardian who wants to do the right thing. How is the guardian to be the

zealous advocate for the person with a disability and advocate against his employer who pays his salary?

- Guardian owns rental housing. Guardian decides to move the person with a disability into his rental housing and charge them rent that is above fair market value. Without informing the court of the specific transaction, who will know that financial exploitation is occurring? How will the court find out? How will it be stopped?
- Perhaps one of the most public, tragic and horrific examples of what can happen when conflicts of interest go unchecked can be found with the Kaufman house example. I want to stress that this is only one example of the danger of conflicts of interest. Arlan Kaufman was the: 1) Guardian and Conservator, 2) so-called “therapist,” 3) landlord, and 4) service provider. These are clear conflicts of interests. They are not only allowed under state law, there is no effective required reporting, training, etc. You have probably heard about the sexual exploitation and abuse that occurred at the Kaufman House. Well, there was also financial exploitation occurring as well. As guardian and conservator Mr. Kaufman controlled his ward’s (Barbara T) finances. As such he controlled the nearly \$175,000 inheritance she received as the result of her brother’s death. Mr. Kaufman lost his license to practice social work and could no longer bill Medicare for services in November 2001. Beginning in 2002 he began to write himself checks for providing “therapy” services. Within two years, Mr. Kaufman wrote himself checks to the amount of nearly \$100,000 of her inheritance for “therapy services rendered” over the prior 15 years. Mr. Kaufman had clear conflicts of interest, the court didn’t now about it and no one held him accountable to his duty to represent the best interest of Barbara T.

I do want to acknowledge that there are countless honorable, ethical and standing guardians/conservators across Kansas who work tirelessly to do what they think is right for the person with a disability. As you know, though, we do not have the right protections in the law for ethical Kansans. We write protections in the law (like in HB 2644) as controls, training requirements and accountability mechanisms to ensure that all guardians understand their obligations and specifically know of the dangerous slippery slope that conflicts of interest create.

Current Kansas law allows for these kinds of conflicts of interests and basically does nothing to prevent conflicts of interest which put persons with disabilities at risk for abuse neglect and exploitation. Though we believe that it is better to absolutely prevent conflicts of interest (which HB 2509, currently assigned to this Judiciary Committee does), at a bare minimum you have to require the provisions in HB 2644 (including the initial and updated notification to the court of the potential conflict of interest, and have the training components and other requirements of this bill).

Suggested Clarification to HB 2644

Add the following language in with the standardized disclosure portions of the bill:

“including details of any financial, agency or other transactions between the [guardian/conservator] and the ward”

Because HB 2644 amends several statues, this language would inserted in seven places, starting on page 1, line 31, after the words “proposed conservatee”;

Then added on page 4, line 10 after the words “proposed conservatee”;

Then added on page 6, line 27 after the words “proposed conservatee”;

Then added on page 8, line 34 after the words “proposed conservatee”;

Then added on page 10, line 41 after the words “proposed conservatee”;

Then added on page 12, line 23 after the words “proposed conservatee”;

Then added on page 16, line 17 after the words “conflict of interest”.

The problem that this language attempts to remedy is that HB 2644 only requires the reporting of the “personal or agency interest” in the abstract, but does not specifically require details of such transactions from the onset. So, for example, in the reporting to the court, the court would know of a potential conflict of interest that the guardian/conservator would have in the form of renting a house to the ward, *but the court would not know the specifics of the transaction* -- for example, that the apartment was a 1 bedroom, 1 bath where the guardian was charging \$1,250 in a neighborhood that amounted to clearly charging greater than fair market value for the property. With an overworked Court, it only makes sense to empower Judges with details of any transactions or any conflicts of interest, to ensure that reviews of the special reports and initial petitions contain the necessary details for the Court to act prudently. If the bill was clearer that the reporting would have to include these types of details, then the form used by the Court would spell out that such details must be provided. We would see this as a clarification that keeps the original intent of the bill.

KANSAS GUARDIANSHIP PROGRAM

KGP

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Wichita

Executive Director
M. Jean Krahn

To: House Judiciary Committee, Representative O'Neal Chair
From: M. Jean Krahn, Executive Director
Date: January 30, 2008
Re: HB 2644

Position on HB 2644

1. The Kansas Guardianship Program supports the proposed changes to the act for obtaining a guardian or a conservator regarding conflict of interest in who may be appointed as a guardian or conservator.
2. We also support the proposed requirement for a basic instructional program regarding the duties and responsibilities of a guardian or conservator.

Agency Background Information

The Kansas Guardianship Program recruits, trains and monitors community volunteers who serve as court appointed guardians or conservators for program-eligible individuals. The individuals served have limited financial resources (Medicaid recipients) and do not have family members willing or appropriate to assume guardianship or conservatorship responsibilities. Currently the KGP serves approximately 1400 wards or conservatees through the efforts of more than 820 volunteers.

The KGP was initiated in 1979 under the administration of Kansas Advocacy and Protective Services, Inc. The 1995 Kansas Legislature established the program as a separate public instrumentality pursuant to K.S.A. 74-9601 et seq., as amended. The program is governed by a seven member board of directors, six of whom are appointed by the Governor and one appointed by the Chief Justice. The KGP is funded through State General Funds.

Persons served by the KGP are identified by SRS Adult Protective Services and State Hospital social workers. A written referral is made to the KGP requesting the matching and nomination of an approved volunteer for appointment as guardian or conservator. The abilities and interests of the ward or conservatee and those of the volunteer are considered when the nomination is made.

Following the court appointment of a volunteer as the guardian or conservator, the KGP contracts with the volunteer; requires written monthly reports of activities undertaken on behalf of the person; provides a \$30 per month stipend to offset out-of-pocket expenses; and provides ongoing monitoring, training and support to the volunteer in order to enhance the quality of life of the persons they serve.

KGP Conflict of Interest Guideline (Attached)

The KGP has followed a conflict of interest guideline for more than twenty years. The program does not initiate the nomination of a volunteer who is employed by a program, facility or an organization providing services and supports to the ward or conservatee.

KGP Volunteer Training (Training Outline Attached)

Instruction and training is provided by the KGP to volunteers serving as court appointed guardians or conservators. Each volunteer receives a copy of the Volunteer Training Handbook which mirrors the training outline. Additionally, the volunteers receive ongoing training, assistance and support while fulfilling the legal responsibilities of guardian and conservator for the ward and conservatee.

No additional agency expenditures are anticipated as a result of the proposed legislation. In the event a cost would be assessed to a potential guardian or conservator for the instructional program, the KGP would request the cost be waived for the volunteers. KGP guardians or conservators expend considerable volunteer time and personal resources in their advocacy efforts.

The KGP believes the proposed revisions represent important assurances in seeking the best interests of persons for whom a guardian or conservator is appointed.

**KANSAS GUARDIANSHIP PROGRAM
CONFLICT OF INTEREST GUIDELINE**

Volunteer Name

Introduction

The role of a guardian or conservator is to advocate for and protect the rights of the ward or conservatee. In this role, the guardian or conservator must be free of any appearance of personal or employer conflict of interest, self-serving gain, compromising influences and loyalties when advocating on behalf of the ward. The guardian and conservator must be free to challenge inappropriate or poorly delivered services and to advocate and exercise judgement solely for the benefit of the ward or conservatee.

The KGP retains the right to the decision regarding with whom the program will contract.

Definition

“Conflict of Interest” - Situations in which an individual may receive financial or material gain or business advantage from a decision made on behalf of another. Situations that create a public perception of a conflict should be handled in the same manner as situations in which an actual conflict of interest exists.” National Guardianship Association “Standards of Practice.” © Copyright, 2000, Edited Edition - 2002.

KGP CONFLICT OF INTEREST GUIDELINE

The KGP will not initiate or bring under contract a nomination (or match) between a KGP volunteer and a possible ward or conservatee in situations when the potential for conflict of interest may occur including, but not limited to the following:

1. A KGP volunteer who *provides services and supports to the ward or conservatee, or*, is employed by a program, facility or an organization which provides services and supports to the ward or conservatee.
2. The immediate family member (defined as grandparent, parent, step-parent, grandchild, step-grandchild, sibling, step-sibling, child, stepchild, or spouse) of an person who is employed by a program, facility or an organization which provides services and supports to the ward or conservatee.

Exceptions to the immediate family member guideline

Possible exceptions to the immediate family member guideline may be considered only after justification and documentation is provided to and approved by the Executive Director.

When a Conflict of Interest Occurs with a KGP Guardian or Conservator

1. A potential conflict of interest occurs if a volunteer takes employment with a program, facility or an organization which provides services and supports to their ward or conservatee. It is the responsibility of the volunteer to contact the KGP immediately if this situation occurs.
2. The KGP regional staff is the responsible party in addressing the situation with the volunteer.
3. The conflict of interest may be addressed in one of the following ways:
 - a. The KGP initiates steps to identify a successor guardian or conservator. The prioritization time frame for this successor referral is balanced with whether or not the guardian or conservator is providing direct services and supports to the ward or conservatee and/or supervising staff who are providing the ward’s or conservatee’s services and supports.
 - b. In some cases the KGP volunteer guardian may continue to serve the ward privately. In those cases, the contract between the volunteer and the KGP will be terminated. If the volunteer is the court appointed conservator, a change in the bonding procedure must occur. The KGP regional staff will contact an SRS attorney to petition the court to change the bond. Upon receipt of the court order releasing the secretary of SRS as surety on the bond, the contract between the volunteer and the KGP will be terminated.

REFERENCES

- I. **Kansas Statute:** The Act for obtaining a guardian or a conservator, or both. KSA 59-3068 (b)
- II. **KGP Handbook:** Section III Responsibilities • Limitations • Decision Making Section III A.5, A.6 and E.1 Conflict of Interest
- III. **National Guardianship Association:** “Standards of Practice” © 2000, 2002 Edited Edition

Volunteer Signature

KGP Regional Staff

Date

06.2006

7-3

Volunteer Name _____

KANSAS GUARDIANSHIP PROGRAM VOLUNTEER TRAINING CHECKLIST

This checklist is used with the KGP Handbook - Reference Section Numbers

CONFIDENTIALITY

_____ I will hold in the strictest confidence all personal and business information I receive or have access to regarding the ward or conservatee. Such information will be divulged only to those directly connected with the ward or conservatee, and then only on a need to know basis in the furtherance of the wishes and/or in best interest of the ward or conservatee. I will discuss these matters only with the people directly involved or who will be consulted for their professional knowledge and expertise.

ADVOCACY

_____ Review statutory language involving person in decision making as appropriate
_____ KGP Philosophy _____ Balancing risk vs benefit

SECTION
IV

COURT • LEGAL ISSUES

_____ Review terminology _____ Letters of Appointment _____ Conservator bond
_____ Review duties, responsibilities _____ Limitations _____ Decisions requiring court approval
_____ Least restrictive setting appropriate to needs of person _____ Statutory Liability Protection
_____ Court approval to admit to a "treatment facility"

SECTION
III & V

Accountability to the Court

_____ Conservator Inventory and Valuation _____ Annual Conservator Accounting
_____ Annual Guardian Report _____ Court oversight and review

INCOME • BENEFITS • FINANCIAL INFORMATION

_____ SSA Representative Payee - Filing for Social Security benefits and redeterminations
_____ Other benefits (Veterans, Railroad Retirement, pension, employment)
_____ Banking _____ Establishing accounts _____ Reconciling check register and bank statement
_____ Improper use of funds _____ No co-mingling of funds _____ No checks written to self

SECTION
III & VI &
X

SOCIAL AND REHABILITATION SERVICES (SRS)

_____ Adult Protective Services, responsibilities _____ Investigate Abuse, Neglect or Exploitation
_____ Economic Assistance, responsibilities
_____ Medicaid eligibility _____ Resource limits _____ Redetermination time line

SECTION
XI

PAYMENT FOR SUPPORTS • SERVICES • MEDICAL CARE

_____ Payment for Medical Care, Medicare, Medicaid and other health insurance
_____ HCBS Waivers (Home and Community Based Services funding)

SECTION
VII & VIII

MONITORING CARE • SUPPORTS AND SERVICES

_____ Monitoring life issues _____ Visiting ward or conservatee _____ Rights issues
_____ Providing or not providing consents _____ Health care and medical decisions
_____ Participating in plan of care meetings

SECTION
IX

ABUSE • NEGLECT • EXPLOITATION (ANE)

_____ Monitoring for and reporting signs of ANE _____ Guardian or Conservator - Mandatory Reporter
_____ Guardians or Conservators as perpetrators _____ Penalties for ANE

SECTION
XII

FUNERAL • BURIAL ARRANGEMENTS

_____ Statutory authority for guardian to make arrangements _____ Preplanning and payment
_____ Guardian authority and limitations regarding cremation and donation of organs
_____ Court approval required for conservator to pay final bills and close estate after death of conservatee

SECTION
XIII

KANSAS GUARDIANSHIP PROGRAM (KGP) PROCEDURES • PAPERWORK

_____ Agency and program information _____ KGP Contract
_____ Stipend reimbursement for out of pocket expenses _____ Stipend/No Stipend Option
_____ No fee for services _____ IRS considers stipend income
_____ KGP Guardian and Conservator Monthly Reports _____ Electronic filing available
_____ Monitoring, training, support and assistance available
_____ Reviewed KGP Conflict of Interest Guideline

SECTION
I & II

Volunteer Signature _____

KGP Signature _____

Date _____

Rev 07.2007

7-4

Written Testimony to House Judiciary Committee
Prepared by Greg Jones Guardian/Conservator/Community Service Provider
January 30 2008

I would like to comment briefly on the proposed amendments to HB2644.

I make my statements based upon my experience as a person with a disability, my employment of 15 years in the disability world and my experience as a guardian for the last nine years.

The proposed amendments of HB 2644 on the surface and in the ideal world appear quite acceptable. However beneath the surface and in the real world they create real life complications, problems and difficulties.

Guardians and Conservators in the real world do so out of a sense of volunteerism and giving something back. Finding people knowledgeable about all of the many complex providers, State and Federal systems must be quite difficult. Adding a required test before being allowed, or while being, a volunteer simply creates yet one more barrier for the individual volunteering or wanting to become a volunteer. One more barrier.

The "conflict of interest" language as in the amended bill once again works well in the ideal world. Once again in the real world it is not quite that simple. In the real world and in the real service delivery system individuals and guardians are allowed total and absolute choice. This amendment is going to limit ones ability to choose. As a provider and a guardian should I be forced by statute to allow a ward to accept a service and a quality of service that I know, as a provider that I and my agency can provide at a higher quality and in a less restrictive setting? Or as a guardian should I be forced by statute to allow my ward to accept a lower quality more restrictive environment? The Ford dealer doesn't take his child to the Chevy dealer. Once again in the "Ideal" world this amendment appears acceptable, but in reality it could and will limit choices, opportunities and freedoms for individuals.

The proposed amendments to HB2644 will create yet one more layer of bureaucracy in the process of becoming a guardian. The proposed amendments will limit and restrict the freedom of the guardian to make appropriate choices. The proposed amendments could impose by statute inferior and substandard outcomes for individuals especially in rural areas. These amendments could actually take away freedoms at a time people with disabilities and their guardians are struggling to create freedoms for people with disabilities.

The current guardianship statute accompanied by current SRS rules, regulations, policy and procedure are adequate to protect individuals with disabilities. Yet one more layer of layer of overprotection and paternalism is not needed.

Thank you
Greg Jones
Southeast Kansas Independent Living
Parsons KS
620-423-9156.

House Judiciary
Date 1-30-08
Attachment # 8



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MEMORANDUM

TO: House Judiciary Committee

FROM: Kansas Judicial Council - Randy M. Hearrell

DATE: January 30, 2008

RE: 2008 HB 2643

BACKGROUND

A member of the Judicial Council Civil Code Advisory Committee raised the issue of a potential conflict between K.S.A. 40-218 and K.S.A. 60-736 (copies of the statutes are attached). The conflict involves the amount of response time available to an insurance company served with garnishment papers.

Pursuant to K.S.A. 40-218, when service on an insurance company has been obtained by serving the Commissioner of Insurance, the insurance company has 40 days to answer. However, K.S.A. 60-736 requires that a garnishee serve an answer within 10 days after service of an Order of Garnishment.

The Judicial Council proposes that K.S.A. 60-736 be amended in subsection(b) by inserting "other than that required pursuant to K.S.A. 40-218, and amendments there to" to resolve the potential conflict.

House Judiciary
Date 1-30-08
Attachment # 9

Kansas Legislature

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40-218

Chapter 40.--INSURANCE

Article 2.--GENERAL PROVISIONS

40-218. Actions and garnishment proceedings against insurance companies; process; venue; procedure; fee; record of commissioner. Every insurance company, or fraternal benefit society, on applying for authority to transact business in this state, and as a condition precedent to obtaining such authority, shall file in the insurance department its written consent, irrevocable, that any action or garnishment proceeding may be commenced against such company or fraternal benefit society in the proper court of any county in this state in which the cause of action shall arise or in which the plaintiff may reside by the service of process on the commissioner of insurance of this state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation. Such consent shall be executed by the president and secretary of the company, authenticated by the seal of the corporation, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers authorizing the president and secretary to execute the same. The summons, accompanied by a fee of \$25, shall be directed to the commissioner of insurance, and shall require the defendant to answer by a certain day, not less than 40 days from its date.

Service on the commissioner of insurance of any process, notice or demand against an insurance company or fraternal benefit society shall be made by delivering to and leaving with the commissioner or the commissioner's designee, the original of the process and two copies of the process and the petition, notice of demand, or the clerk of the court may send the original process and two copies of both the process and petition, notice or demand directly to the commissioner by certified mail, return receipt requested. In the event that any process, notice or demand is served on the commissioner, the commissioner shall immediately cause a copy thereof to be forwarded by certified mail, return receipt requested to the insurance company or fraternal benefit society address to its general agent if such agent resides in this state or to the secretary of the insurance company or fraternal benefit society sued at its registered or principal office in any state in which it is domesticated. The commissioner of insurance shall make return of the summons to the court from whence it issued, showing the date of its receipt, the date of forwarding such copies, and the name and address of each person to whom a copy was forwarded. Such return shall be under the hand and seal of office, and shall have the same force and effect as a due and sufficient return made on process directed to a sheriff. The commissioner of insurance shall keep a suitable record in which shall be docketed every action commenced against an insurance company, the time when commenced, the date and manner of service; also the date of the judgment, its amount and costs, and the date of payment thereof, which shall be certified from time to time by the clerk of the court.

Kansas Legislature

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60-736

Chapter 60.--PROCEDURE, CIVIL

Article 7.--ATTACHMENT AND GARNISHMENT

60-736. Answer of garnishment; attachment of intangible property other than earnings; form and content. This section shall apply if the garnishment is to attach intangible property other than earnings of the judgment debtor.

(a) The answer of the garnishee shall be substantially in compliance with the forms set forth by the judicial council.

(b) Within 10 days after service upon a garnishee of an order of garnishment the garnishee shall complete the answer in accordance with the instructions accompanying the answer form stating the facts with respect to the demands of the order and file the completed answer with the clerk of the court. The clerk shall cause a copy of the answer to be mailed promptly to the judgment creditor and judgment debtor at the addresses listed on the answer form. The answer shall be supported by unsworn declaration in the manner set forth on the answer form.

History: L. 2002, ch. 198, § 9; July 1.



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RICHARD B. HINZE

December 19, 2006

Randy M. Hearrell
Kansas Judicial Council
301 S.W. Tenth Street, Suite 262
Topeka, KS 66612-1507

FAX TRANSMISSION
- 1-785-296-1035 -

RE: Proposed Legislation

Dear Randy:

With the Legislature gearing up soon I thought I would contact you regarding an issue that has arisen over a potential conflict between 40-218 (Service on Insurance Commissioner) and the answer date when an insurance company is served with garnishment papers.

K.S.A. 40-218 allows 40 days for the insurance company to answer, when service on it has been obtained by serving the Commissioner of Insurance. However, K.S.A. 60-736 (Answer of Garnishment) requires that a garnishee serve an answer within ten (10) days after service of an Order of Garnishment.

Even if service is made pursuant to K.S.A. 60-304 by serving an officer, manager, partner or resident managing general agent of an insurance company, the answer date would be 20 days for a domestic corporation and 30 days if service was made outside the state under the Long-Arm Statute.

It seems to me that this is a matter that we should address. A fix may require a change in the statute allowing service on the Commissioner of Insurance, or the garnishment statute. Since the Judicial Council publishes the forms, perhaps it could be corrected by changing the form, but I think that is unlikely.

I do know that it presents some problems for the Clerk and the Commissioner. We just had a summons rejected because the insurance company's time for answer was fixed at ten days, instead of forty.

Very truly yours,

A handwritten signature in black ink, appearing to read "D. Vasos", written over a horizontal line.

DONALD W. VASOS

DWV:clw