

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on March 6, 2008 in Room 313-S of the Capitol.

All members were present except:

Marti Crow - excused
Ben Hodge - excused
Jason Watkins - 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:

Randy Hearrell, Kansas Judicial Council
David Weaver, Kansas State University Foundation
Nick Badgerow, Kansas Judicial Council

The hearing on **SB 433 - uniform prudent management of institutional funds act**, was opened.

Randy Hearrell, Kansas Judicial Council, explained that the new uniform act provides statutory guidelines for management, investment, and expenditure of endowment funds held by charitable institutions. (Attachment #1)

David Weaver, Kansas State University Foundation, commented that the proposed bill encourages that investment decisions should be made with regard to the overall resources of an institution and its charitable purposes. Also, it eliminates the historic dollar value limitation on expenditures, which have become irrelevant because of current economic conditions. The release of donor restrictions for small institutional funds are impractical to manage without incurring disproportionate legal fees. (Attachment #2)

The hearing on **SB 433** was closed.

The hearing on **SB 434 - code of civil procedure, electronically stored information**, was opened.

Nick Badgerow, Kansas Judicial Council, appeared as a proponent of the bill because it would keep the State Rules of Civil Procedure as uniform, as possible, with the Federal Rules of Civil Procedure. (Attachment #3)

The hearing on **SB 434** was closed.

SB 412 - health care; medical assistance repayment; discretionary trust

Representative Pauls made the motion to report SB 412 favorably for passage. Representative Owens seconded the motion. The motion carried.

SB 432 - uniform transfer on death security registration act

Representative Whitham made the motion to report SB 432 favorably for passage and be place on the consent calendar. Representative Owens seconded the motion. The motion carried.

SB 431 - probate, small estates, increasing allowances for spouses and minor children

Representative Pauls made the motion to report SB 431 favorably for passage. Representative Owens seconded the motion. The motion carried.

CONTINUATION SHEET

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 6, 2008 in Room 313-S of the Capitol.

SB 435 - amendment to revised Kansas Juvenile Justice code and Kansas code for care of children

Representative Pauls made the motion to report SB 435 favorably for passage. Representative Owens seconded the motion.

Representative Pauls made the substitute motion to adopt the balloon (Attachment #4) which would amend the definition of "commissioner". Representative Owens seconded the motion. The motion carried.

Representative Ward expressed concern with language on page 26, line 16 & 17 which could add the reason of not paying child support to the cause of termination of a case. He made the motion to strike those lines so extended time would not be a factor in the case. Representative Kuether seconded the motion. The motion carried.

Representative Pauls made the motion to report SB 435 favorably for passage, as amendment. Representative Owens seconded the motion. The motion carried.

The committee meeting adjourned at 4:30 p.m. The next meeting was scheduled for March 10, 2008.



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Kansas Judicial Center
301 S.W. Tenth Street, Suite 140
Topeka, Kansas 66612-1507

Telephone (785) 296-2498
Facsimile (785) 296-1035

judicial.council@ksjc.state.ks.us
www.kscourts.org/kansas-courts/judicial-council

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MEMORANDUM

TO: Senate Judiciary Committee
FROM: Kansas Judicial Council - Randy M. Hearrell
DATE: January 30, 2008
RE: 2008 Senate Bill 433

BACKGROUND

The Uniform Management of Institutional Funds Act (UMIFA) was approved by the National Conference of Commissioners on Uniform State Laws in 1972 and enacted by Kansas in 1973. The act was adopted in 47 states and served Kansas and the other states well.

UMIFA was a pioneering statute providing uniform and fundamental rules for the investment of funds held by charitable institutions and the expenditure of funds donated as endowments to those institutions. UMIFA was based on two general principals:

- (1) that assets would be prudently invested in diversified investments that sought growth as well as income, and
- (2) that appreciation of assets could prudently be spent for the purposes of any endowment fund held by a charitable institution.

These two principles were referred to by the Uniform Law Commissioners as the "twin lodestars of asset management of endowments since UMIFA" was recommended.

UMIFA was drafted nearly 35 years ago, and while it has served well, portions of it are now out of date. Prudence norms have evolved and the new Uniform Prudent Management of Institutional Funds Act (UPMIFA) which is contained in 2008 Senate Bill 433 provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending. The Uniform Prudent Investor Act (UPIA), which was enacted in Kansas in 2000, served as a model for many of the revisions. UPMIFA contains some of the same rules as UPIA relating to rules on investment decision making for trusts, including charitable trusts, and

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imposes the same type of rules that are intended to protect beneficiaries of trusts or charities organized as nonprofit corporations. UPMIFA does not apply to trusts managed by corporate and other fiduciaries that are not charities, because UPIA provides management and investment standards for those trusts.

In applying principles based on the UPIA to charities organized as nonprofit corporations, UPMIFA combines the approaches taken by UPIA and the Revised Model Nonprofit Corporation Act (RMNCA). UPMIFA reflects the fact that standards for managing and investing institutional funds are and should be the same regardless of whether a charitable organization is organized as a trust, a nonprofit corporation or some other entity.

UPMIFA provides guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations, and UPMIFA imposes additional duties on those who manage and invest charitable funds. These duties provide additional protections for charities and also protect the interests of donors who want to see their contributions used wisely.

UPMIFA modernizes the rules governing expenditures from endowment funds, both to provide stricter guidelines on spending from endowment funds and to give institutions the ability to cope more easily with fluctuations in the value of the endowment.

Finally, UPMIFA updates the provisions governing the release and modification of restrictions on charitable funds to permit more efficient management of these funds. These provisions derive from the approach taken in the Uniform Trust Code (UTC) for modifying charitable trusts. Like the UTC provisions, UPMIFA's modification rules preserve the historic position of the Attorneys General in most states as the overseers of charities.

As under UMIFA, the new Act applies to charities organized as charitable trusts, as nonprofit corporations, or in some other manner, but the rules do not apply to funds managed by trustees that are not charities. Thus, the Act does not apply to trusts managed by corporate or individual trustees, but the Act does apply to trusts managed by charities.

HIGHLIGHTS OF UPMIFA

Investment freedom. Portfolio managers are not limited in the kinds of assets that may be in the portfolio. This is broader than UMIFA.

Costs. Costs must be prudently managed in relationship to assets, the purposes of the institution and the skills available to the institution. This is not addressed in UMIFA.

Expenditure of funds. Total return expenditure is expressly authorized under comprehensive prudent standards relating to the whole economic situation of the charitable institution. This is not addressed in UMIFA.

Historic dollar value abolished. UPMIFA abolishes the historic dollar value limitation on expenditures in UMIFA.

Release of restrictions for small institutional funds. UPMIFA provides new procedures for releasing restrictions on small institutional funds (SB 433 defines these as funds less than "\$50,000 held for over 10 years"), requiring only notice to the Attorney General 60 days in advance of the release. This is not addressed in UMIFA.

Application. UPMIFA applies to funds held in any form, including nonprofit corporate form, except charitable trusts, with a commercial or individual trustee. UMIFA applies only to endowments held by a charitable institution for its own account.

ATTACHMENTS

The following is a "Quick Comparison" of the Uniform Prudent Management of Institutional Funds Act (UPMIFA) which is contained in SB 433 with the Uniform Management of Institution Funds Act (UMIFA) which is existing Kansas law and found at K.S.A. 58-3601 *et seq.* This comparison was prepared by the National Conference of Commissioners on Uniform State Laws and has been slightly modified to reflect the changes the Kansas Drafting Committee made.

In addition, I have attached a letter from the Uniform Law Commission recommending passage of SB 433.

QUICK COMPARISON

UPMIFA	UMIFA
<p>Scope:</p> <ul style="list-style-type: none"> • All charitable institutions holding "institutional funds" including trusts without non-charitable beneficiaries 	<p>Scope:</p> <ul style="list-style-type: none"> • Charitable organizations except for trusts
<p>Investment Conduct:</p> <ul style="list-style-type: none"> • Express duty of loyalty • Express cost management obligation • Whole portfolio management standard of performance • Express diversification requirement • Portfolio balancing required 	<p>Investment Conduct:</p> <ul style="list-style-type: none"> • General obligation to invest prudently using ordinary business care
<p>Expenditure of Funds:</p> <ul style="list-style-type: none"> • Express prudent total return standard, 7 factors: <ul style="list-style-type: none"> ○ Fund duration ○ Fund/institution purposes ○ General economic conditions ○ Effects, inflation/deflation ○ Expected total return ○ Other resources ○ Institutional investment policy 	<p>Expenditure of Funds:</p> <ul style="list-style-type: none"> • Net appreciation may be spent for purposes of endowment • Historic dollar value limitation
<p>Delegation of Management/Investment:</p> <ul style="list-style-type: none"> • Prudent delegation in good faith, care standard of prudent person: <ul style="list-style-type: none"> ○ To select agent ○ Establish scope and terms of delegation ○ Requires periodic review and supervision of agent • Agent has duty of reasonable care • Agent subject to court jurisdiction • Delegation to committees, officers or employees as authorized by other law 	<p>Delegation of Management/Investment:</p> <ul style="list-style-type: none"> • Delegation allowed without express standards

UPMIFA Uniform Prudent Management of Institutional Funds Act

UPMIFA	UMIFA
<p>Release or Modification of Restrictions:</p> <p><u>Restriction</u></p> <ul style="list-style-type: none"> • Court may release or modify if restriction is: <ul style="list-style-type: none"> ○ Impracticable or wasteful ○ Impairs management or investment ○ Meets unanticipated circumstances that allow release or modification furthering purposes of the fund • Notice to Attorney General required <p><u>Purpose</u></p> <ul style="list-style-type: none"> • Court may release or modify if purpose is: <ul style="list-style-type: none"> ○ Unlawful to retain ○ Impracticable ○ Impossible to achieve ○ Wasteful • Must be consistent with donor's intent • Notice to Attorney General Required <p><u>Small Old Fund</u></p> <ul style="list-style-type: none"> • Institution may institute release or modification without court approval • Notice to Attorney General required 	<p>Release or Modification of Restrictions:</p> <ul style="list-style-type: none"> • Court release if restriction obsolete, inappropriate or impracticable • Notice to Attorney General required • Cy pres (modification of purpose) not limited or addressed



Uniform Law Commission
 NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

11 N. Wabash Ave.
 Suite 1010
 Chicago, IL 60602
 (312) 450-6600 tel
 (312) 450-6601 fax
 www.nccusl.org

January 28, 2008

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Vice President
 313 Judicial Center
 25 Rev. Dr. Martin Luther
 King Jr. Blvd.
 St. Paul, MN 55155

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 Nashville, TN 37219

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 229 19th Ave. S.
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100 Main St.
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 Burlington, VT 05402

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 80 S. 8th St., 500 IDS Center
 Minneapolis, MN 55402-3796

STAFF

JOHN A. SEBERT

Executive Director
 john.sebert@nccusl.org

J. ELIZABETH COTTON-MURPHY

Chief Administrative Officer
 elizabeth.cotton@nccusl.org

MICHAEL R. KERR

Legislative Director / Legal Counsel
 michael.kerr@nccusl.org

MICHELLE W. CLAYTON

Senior Counsel
Legislative / Scope & Program
 michelle.clayton@nccusl.org

UNIFORM LAW FOUNDATION

ROBERT A. STEIN

Chair
 University of Minnesota Law School
 229 19th Ave. S.
 Minneapolis, MN 55455

Randy M. Hearrell
 Executive Director
 Kansas Judicial Council
 Kansas Judicial Center
 301 SW 10th Avenue
 Topeka, Kansas 66612-1507

Dear Randy:

This letter is to confirm our conversation regarding Senate Bill 433, the Kansas Uniform Prudent Management of Institutional Funds Act (UPMIFA).

UPMIFA was drafted to replace the Uniform Management of Institutional Funds Act (UMIFA) of 1972 because the older law no longer reflects the prudence standards that have evolved over time. UPMIFA updates the law to make the process of managing, investing and spending charitable funds much better. Since the UPMIFA was finalized in July 2006, it has been enacted in 14 jurisdictions and is expected to be introduced in another 20 states in 2008, including Kansas.

As you know, the Kansas Judicial Council carefully reviewed UPMIFA over the summer and consulted the UPMIFA Reporter, Susan Gary, and me about some changes being recommended in the bill. While two of the changes are non-uniform, the Chairman of the Drafting Committee, Barry Hawkins, and the Reporter, Susan Gary, believe that they do not do substantial damage to uniformity. Therefore, we do not oppose the changes and recommend passage of Senate Bill 433.

As always, it is a pleasure working with you, and we greatly appreciate the excellent work of the Kansas Judicial Council.

Best regards,

Michelle
 Michelle Clayton

cc: Senator John Vratil
 Representative Michael R. O'Neal

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Senate Bill 433
Uniform Prudent Management of Institutional Funds Act
House Judiciary Committee
Room 313 of the State Capitol Building
Thursday March 6, 2008
3:30 pm.
Chairman Michael R. O'Neal of Hutchinson

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) promotes best practices for the management, investment and spending of charitable funds. It strengthens the concept of prudent investing and promotes institutional prudence of charitable spending. The Kansas State University Foundation endorses UPMIFA as presented to us by the Kansas Judicial Council.

UPMIFA emphasizes investment decisions should be made in relation to the overall resources of an institution and its charitable purposes. Each institution should have the flexibility to invest its assets in a manner that will maximize its charitable mission within its fiduciary context. UPMIFA helps promote investment portfolio diversification and does not limit investment options or the kind of assets that are desirable in a diversified portfolio.

UPMIFA continues the concept of using a portion of an endowment's lifetime "total return" as the right measure for yearly expenditures. This allows an institution to exercise prudent spending of both income and appreciation based on the current economic conditions. Additionally, each institution must evaluate how to best accomplish its respective mission. What is best for one institution may not be best for another. UPMIFA places the responsibility of prudent spending with the institution instead of mandating a spending policy that may not accomplish the institution's mission.

UPMIFA eliminates the historic dollar value limitation on expenditures which over time has become irrelevant because it is inflexible and may not be applicable to current economic conditions. The historic dollar value limitation creates underwater endowments (when the market value drops below the historic dollar value). Donors to our institution expressed frustration at this limitation because it severely reduced distributions to the University during the same time the University was experiencing budget cutbacks. Donors argued the distributions to the University were reduced during a time when the University actually needed the dollars the most. Our institution will now have the flexibility to do what is best for our needs.

UPMIFA allows the release of donor restrictions for small institutional funds that are impractical to manage without incurring disproportionate legal fees. Our institution emphasizes adherence to donor restrictions. Yet there are circumstances when a donor restriction becomes impracticable or wasteful to the overall objective. In those cases when a request to release a restriction is desired, our intent is to honor the original spirit and intent of the donor and match the donor's intent with a similar purpose. UPMIFA provides guidance of how to address these issues.

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been added to make the statute equivalent to the revised federal rule.

The terms of federal rule 26(b)(5) are not specifically reflected in K.S.A. 60-226. Old federal rule 26(b)(5) became 26(b)(5)(A) and a new sub-section, 26(b)(5)(B) was added. This language, added as K.S.A. 60-226(b)(7), provides that, after being notified of inadvertent disclosure, the receiving party must return privileged materials or file privileged materials under seal.

Section 3 (Amending K.S.A. 60-233). Interrogatories to parties. Federal rule 33(d) was amended to allow a party to respond to an interrogatory by producing ESI. K.S.A. 60-233(d) was essentially identical to Rule 33(d), and the new language has been added to make the statute equivalent to the revised federal rule.

Section 4 (Amending K.S.A. 60-234). Production of documents, electronically stored information, and things and entry upon land for inspection and other purposes. Federal rule 34(a) was amended so that ESI is distinct from “documents” and “things.” Federal rule 34(b) was amended to provide for a default form for ESI production. K.S.A. 60-234 was essentially identical to Rule 34, and the new language has been added to make the statute equivalent to the revised federal rule.

Section 5 (Amending K.S.A. 60-237). Failure to allow discovery; sanctions. A new subsection was added to Federal rule 37 to create a safe harbor from sanctions relating to routine destruction of ESI. The same language was added as K.S.A. 60-237(e).

Section 6 (Amending K.S.A. 245). Subpoenas. Several changes were made to Federal rule 45 so that the rule governing subpoenas will be consistent with the new provisions relating to ESI. Corresponding changes were made to K.S.A. 60-245.

Draft of Proposed Balloon Amendment to 2008 SB 435

Chapter 38.--MINORS

Article 23.--REVISED KANSAS JUVENILE JUSTICE CODE

38-2302. **Definitions.** As used in this code, unless the context otherwise requires:

- (a) "Commissioner" means the commissioner of juvenile justice *or the commissioner's designee*.
- (b) "Conditional release" means release from a term of commitment in a juvenile correctional facility for an aftercare term pursuant to K.S.A. 2006 Supp. 38-2369, and amendments thereto, under conditions established by the commissioner.
- (c) "Court-appointed special advocate" means a responsible adult, other than an attorney appointed pursuant to K.S.A. 2006 Supp. 38-2306, and amendments thereto, who is appointed by the court to represent the best interests of a child, as provided in K.S.A. 2006 Supp. 38-2307, and amendments thereto, in a proceeding pursuant to this code.
- (d) "Educational institution" means all schools at the elementary and secondary levels.
- (e) "Educator" means any administrator, teacher or other professional or paraprofessional employee of an educational institution who has exposure to a pupil specified in subsections (a)(1) through (5) of K.S.A. 72-89b03, and amendments thereto.
- (f) "Institution" means the following institutions: the Atchison juvenile correctional facility, the Beloit juvenile correctional facility, the Larned juvenile correctional facility, the Topeka juvenile correctional facility and the Kansas juvenile correctional complex.
- (g) "Investigator" means an employee of the juvenile justice authority assigned by the commissioner with the responsibility for investigations concerning employees at the juvenile correctional facilities and juveniles in the custody of the commissioner at a juvenile correctional facility.
- (h) "Jail" means: (1) An adult jail or lockup; or
(2) a facility in the same building as an adult jail or lockup, unless the facility meets all applicable licensure requirements under law and there is: (A) Total separation of the juvenile and adult facility spatial areas such that there could be no haphazard or accidental contact between juvenile and adult residents in the respective facilities; (B) total separation in all juvenile and adult program activities within the facilities, including recreation, education, counseling, health care, dining, sleeping and general living activities; and (C) separate juvenile and adult staff, including management, security staff and direct care staff such as recreational, educational and counseling.
- (i) "Juvenile" means a person to whom one or more of the following applies, the person: (1) Is 10 or more years of age but less than 18 years of age; (2) is alleged to be a juvenile offender; or

In the Revised Child in Need of Care Code, "Secretary" is defined in K.S.A. 38-2202(aa) as "the secretary of social and rehabilitation services or the secretary's designee." However, similar language was not included in the Revised Juvenile Justice Code as it relates to the Commissioner of Juvenile Justice. This amendment would contribute to consistency between the Codes.

(3) has been adjudicated as a juvenile offender and continues to be subject to the jurisdiction of the court.

(j) "Juvenile correctional facility" means a facility operated by the commissioner for the commitment of juvenile offenders.

(k) "Juvenile corrections officer" means a certified employee of the juvenile justice authority working at a juvenile correctional facility assigned by the commissioner with responsibility for maintaining custody, security and control of juveniles in the custody of the commissioner at a juvenile correctional facility.

(l) "Juvenile detention facility" means a public or private facility licensed pursuant to article 5 of chapter 65 of the Kansas Statutes Annotated, and amendments thereto, which is used for the lawful custody of alleged or adjudicated juvenile offenders.

(m) "Juvenile intake and assessment worker" means a responsible adult authorized to perform intake and assessment services as part of the intake and assessment system established pursuant to K.S.A. 75-7023, and amendments thereto.

(n) "Juvenile offender" means a person who commits an offense while 10 or more years of age but less than 18 years of age which if committed by an adult would constitute the commission of a felony or misdemeanor as defined by K.S.A. 21-3105, and amendments thereto, or who violates the provisions of K.S.A. 21-4204a or 41-727 or subsection (j) of K.S.A. 74-8810, and amendments thereto, but does not include: (1) A person 14 or more years of age who commits a traffic offense, as defined in subsection (d) of K.S.A. 8-2117, and amendments thereto;

(2) a person 16 years of age or over who commits an offense defined in chapter 32 of the Kansas Statutes Annotated, and amendments thereto;

(3) a person under 18 years of age who previously has been:

(A) Convicted as an adult under the Kansas criminal code;

(B) sentenced as an adult under the Kansas criminal code following termination of status as an extended jurisdiction juvenile pursuant to K.S.A. 2006 Supp. 38-2364, and amendments thereto; or

(C) convicted or sentenced as an adult in another state or foreign jurisdiction under substantially similar procedures described in K.S.A. 2006 Supp. 38-2347, and amendments thereto, or because of attaining the age of majority designated in that state or jurisdiction.

(o) "Law enforcement officer" means any person who by virtue of that person's office or public employment is vested by law with a duty to maintain public order or to make arrests for crimes, whether that duty extends to all crimes or is limited to specific crimes.

(p) "Parent" when used in relation to a juvenile, includes a guardian and every person who is, by law, liable to maintain, care for or support the juvenile.

(q) "Risk assessment tool" means an instrument administered to juveniles which delivers a score, or group of scores, describing, but not limited to describing, the juvenile's potential risk to the community.

(r) "Sanctions house" means a facility which is operated or structured so as to ensure that all entrances and exits from the facility are under the exclusive control of the staff of the facility, whether or not the person being detained has freedom of movement within the perimeters of the facility, or which relies on locked rooms and buildings, fences or physical restraint in order to control the behavior of its residents. Upon an order from the court, a licensed juvenile detention facility may serve as a sanctions house.

(s) "Warrant" means a written order by a judge of the court directed to any law enforcement officer commanding the officer to take into custody the juvenile named or described therein.

(t) "Youth residential facility" means any home, foster home or structure which provides 24-hour-a-day care for juveniles and which is licensed pursuant to article 5 of chapter 65 or article 70 of chapter 75 of the Kansas Statutes Annotated, and amendments thereto.

History: L. 2006, ch. 169, § 2; Jan. 1, 2007.

Comments: In the Revised Child in Need of Care Code, "Secretary" is defined in K.S.A. 38-2202(aa) as "the secretary of social and rehabilitation services or the secretary's designee." However, similar language was not included in the Revised Juvenile Justice Code as it relates to the Commissioner of Juvenile Justice. The amendment above would contribute to consistency between the Codes.