Approved: April 4, 2008
Date

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:34 A.M. on January 28, 2008, in Room 123-S of the Capitol.

All members were present except:
Barbara Allen arrived, 9:37 A.M.
Donald Betts, excused
Les Donovan, excused
David Haley arrived, 9:38 A.M.

Committee staff present:
Athena Andaya, Kansas Legislative Research Department
Bruce Kinzie, Office of Revisor of Statutes
Karen Clowers, Committee Assistant

Conferees appearing before the committee:
Randy Hearrell, Kansas Judicial Council
Nick Badgerow, Chair, Kansas Judicial Council Civil Code Advisory Committee
Jeanne Turner, Chief Clerk, 5th Judicial District

Others attending:
See attached list.

Chairman Vratil brought to the committees attention, written testimony on **SB 413** received by Mr. Ed Collister (Attachment 1).

The hearing on **SB 431–Probate, small estates, increasing allowances for spouses and minor children** was opened.

Randy Hearrell spoke in support indicating the Judicial Council was requested by the Legislature to review the dollar limitation in K.S.A. 59-1507b for the transfer of certain personal property to successors by affidavit (Attachment 2). The committee proposes increasing the limit to $40,000 due to the costs associated with administration of small estates. In addition, an increase to $50,000 for allowances to spouses and minor children is proposed to keep up with inflation and be proportional to the new amount in K.S.A. 59-1507b.

There being no further conferees, the hearing on **SB 431** was closed.

The Chairman opened the hearing on **SB 434–Code of civil procedure, electronically stored information.**

Nick Badgerow testified in support, stating **SB 434** contains recommendations by the Civil Code Advisory Committee following review of changes to the Federal Rules of Civil Procedure relating to discovery of electronically stored information (Attachment 3).Mr. Badgerow indicated Kansas has always attempted to stay as uniform as possible with federal rules and recommended the bill be enacted.

There being no further conferees, the hearing on **SB 434** was closed.

The hearing on **SB 424–Oil and gas leases, distribution of monies deposited with the court** was opened.

Jeanne Turner appeared in favor, stating often when a company wants to buy an oil or gas lease owners cannot be found and a case is filed in district court and a receiver is appointed to represent those parties (Attachment 4). It would be a better use of resources for the purchasing company to be responsible for the receipting, holding and issuing of checks in these cases. Ms. Turner indicated the oil and gas industry have expressed no opposition to this change and that the monies would still be subject to the Kansas statute concerning unclaimed property.

There being no further conferees, the hearing on **SB 424** was closed.

The Chairman called for final action on **SB 48–Municipal court, accused person's competency to stand trial, mental health evaluation.**

Senator Journey moved, Senator Lynn seconded, to amend **SB 48**, page 2, line 5, by adding "or misdemeanor" following the word felony. Motion carried.

Senator Journey moved, Senator Umbarger seconded, to recommend **SB 48** as amended favorably for passage. Motion carried.

Chairman Vratil indicated **SB 301** will be rescheduled next week due to the absence of Senator Betts.

Senator Vratil announced the appointment of a subcommittee consisting of Senator Goodwin, Senator Journey, and himself to address **SB 409** and several bills on related topics assigned to the committee.

The meeting adjourned at 9:52 A.M. The next scheduled meeting is January 29, 2007.

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.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1/28/08

NAME	REPRESENTING
Jeanne Turner	Ks Assoc of Dist Ct Clerks + Adm.
Oswald Sawyer	Ks. Dept. of Transportation.
Deicno Gonjasco	KS Hispanic & Latino Affairs
Fred Miller	citizen
Tessa Goupil	citizen
Lindsey Douglas	Hein Law Firm
Beth Lange	SRS
C.W. Klebe	Atty General
Michael Hooper	Kearney & Assoc
Sean Miller	Capitol Strategies
Randy M. Hearrell	Judicial Council
NICK BADGEROW	JUDICIAL COUNCIL
Scott Heidner	KADC
Kathy Porter	Judicial Branch
ED LARSON	JUDICIAL BRANCH
Whitney Damron	KS Bar Assn
JEFFREY ALDERMAN	KANSAS BAR ASSOC
Ed Cross	KIOGA

John Vratil - Senate bill #413

From: "Collister & Kampschroeder" <collkamp@sbcglobal.net>
To: "Sen. John Vratil" <vratil@senate.state.ks.us>
Date: 1/21/2008 3:40 PM
Subject: Senate bill #413

John:

Late last week, Jim Clark advised me that your Judiciary Committee was having a hearing on the revised DNA bill and he asked me if I could testify. I have a conflict and I cannot be there, but I wanted to offer some thoughts on the subject because I guess it really bothers me.

My first comment is the same as last year. Inasmuch as there is legislation in existence that authorizes the taking of DNA sample from those convicted of felonies, it remains absolutely true that the only persons the current legislation is applicable to are those who are innocent. The proposed legislation has changes which positively offer some relief, but in my opinion, the net result is not as good as it ought to be and poses collateral problems.

Let's think about criminal law and offenders for a moment. In spite of recent trends, I think it is still true that we believe that anyone accused of a crime is innocent until proven guilty. Proving guilty involves either a judicial proceeding involving judge or jury, or an admission. Thus conceivably, this legislation which still command that a person accused of a felony crime give up his or her right to privacy concerning the DNA sample in the absence of a determination of guilt. The taking of the sample could be an unconstitutional act. I guess we can justify taking samples from those convicted of felonies by accepting the proposition that anybody who fits in that group has by their action waived a privacy right concerning the DNA requirement. But, the person who is not convicted has not waived that right. Thus, there are two objectable conclusions to the process left: 1) we are still taking a sample by compelling the waiver of a right prior to a determination of guilt which seems un-American; and 2) we compound that problem by telling the offended citizen that if in fact he was not guilty all along and was innocent, it is his responsibility and expense to get rid of the onerous action and its result. If the State does something wrong, the State ought to correct it.

On a separate note, I think a question to ask is what is the purpose of this pre-conviction requirement? It cannot be that we want a sample from everyone convicted of a crime because we will get that anyway. The reasoning could be that it gives us a free shot at getting a DNA sample for investigation purposes. But if that need is necessary in a specific case, there already exists a process for obtaining the sample.

The possibility is that deep down, we think that this justification for collecting more DNA sample is wise because ultimately we want a DNA sample from everyone, every citizen, at birth. Don't laugh at that. What else is the rationale of wanting an accumulation of DNA sample from those we suspect of committing crimes before a conviction?

Further, I think you will find there will be some collateral results in the judicial system that further burden the system if this acquisition process is adopted. Today it is not an uncommon practice to waive preliminary hearings for example. It can be done for a variety of reasons, one of them the economy of time. However, if that waiver waives corresponding rights concerning the collection of a DNA sample, I for one would think that every criminal defense lawyer would have to refuse to waive the preliminary hearing. An additional issue would be presented increasing preliminary hearing determinations. At the very least, I would think these consequences would give a decent reason for a defense lawyer to require a full blown preliminary hearing causing as many witnesses as necessary to appear because there may be what are considered new onerous consequences in order to bind over. I do not need to tell you that the court system does not need anymore road blocks to the ultimate result, but I can certainly see this being one.

What is the difference between taking this sample and using fingerprint evidence? That's easy. There is no expectation of privacy for fingerprints (we have to remember that privacy concerns control many Fourth

Senate Judiciary
1-28-08
Attachment 1

Amendment decisions).

I think this approach is a terrible step in the wrong direction, and is a suggestion that liberty and freedom are not quite as important as we thought they were.

Ed Collister

Attorney at Law

3311 Clinton Parkway Court

Lawrence, Kansas 66047-2631

(785) 842-3126

1-2

KANSAS JUDICIAL COUNCIL

JUSTICE ROBERT E. DAVIS, CHAIR, LEAVENWORTH
JUDGE JERRY G. ELLIOTT, WICHITA
JUDGE ROBERT J. FLEMING, PARSONS
JUDGE JEAN F. SHEPHERD, LAWRENCE
SEN. JOHN VRATIL, LEAWOOD
REP. MICHAEL R. O'NEAL, HUTCHINSON
J. NICK BADGEROW, OVERLAND PARK
GERALD L. GOODELL, TOPEKA
JOSEPH W. JETER, HAYS
STEPHEN E. ROBISON, WICHITA

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

EXECUTIVE DIRECTOR
RANDY M. HEARRELL
STAFF ATTORNEYS
NANCY J. STROUSE
CHRISTY R. MOLZEN
NATALIE F. GIBSON
ADMINISTRATIVE ASSISTANTS
JANELLE L. WILLIAMS
MARIAN L. CLINKENBEARD
BRANDY M. WHEELER

MEMORANDUM

TO: **Senate Judiciary Committee**

FROM: **Kansas Judicial Council - Randy M. Hearrell**

DATE: **January 28, 2008**

RE: **2008 SB 431**

The Judicial Council was requested by the Legislature to review the dollar limitation in K.S.A. 59-1507b relating to the transfer of certain personal property to successors by affidavit. The current dollar limit in the statute is $20,000 and has been the limit since July 1, 2000. The previous limit was $10,000 and had been in effect for twenty years.

The Committee proposes increasing the limit to $40,000. This amount is the same as the Missouri Small Estates Act and is beneficial to the citizens of Kansas because if administration is required in small estates it is expensive and time consuming, given the amount of property involved.

The increases to $50,000 in K.S.A. 59-403 (Allowance to Spouse and Minor Children), 59-6a215 (Elective Share of Surviving Spouse - Homestead or Homestead Allowance), and 59-2287 (Refusal to Grant Letters of Administration) are proposed to keep up with inflation and keep the amounts proportional to the new amount in K.S.A. 59-1507b.

KANSAS JUDICIAL COUNCIL

JUSTICE ROBERT E. DAVIS, CHAIR, LEAVENWORTH
JUDGE JERRY G. ELLIOTT, WICHITA
JUDGE ROBERT J. FLEMING, PARSONS
JUDGE JEAN F. SHEPHERD, LAWRENCE
SEN. JOHN VRATIL, LEAWOOD
REP. MICHAEL R. O'NEAL, HUTCHINSON
J. NICK BADGEROW, OVERLAND PARK
GERALD L. GOODELL, TOPEKA
JOSEPH W. JETER, HAYS
STEPHEN E. ROBISON, WICHITA

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

EXECUTIVE DIRECTOR
RANDY M. HEARRELL
STAFF ATTORNEYS
NANCY J. STROUSE
CHRISTY R. MOLZEN
NATALIE F. GIBSON
ADMINISTRATIVE ASSISTANTS
JANELLE L. WILLIAMS
MARIAN L. CLINKENBEARD
BRANDY M. WHEELER

MEMORANDUM

TO: **Senate Judiciary Committee**
FROM: **Kansas Judicial Council Civil Code Advisory Committee - Nick Badgerow**
DATE: **January 28, 2008**
RE: **2008 SB 434 - Proposed Amendments to Kansas Civil Procedure Rules**

On December 1, 2006, amendments to the Federal Rules of Civil Procedure relating to discovery of electronically stored information ("ESI") went into effect. ESI includes any information stored in an electronic (as opposed to paper) form and includes e-mails, spreadsheets, word processing documents, databases, voicemail, instant messages, and anything on a hard drive. On that same day, the Judicial Council assigned the Civil Code Advisory Committee to review these changes in the Federal Rules to see if they are appropriate for Kansas.

There has been a long history in Kansas of having changes in the Federal Rules of Civil Procedure reviewed by the Judicial Council and the Council's recommendations then being considered by the Legislature. Kansas has always attempted to stay as uniform as possible with the federal rules.

Although development of this ESI area may be ongoing for some time, the Judicial Council recommends that the statutory changes contained in 2008 SB 434 be enacted.

Comments to SB 434

Section 1 (Amending K.S.A. 60-216). Pretrial conferences; case management conference. Federal rules 16 and 26(f) were changed to reflect two new issues: (1) ESI discovery and (2) inadvertent waiver of privilege. The new language from federal rule 16 has been added as K.S.A. 60-216(b)(5) and (b)(6).

Section 2 (Amending K.S.A. 60-226). General provisions governing discovery. Federal rule 26(b)(2)(B) was added to limit discovery for ESI not reasonably accessible due to undue cost burden. K.S.A. 60-226(b)(2) was essentially identical to the federal rule, and the new language has

Senate Judiciary
1-28-08
Attachment 3

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, <u>electronically stored information,</u> 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.

Donn... ...ld, President
Atchison County
423 N 5th
PO Box 408
Atchison, Ks. 66002
913-367-7400

Phil Fielder, ...ent-Elect
Ellis County
1204 Fort Street, 3rd Floor
PO Box 8
Hays, Ks. 67601
785-628-9415

SB 424 - K.S.A. 55-221
Oil and Gas Leases
TESTIMONY
By: Phil Fielder, Court Administrator
23rd Judicial District

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to appear before you today to speak on behalf of the Kansas Association of District Court Clerks and Administrators in regard to K.S.A. 55-221. This bill deals with payments made after the sale of an oil or gas lease.

Currently, when a company wants to buy an oil or gas lease and there are owners who cannot be found, a civil case is filed in district court, and a receiver is appointed to represent those parties who cannot be located. When the lease is sold, the statute directs that payments to those unknown parties be deposited with the district court. If this process stopped here, with the one-time payment to the court, this would not be an issue. Problems arise if the lease later goes into production, and ongoing payments start coming into the court.

This situation can become complex, especially now, with the increase in oil and gas prices. More and more older gas and oil leases are being purchased and placed back in production, many whose ownership has been passed down from generation to generation. Others may have been sold to investment companies. For example, Trego County has a case in which several owners have a 1/49,000th or a 1/37,000th share of the lease. Some of the amounts owed to those owners were as small as 43¢ and $1.40. More than half of the lease owners in this case could not be found. Several of those that could be found were issued checks for as little as 43¢. Parties are more likely to frame the check than to cash it. As you can easily see, in addition to becoming difficult to manage, it is costly and time consuming.

We propose that future production proceeds be retained by the oil or gas purchasing company. Our position is that the company holds money in suspension already for many types of leases and cases, and has more resources to locate and keep track of these parties. This would save both the Courts and the oil and gas companies the time and expense of receipting, holding, and issuing checks. The money would still be subject to the Kansas statute concerning unclaimed property. The persons we have spoken to in the oil and gas industry have expressed no opposition to this change in the statute.

Thank you for allowing me the opportunity to appear before you today on this bill. I would be glad to answer any questions you may have.

Ann McNett
Barber County
118 E. Washington
Medicine Lodge, Ks. 67104
620-886-5639

Kathleen Collins, Treasurer
Wyandotte County
710 N. 7th St., Mezzanine
Kansas City, KS 66101
913-573-2946

Jane E Hrabik, Immed. Past Pres.
Rice County
101 W Co...

Senate Judiciary
1-28-08
Attachment 4