

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The meeting was called to order by Chairman John Vratil at 9:34 A.M. on January 30, 2008, in Room 123-S of the Capitol.

All members were present except:

Barbara Allen, excused
David Haley arrived, 9:42 A.M.
Terry Bruce arrived, 9:44 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
Hon. Tim Henderson, District Judge, 18th Judicial District

Others attending:

See attached list.

The Chairman opened the hearing on **SB 432–Uniform transfer on death security registration act; security accounts.**

Randy Hearrell appeared in favor, stating that the Judicial Council studied a possible problem with the Uniform Transfer on Death Security Registration Act at the request of Michael K. Sears, Great Plains Trust Company, Overland Park, Kansas (Attachment 1). Mr. Sears expressed concern with the definition of “security” in the Uniform Transfer on Death Security Registration Act. As a result, the Judicial Council proposed **SB 432** and supports its passage.

There being no further conferees, the hearing on **SB 432** was closed.

The hearing on **SB 433–Uniform prudent management of institutional funds act** was opened.

Randy Hearrell spoke as a proponent, stating that **SB 433** will update the Uniform Management of Institutional Funds Act (UMIFA) which was enacted in 1972 (Attachment 2). Mr. Hearrell indicated the bill was reviewed by the Uniform Law Commission and the Commission recommend the bill.

There being no further conferees, the hearing on **SB 433** was closed.

The Chairman opened the hearing on **SB 435–Amendments to revised Kansas juvenile justice code and revised Kansas code for care of children.**

Judge Tim Henderson testified in support, and provided background on the Revised Kansas Code for Care of Children which became effective on January 1, 2007 (Attachment 3). **SB 435** represents proposed amendments by the Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee. Judge Henderson reviewed the substantive changes in the bill.

There being no further conferees, the hearing on **SB 435** was closed.

The Chairman called for final action on **SB 413–Collection of certain specimens, probable cause determination.** Senator Vratil reviewed the bill and the proposed amendments by Ed Klumpp during the hearing on January 22.

Following discussion, Senator Bruce moved, Senator Lynn seconded, to table SB 413. Motion carried.

CONTINUATION SHEET

MINUTES OF THE Senate Judiciary Committee at 9:34 A.M. on January 30, 2008, in Room 123-S of the Capitol.

Chairman Vratil called for final action on **SB 418– Kansas sentencing commission; duty to annually produce official juvenile correctional facility population projections SB 419–Criminal procedure; form and consent of journal entry**. Senator Vratil reviewed the bill. During discussion, it was clarified that the \$50,000 cost would be moved from the Juvenile Justice Authority to the Kansas Sentencing Commission during the budget process.

Senator Schmidt suggested that a formal request be made to the Kansas Sentencing Commission inquiring if bed space information at the county level is available and if the information is available, ask the Commission to provide bed space impact data for county jails. If the information is not available, what challenges does the request place before the Sentencing Commission?

The Chairman indicated a proposed balloon amendment by the Kansas Sentencing Commission was provided during the hearing on January 24 (Attachment 4). Senator Goodwin moved, Senator Donovan seconded, to amend SB 418 as reflected in the balloon amendment proposed by the Kansas Sentencing Commission. Motion carried.

Senator Bruce moved, Senator Goodwin seconded, to recommend SB 418, as amended, favorably for passage. Motion carried.

Chairman Vratil called for final action on **SB 419–Criminal procedure; form and consent of journal entry**. The Chairman reviewed the bill.

Senator Donovan moved, Senator Goodwin seconded, to recommend SB 418 favorably for passage. Motion carried.

The meeting adjourned at 10:19 A.M. The next scheduled meeting is January 31, 2008.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1/30/08

NAME	REPRESENTING
Scott Heidner	KADC
Jim La Duke	State Farm
Steve Payne	State Farm
Robert Du McKenna	SRS
Janya Keys	SBB
Robin Clements	Child Welfare Cos.
Mark Allen	Judicial Branch
Tim Henderson	18th Judicial District
Wendy M. Heanue	Kansas Judicial Council
Justin May	Pinegar, Smith
Dan Mackley	Pooled Money Investment Board
Shamika Stamps	KS African American Affairs
B Deidre Grayson	KS Hispanic & Latino Affairs
Melissa Ness	St. Francis Community Services
JEAN MILLER	CAPITOL STRATEGIES
Ruth Mailand	Kansas University Endowment Assoc.
Jeff Davis	" " "
Bob Keller	JCSO

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-30-08

NAME	REPRESENTING
Janet Burtel	Kansas Farm Bureau Marion County Farm Bureau Assoc.
Heather Morgan	JSA
Dan Murray	Federico Consulting
Donna Bates	Kansas Farm Bureau State Women's Com. 1st District
Callie Hartle	KS Assoc. for Justice (KsAJ)
Helen Pedigo	KS. Sentencing Commission
Brenda Harmon	" " "
Patsy Woods	SRB
Whitney Damron	KS Bar Assn.
Kyle Kersh	KVC



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 30, 2008
RE: 2008 SB 432

The Judicial Council undertook a study of a problem with the Uniform Transfer on Death Security Registration Act (UTODSRA) at the request of Michael K. Sears who is Vice President and a Trust Officer with Great Plains Trust Company in Overland Park.

Mr. Sears expressed concern with the way the term "security" is defined in the UTODSRA. Mr. Sears' correspondence to the Council described the problem as follows:

"The concern I have is the way the term "security" is defined. The Kansas version refers to a couple other Kansas statutes for the definition of security. I think those definitions are fine. However, the Kansas version of the Act modified the uniform version so that the definition of "security" no longer includes a "security account" as one of the definitions of security. The term "security account" is defined in the Act to include things such as a brokerage account or an agency account with a bank or a trust company. These types of accounts are not defined as securities in the other Kansas statutes referenced by the Act. As a result, according to the actual language of the Act, the transfer on death option is not applicable to "security accounts" including agency and brokerage accounts. I don't think this is the intent of the statute."

The Judicial Council considered the problem described by Mr. Sears and as a result proposed 2008 SB 432 and supports its passage. Attached is an e-mail from Mr. Sears expressing support for the solution to the problem SB 432 proposes.

Also attached is a copy of the definitions section to the original UTODSRA which shows in the original Act "a security account" was a part of the definition of "security", and was not included when Kansas enacted the Act in 1994.

Senate Judiciary

1-30-08

Attachment 1

Hearrell, Randy [KSJC]

From: Mike Sears [mike@greatplainstrust.com]
Sent: Thursday, January 24, 2008 11:11 AM
To: Vratil, John [Senate]
Cc: Hearrell, Randy [KSJC]
Subject: Kansas Uniform Transfer on Death Securities Registration Act

Dear Senator Vratil,

I wanted to write you regarding a minor issue that I think needs to be fixed regarding the Uniform Transfer on Death Securities Registration Act (17-14a01 et. seq)("the Act"). I brought this to the attention of the judicial council, and they suggested that I write to you directly as well.

The concern I have is the way the term "security" is defined. The Kansas version refers to a couple other Kansas statutes for the definition of security. I think those definitions are fine. However, the Kansas version of the Act modified the uniform version so that the definition of "security" no longer includes a "security account" as one of the definitions of security. The term "security account" is defined in the Act to include things such as a brokerage account or an agency account with a bank or a trust company. These types of accounts are not defined as securities in the other Kansas statutes referenced by the Act. As a result, according to the actual language of the Act, the transfer on death option is not applicable to "security accounts" including agency and brokerage accounts. I don't think this is the intent of the statute.

While I do not think it has caused any problems to date, I think it could potentially cause a problem in the future.

Every banker or trust officer that I have spoken to has indicated to me that they currently allow for a transfer on death designation for agency and brokerage accounts. It is my understanding that the TOD designation is a creature of statute, not common law, and therefore the only basis for recognizing such a designation is statutory.

If a technical reading of the statute does not allow for a TOD designation on a security account, a problem could arise when the TOD designation differs from the decedent's other estate planning documents. For example, if a decedent's will says that all his assets are to be distributed to his son, and the decedent's five million dollar investment account has a TOD designation naming his daughter as the beneficiary, the son may argue that the TOD designation is invalid in an attempt to have that account pass to him under the will. This could create potential liability for the bank or financial institution that allowed the designation and for the attorney or advisor who recommended the TOD designation. In addition, it frustrates the intent of the decedent.

I think the issue can be addressed by either amending KSA 17-49a01(e) to include "security accounts" in the definition of security, or by amending KSA 17-49a03 to read "A security or security account may be registered . . . " I think this would clarify the statute and conforms to the intent of the law.

I would support such a change, and other bankers and trust officers that I have spoken to support the change as well.

If you have any questions, please feel free to call or e-mail me.

-Mike

Michael K. Sears, J.D., CTFA
Vice President / Trust Officer
Great Plains Trust Company
7700 Shawnee Mission Parkway, Suite 101
Overland Park, KS 662020
(913) 647-1289 / FAX (913) 831-0007
www.greatplainstrust.com

Westlaw

Page 1

Unif.Probate Code § 6-301

Uniform Laws Annotated Currentness

Uniform Probate Code 1969 (Refs & Annos)

▣ Article VI. Nonprobate Transfers on Death (1989)--(Revised 1989 Version) (Refs & Annos)

▣ Part 3. Uniform TOD Security Registration Act (Refs & Annos)

→ § 6-301. Definitions.

In this part:

(1) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(2) "Register," including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(3) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.

(4) "Security" means a share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account. ✓

(5) "Security account" means (i) a reinvestment account associated with a security, a securities account with a broker, a cash balance in a brokerage account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account, or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.



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 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 has been adopted in 47 states and has 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 are 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 us 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

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

111 N. W. Ave.
Suite 101
Chicago, IL 60602
(312) 450-6600 tel
(312) 450-6601 fax
www.nccusl.org

OFFICERS

MARTHA LEE WALTERS

President

Oregon Supreme Court
1163 State St.
Salem, OR 97301

HARRIET LANSING

Vice President

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

H. LANE KNEEDLER

Secretary

901 E. Byrd St., Suite 1700
Richmond, VA 23219

CHARLES A. TROST

Treasurer

Nashville City Center
511 Union St., Suite 2700
Nashville, TN 37219

EXECUTIVE COMMITTEE

ROBERT A. STEIN

Chair

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

RICHARD T. CASSIDY

100 Main St.
P.O. Box 1124
Burlington, VT 05402

LANI LIU EWART

1099 Alakea St., Suite 1800
Honolulu, HI 96813

MICHAEL B. GETTY

430 Cove Towers Dr., #503
Naples, FL 34110

EX OFFICIO MEMBERS

President

Vice President

Secretary

Treasurer

HOWARD SWIBEL

Immediate Past President

120 S. Riverside Plaza, Suite 1200
Chicago, IL 60606

MICHAEL HOUGHTON

Chair, Scope and Program Committee

P.O. Box 1347
1201 N. Market St., 18th Floor
Wilmington, DE 19899

ROBERT J. TENNESSEN

Chair, Legislative Committee

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

January 28, 2008

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 Clayton

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

2-6



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
DATE: January 30, 2008
RE: 2008 Senate Bill No. 435

BACKGROUND

In 2006, the Legislature passed the Revised Kansas Code for Care of Children and the Revised Kansas Juvenile Justice Code, both effective January 1, 2007. As with any significant code revision, some issues arise that require immediate attention while other issues become apparent only after some time has passed. The Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee (Committee) worked with the 2007 Legislature to amend sections of the Codes that needed immediate change including sections relating to juvenile fingerprints and photographs, reading of reports pertaining to evaluation or development needs of the child, and service of process. Since then, the Committee has prepared practice forms for both the Revised Kansas Code for Care of Children and the Revised Kansas Juvenile Justice Code and in doing so, the Committee has identified several other areas that need to be amended. Some of the proposed amendments are technical in nature, some require clarification and some are required to remain in compliance with federal acts or regulations. The Committee proposes Senate Bill 435 to correct these problems.

COMMENT TO CHANGES

The majority of the changes recommended in 2008 Senate Bill 435 are technical or clarifying in nature. Sections 8, 15 and 20 contain technical changes while Sections 1-3, 6, 7, 9-11, and 13 clarify current language. The more substantive changes recommended are in Sections 4, 5, 12, 14, 16-19, and 21, and are discussed below.

Senate Judiciary
1-30-08
Attachment 3

The amendment in Section 4 replaces K.S.A. 38-133, which will be repealed, and clarifies that where a child's parents refuse to give consent or are not available to give consent, and surgical or medical care is determined by a physician to be necessary for the welfare of such child, the providing of health care to the child should not be delayed until disposition.

The amendment in Section 5 pertains to service of process and makes it consistent with K.S.A. 60-304(c) relating to service on a disabled person. K.S.A. 77-201(27) includes those who are incapacitated or imprisoned in its definition of "under legal disability." In addition, the second sentence of subsection (d) was stricken to remove the requirement that the person in charge of an institution consult with the parent to complete service of process. The Committee is of the opinion that such a requirement is inappropriate and that communication of the client's wishes to the court is the role of the attorney.

The amendments in Sections 12 and 17 relate to amendments to the Adoption and Safe Families Act (ASFA) which changed the reference from the "opportunity" to be heard to the "right" to be heard. This amendment is required by federal enactments, is tied to funding and does not alter current law.

The amendment in Section 14 is necessary because the child is in the custody of the secretary at this time, but may be living in the home of a parent.

The amendment in Section 16 clarifies the start time for scheduling permanency hearings and brings the statute in line with ASFA.

The amendment in Section 18 addresses the obstacles the Court faces when trying to obtain relinquishments from incarcerated persons or those living out of state. The proposed language allows for a written relinquishment to be acknowledged either before a judge or by a notary. The proposed language is nearly identical to K.S.A. 59-2124(c) in the adoption code.

The amendment in Section 19 adds "extended out of home placement" as defined in K.S.A. 38-2202(h), to the factors to be considered in termination of parental rights.

The amendment in Section 21 provides a clear definition of "infectious disease" that broadens permitted testing to all infectious diseases rather than limiting it to HIV and Hepatitis B as the current language seems to do. In addition, the change makes the statute consistent with the adult counterpart in K.S.A. 65-6009.

ADDITIONAL PROPOSED AMENDMENTS

While reviewing SB 435, the Committee determined that there were a few additional changes that should be recommended in Sections 4, 8, 17, and 20. These additional recommendations are included in the balloon amendments attached to this testimony. The additional amendments to Section 4, were discussed by the Committee when reviewing the bill and are intended to better clarify the language and maintain consistency within the statute. The additional changes in sections

8 and 17 are changes that were originally requested but simply did not make it into the bill. The additional amendment to section 20 is technical.

PROPOSED AMENDMENTS TO SECTION 4

SB 435

7

30 Sec. 4. K.S.A. 2007 Supp. 38-2217 is hereby amended to read as
31 follows: 38-2217. (a) *Physical or mental care and treatment.* (1) When a
32 child less than 18 years of age is alleged to have been physically, mentally
33 or emotionally abused or neglected or sexually abused, no consent shall
34 be required to medically examine the child to determine whether the
35 child has been abused or neglected. Unless the child is alleged or sus-
36 pected to have been abused by the parent or guardian, the investigating
37 officer shall notify or attempt to notify the parent or guardian of the
38 medical examination of the child.

39 (2) When the health or condition of a child who is subject to juris-
40 diction of the court requires it, the court may consent to the performing
41 and furnishing of hospital, medical, surgical or dental treatment or pro-
42 cedures, including the release and inspection of medical or dental records.

43 A child, or parent of any child, who is opposed to certain medical pro-
SB 435

8

1 cedures authorized by this subsection may request an opportunity for a
2 hearing thereon before the court. Subsequent to the hearing, the court
3 may limit the performance of matters provided for in this subsection or
4 may authorize the performance of those matters subject to terms and
5 conditions the court considers proper.

6 (3) The custodian is the personal representative for the purpose of
7 consenting to disclosure of otherwise protected health information and
8 may give consent to the following:

- 9 (A) Dental treatment for the child by a licensed dentist;
- 10 (B) diagnostic examinations of the child, including but not limited to
- 11 the withdrawal of blood or other body fluids, x-rays and other laboratory
- 12 examinations;
- 13 (C) releases and inspections of the child's medical history records;
- 14 (D) immunizations for the child;

1) To maintain consistency,
insert after custodian:
"or an agent of the custodian"

After amendment paragraph (3)
should read, "The custodian or an
agent of the custodian is the personal
representative for the purpose of
consenting to disclosure of otherwise
protected health information and
may give consent to the following."

15 (E) administration of lawfully prescribed drugs to the child; and
 16 (F) examinations of the child including, but not limited to, the with-
 17 drawal of blood or other body fluids or tissues for the purpose of deter-
 18 mining the child's parentage.; and
 19 (G) subject to limitations in K.S.A. 59-3075(d)(4), (5) and (6), medical
 20 or surgical care determined by a physician to be necessary for the welfare
 21 of such child, if the parents are not available or refuse to consent.
 22 (4) When the court has ~~granted legal custody of a child in a disposi-~~
 23 ~~tional hearing to adjudicated a child to be in need of care, any agency,~~
 24 ~~association or individual, the custodian or an agent designated by the~~
 25 ~~custodian~~ having custody of the child is the personal representative for
 26 the purpose of consenting to disclosure of otherwise protected health
 27 information and shall have authority to consent to the performance and
 28 furnishing of hospital, medical, surgical or dental treatment or procedures
 29 or mental care or treatment other than inpatient treatment at a state
 30 psychiatric hospital, including the release and inspection of medical or
 31 hospital records, subject to terms and conditions the court considers
 32 proper.
 33 (5) Any health care provider who in good faith renders hospital, med-
 34 ical, surgical, mental or dental care or treatment to any child or discloses
 35 protected health information as authorized by this section shall not be
 36 liable in any civil or criminal action for failure to obtain consent of a
 37 parent.
 38 (6) Nothing in this section shall be construed to mean that any person
 39 shall be relieved of legal responsibility to provide care and support for a
 40 child.
 41 (b) *Care and treatment requiring court action.* If it is brought to the
 42 court's attention, while the court is exercising jurisdiction over the person
 43 of a child under this code, that the child may be a mentally ill person as
 SB 435
 1 defined in K.S.A. 59-2946, and amendments thereto, or a person with an
 2 alcohol or substance abuse problem as defined in K.S.A. 59-29b46, and

5) Strike:
 "having
 custody of
 the child"

2) Technical change: Strike: "(d)" and insert "(e)". The statute should read, "K.S.A. 59-3075(e)(4), (5) and (6)".

3) Strike:
 "any agency, association or individual,".

4) To maintain consistency, do not strike and reinsert: "*the custodian or an agent designated by the custodian*".

6) To maintain consistent limitations, insert: "*and subject to the limitations of K.S.A. 59-307(e)(4), (5) and (6)*".

After amendment, paragraph (4) should read, "When the court has *adjudicated a child to be in need of care, the custodian or an agent designated by the custodian* is the personal representative for the purpose of consenting to disclosure of otherwise protected health information and shall have authority to consent to the performance and furnishing of hospital, medical, surgical or dental treatment or procedures or mental care or treatment other than inpatient treatment at a state psychiatric hospital, including the release and inspection of medical or hospital records, subject to terms and conditions the court considers proper *and subject to the limitations of K.S.A. 59-307(e)(4), (5) and (6)*."

3 amendments thereto, the court may:
4 (1) Direct or authorize the county or district attorney or the person
5 supplying the information to file the petition provided for in K.S.A. 59-
6 2957, and amendments thereto, and proceed to hear and determine the
7 issues raised by the application as provided in the care and treatment act
8 for mentally ill persons or the petition provided for in K.S.A. 59-29b57,
9 and amendments thereto, and proceed to hear and determine the issues
10 raised by the application as provided in the care and treatment act for
11 persons with an alcohol or substance abuse problem; or
12 (2) authorize that the child seek voluntary admission to a treatment
13 facility as provided in K.S.A. 59-2949, and amendments thereto, or K.S.A.
14 59-29b49, and amendments thereto.
15 The application to determine whether the child is a mentally ill person
16 or a person with an alcohol or substance abuse problem may be filed in
17 the same proceedings as the petition alleging the child to be a child in
18 need of care, or may be brought in separate proceedings. In either event,
19 the court may enter an order staying any further proceedings under this
20 code until all proceedings have been concluded under the care and treat-
21 ment act for mentally ill persons or the care and treatment act for persons
22 with an alcohol or substance abuse problem.

PROPOSED AMENDMENT TO SECTION 8

SB 435 13

43 Sec. 8. K.S.A. 2007 Supp. 38-2244 is hereby amended to read as

SB 435 14

1 follows: 38-2244. (a) At any time after filing a petition, but prior to an
2 adjudication, the court may enter an order for continuance and informal
3 supervision without an adjudication if no party ~~or interested party~~ objects.

4 Upon granting the continuance, the court shall include in the order any
5 conditions with which the parties ~~or~~ *and* interested parties are expected
6 to comply and provide the parties ~~or~~ interested parties with a copy of the
7 order. The conditions may include appropriate dispositional alternatives
8 authorized by K.S.A. 2007 Supp. 38-2255, and amendments thereto.

9 (b) An order for informal supervision may remain in force for a period
10 of up to six months and may be extended, upon hearing, for an additional
11 six-month period for a total of one year. For a child under an order for
12 informal supervision who remains in the custody of such child's parent,
13 such one-year period may be extended if no party objects, upon hearing,
14 for up to an additional one year, with reviews by the court occurring at
15 least every six months.

16 (c) The court after notice and hearing may revoke or modify the order
17 with respect to a party or interested party upon a showing that the party
18 or interested party, being subject to the order for informal supervision,
19 has substantially failed to comply with the terms of the order, or that
20 modification would be in the best interests of the child. Upon revocation,
21 proceedings shall resume pursuant to this code.

22 (d) Persons subject to the order for informal supervision who suc-
23 cessfully complete the terms and period of supervision shall not again be
24 proceeded against in any court based solely upon the allegations in the
25 original petition and the proceedings shall be dismissed.

26 (e) If the court issues an order for informal supervision pursuant to
27 this section, the court may also enter an order restraining any alleged

Strike "or"
Insert "*and*"

After amendment the sentence should read, "Upon granting the continuance, the court shall include in the order any conditions with which the parties *and* interested parties are expected to comply and provide the parties *and* interested parties with a copy of the order."

28 perpetrator of physical, mental or emotional abuse or sexual abuse of the
29 child from residing in the child's home, visiting, contacting, harassing or
30 intimidating the child, other family member or witness; or attempting to
31 visit, contact, harass or intimidate the child, other family member or wit-
32 ness. The restraining order shall be served by personal service pursuant
33 to subsection (a) of K.S.A. 2007 Supp. 38-2237, and amendments thereto,
34 on any alleged perpetrator to whom the order is directed.
35 (f) Lack of service on a parent shall not preclude an informal super-
36 vision under the provisions of this section. If an order of informal super-
37 vision is entered which effects change in custody, any parent not served
38 pursuant to K.S.A. 2007 Supp. 38-2237, and amendments thereto, who
39 has not consented to the informal supervision, may request reconsidera-
40 tion of the order of informal supervision. The court shall hear the request
41 without unnecessary delay. If the informal supervision order effects a
42 change in custody, efforts to accomplish service pursuant to K.S.A. 2007
43 Supp. 38-2237, and amendments thereto, shall continue.

PROPOSED AMENDMENT TO SECTION 17

SB 435 23

27 Sec. 17. K.S.A. 2007 Supp. 38-2265 is hereby amended to read as
28 follows: 38-2265. (a) The court shall require notice of the time and place
29 of the permanency hearing be given to the parties and interested parties.
30 The notice shall state that the person receiving the notice shall have an
31 opportunity to be heard at the hearing.

32 (b) The court shall require notice and ~~opportunity~~ *the right* to be
33 heard to the following:

- 34 (1) The child's foster parent or parents or permanent custodian pro-
35 viding care for the child;
- 36 (2) preadoptive parents for the child, if any;
- 37 (3) the child's grandparents at their last known addresses or, if no
38 grandparent is living or if no living grandparent's address is known, to the
39 closest relative of each of the child's parents whose address is known;
- 40 (4) the person having custody of the child; and
- 41 (5) upon request, by any person having close emotional ties with the
42 child and who is deemed by the court to be essential to the deliberations
43 before the court.

SB 435 24

1 (c) The notices required by this subsection shall be given by first class
2 mail, not less than 10 business days before the hearing.

3 (d) Individuals receiving notice pursuant to subsection (b) shall not
4 be made a party or interested party to the action solely on the basis of
5 this notice and ~~opportunity~~ *the right* to be heard. ~~Opportunity~~ *The right*
6 to be heard shall be at a time and in a manner determined by the court
7 and does not confer an entitlement to appear in person *at government*
8 *expense*.

9 (e) The provisions of this section shall not require additional notice
10 to any person otherwise receiving notice of the hearing pursuant to K.S.A.
11 2007 Supp. 38-2239, and amendments thereto.

Strike "an opportunity"
Insert "*the right*"

After amendment, paragraph (a) should read, "The court shall require notice of the time and place of the permanency hearing be given to the parties and interested parties. The notice shall state that the person receiving the notice shall have *the right* to be heard at the hearing."

PROPOSED AMENDMENT TO SECTION 20

SB 435 27

30 Sec. 20. K.S.A. 2007 Supp. 38-2304 is hereby amended to read as
31 follows: 38-2304. (a) Except as provided in K.S.A. 2007 Supp. 38-2347,
32 and amendments thereto, proceedings concerning a juvenile shall be gov-
33 erned by the provisions of this code.

34 (b) The district court shall have original jurisdiction to receive and
35 determine proceedings under this code.

36 (c) When a complaint is filed under this code, the juvenile shall be
37 presumed to be subject to this code, unless the contrary is proved.

38 (d) Once jurisdiction is acquired by the district court over an alleged
39 juvenile offender, except as otherwise provided in subsection (e), juris-
40 diction shall continue until one of the following occurs:

- 41 (1) The complaint is dismissed;
- 42 (2) the juvenile is adjudicated not guilty at trial;
- 43 (3) the juvenile, after being adjudicated guilty and sentenced:

SB 435 28

- 1 (i) Successfully completes the term of probation or order of assign-
2 ment to community corrections;
- 3 (ii) is discharged by the commissioner pursuant to K.S.A. 2007 Supp.
4 38-2376, and amendments thereto; ~~or~~
- 5 (iii) reaches the juveniles 21st birthday and no exceptions apply that
6 extend jurisdiction beyond age 21;
- 7 (4) the court terminates jurisdiction; or
- 8 (5) the offender is convicted of a new felony while the offender is
9 incarcerated in a juvenile correctional facility pursuant to K.S.A. 38-1671
10 prior to its repeal or K.S.A. 2007 Supp. 38-2373, and amendments
11 thereto, for an offense, which if committed by an adult would constitute
12 the commission of a felony.

13 (e) Once jurisdiction is acquired by the district court over an alleged
14 juvenile offender, it shall continue beyond the juvenile offender's 21st

<p>Insert an apostrophe: "juvenile's"</p> <p>After amendment, subparagraph (iii) should read, "reaches the juvenile's 21st birthday and no exceptions apply that extend jurisdiction beyond age 21;".</p>
--

15 birthday but no later than the juvenile offender's 23rd birthday if either
16 or both of the following conditions apply:

17 (1) The juvenile offender is sentenced pursuant to K.S.A. 2007 Supp.
18 38-2369, and amendments thereto, and the term of the sentence includ-
19 ing successful completion of aftercare extends beyond the juvenile of-
20 fender's 21st birthday; or

21 (2) the juvenile offender is sentenced pursuant to an extended juris-
22 diction juvenile prosecution and continues to successfully serve the sen-
23 tence imposed pursuant to the revised Kansas juvenile justice code.

24 (f) Termination of jurisdiction pursuant to this section shall have no
25 effect on the juvenile offender's continuing responsibility to pay restitu-
26 tion ordered.

27 (g) (1) If a juvenile offender, at the time of sentencing, is in an out
28 of home placement in the custody of the secretary of social and rehabil-
29 itation services under the Kansas code for care of children, the sentencing
30 court may order the continued placement of the juvenile offender as a
31 child in need of care unless the offender was adjudicated for a felony or
32 a second or subsequent misdemeanor. If the adjudication was for a felony
33 or a second or subsequent misdemeanor, the continued placement cannot
34 be ordered unless the court finds there are compelling circumstances
35 which, in the best interest of the juvenile offender, require that the place-
36 ment should be continued. In considering whether compelling circum-
37 stances exist, the court shall consider the reports and recommendations
38 of the foster placement, the contract provider, the secretary of social and
39 rehabilitation services, the presentence investigation and all other rele-
40 vant factors. If the foster placement refuses to continue the juvenile in
41 the foster placement the court shall not order continued placement as a
42 child in need of care.

43 (2) If a placement with the secretary of social and rehabilitation serv-
SB 435 29

1 ices is continued after sentencing, the secretary shall not be responsible
2 for any costs of sanctions imposed under this code.

3 (3) If the juvenile offender is placed in the custody of the juvenile
4 justice authority, the secretary of social and rehabilitation services shall
5 not be responsible for furnishing services ordered in the child in need of
6 care proceeding during the time of the placement pursuant to the revised
7 Kansas juvenile justice code. Nothing in this subsection shall preclude
8 the juvenile offender from accessing other services provided by the de-
9 partment of social and rehabilitation services or any other state agency if
10 the juvenile offender is otherwise eligible for the services.

3-12

SENATE BILL No. 418

By Committee on Judiciary

1-15

9 AN ACT concerning the Kansas sentencing commission; relating to the
10 duties thereof; amending K.S.A. 2007 Supp. 74-9101 and repealing
11 the existing section.
12

13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 2007 Supp. 74-9101 is hereby amended to read as
15 follows: 74-9101. (a) There is hereby established the Kansas sentencing
16 commission.

17 (b) The commission shall:

18 (1) Develop a sentencing guideline model or grid based on fairness
19 and equity and shall provide a mechanism for linking justice and correc-
20 tions policies. The sentencing guideline model or grid shall establish ra-
21 tional and consistent sentencing standards which reduce sentence dis-
22 parity, to include, but not be limited to, racial and regional biases which
23 may exist under current sentencing practices. The guidelines shall specify
24 the circumstances under which imprisonment of an offender is appro-
25 priate and a presumed sentence for offenders for whom imprisonment is
26 appropriate, based on each appropriate combination of reasonable of-
27 fense and offender characteristics. In developing its recommended sen-
28 tencing guidelines, the commission shall take into substantial considera-
29 tion current sentencing and release practices and correctional resources,
30 including but not limited to the capacities of local and state correctional
31 facilities. In its report, the commission shall make recommendations re-
32 garding whether there is a continued need for and what is the projected
33 role of, if any, the Kansas parole board and whether the policy of allo-
34 cating good time credits for the purpose of determining an inmate's eli-
35 gibility for parole or conditional release should be continued;

36 (2) consult with and advise the legislature with reference to the im-
37 plementation, management, monitoring, maintenance and operations of
38 the sentencing guidelines system;

39 (3) direct implementation of the sentencing guidelines system;

40 (4) assist in the process of training judges, county and district attor-
41 neys, court services officers, state parole officers, correctional officers,
42 law enforcement officials and other criminal justice groups. For these
43 purposes, the sentencing commission shall develop an implementation

1 before six weeks following the date of receipt of the data from the de-
2 partment of corrections. When the commission's projections indicate that
3 the inmate population will exceed available prison capacity within two
4 years of the date of the projection, the commission shall identify and
5 analyze the impact of specific options for (A) reducing the number of
6 prison admissions; or (B) adjusting sentence lengths for specific groups
7 of offenders. Options for reducing the number of prison admissions shall
8 include, but not be limited to, possible modification of both sentencing
9 grids to include presumptive intermediate dispositions for certain cate-
10 gories of offenders. Intermediate sanction dispositions shall include, but
11 not be limited to: intensive supervision; short-term jail sentences; halfway
12 houses; community-based work release; electronic monitoring and house
13 arrest; substance abuse treatment; and pre-revocation incarceration. In-
14 termediate sanction options shall include, but not be limited to, mecha-
15 nisms to explicitly target offenders that would otherwise be placed in
16 prison. Analysis of each option shall include an assessment of such options
17 impact on the overall size of the prison population, the effect on public
18 safety and costs. In preparing the assessment, the commission shall review
19 the experience of other states and shall review available research regard-
20 ing the effectiveness of such option. The commission's findings relative
21 to each sentencing policy option shall be presented to the governor and
22 the joint committee on corrections and juvenile justice oversight no later
23 than November 1;

24 (16) at the request of the governor or the joint committee on correc-
25 tions and juvenile justice oversight, initiate and complete an analysis of
26 other sentencing policy adjustments not otherwise evaluated by the
27 commission;

28 (17) develop information relating to the number of offenders on post-
29 release supervision and subject to electronic monitoring for the duration
30 of the person's natural life;

31 (18) determine the effect the mandatory sentencing established in
32 K.S.A. 21-4642 and 21-4643, and amendments thereto, would have on
33 the number of offenders civilly committed to a treatment facility as a
34 sexually violent predator as provided pursuant to K.S.A. 59-29a01 et seq.,
35 and amendments thereto; ~~and~~

36 (19) assume the designation and functions of the state statistical anal-
37 ysis center. All criminal justice agencies, as defined in subsection (c) of
38 K.S.A. 22-4701, and amendments thereto, and the juvenile justice au-
39 thority shall provide any data or information, including juvenile offender
40 information, requested by the commission to facilitate the function of the
41 state statistical analysis center; *and*

42 (20) *produce official juvenile correctional facility population projec-*
43 *tions annually on or before* ~~six weeks following the receipt of the data~~

November 1, not more than

SB 418

4

, and develop bed impacts regarding legislation that may affect juvenile correctional facility population

- 1 *from the juvenile justice authority.*
- 2 Sec. 2. K.S.A. 2007 Supp. 74-9101 is hereby repealed.
- 3 Sec. 3. This act shall take effect and be in force from and after its
- 4 publication in the statute book.