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TO: Senate Judiciary Committee
FROM: Kansas Judicial Council – Chris Joseph
DATE: March 14, 2018
RE: Judicial Council Testimony on 2018 HB 2459 Relating to the Kansas Standard Asset Seizure and Forfeiture Act

The Judicial Council recommends HB 2459, which amends the Kansas Standard Asset Seizure and Forfeiture Act (KSASFA), K.S.A. 60-4101 *et seq.* This bill is the product of a request from Senator Rick Wilborn and Representative Blaine Finch that the Kansas Judicial Council study the topic of civil asset forfeiture, which had been the subject of a Legislative Post Audit report in July 2016, as well as five House bills and three Senate bills introduced in 2017.

The Judicial Council formed an ad hoc advisory committee to conduct the study, and a list of the committee members can be found at the end of this testimony. In forming the Civil Asset Forfeiture Advisory Committee, the Judicial Council invited both proponents and opponents of forfeiture law reform to participate. As always, the Council's goal was to bring people on all sides of the issue to the table in hopes of facilitating communication and consensus. Because of the diverse viewpoints held by its members, the Committee focused its efforts on finding areas of agreement. The Committee's full report is available at the Judicial Council's website.

The Committee's recommendations are discussed in more detail below and are keyed to the specific sections of the bill in which the related amendments are located. The bill includes amendments consistent with the following general conclusions reached by the Committee regarding KSASFA and how it can be improved:

- Kansas should have a central repository for forfeiture and seizure data, along with more detailed reporting requirements;
- guidelines for law enforcement agencies' tracking and use of forfeiture proceeds should be clarified;

- KSASFA should be amended in several areas to make it easier for a property owner to successfully file a claim and to make the process more fair to claimants; and
- KSASFA should clearly proscribe referrals of forfeiture cases by public officials to any person or law firm in which the official has a direct or indirect financial interest.

The Committee was not able to reach agreement on any of the more sweeping reforms contained in bills introduced in the 2017 Legislative session. The main obstacle in making further changes was the lack of any reliable data to support them. Many Committee members were unwilling to throw out the existing system without proof of systemic problems, arguing that changes to Kansas law should be Kansas-focused and based on reliable data as opposed to simply replicating the reforms enacted by other states without evidence of similar circumstances. The Committee believes the central repository and the new reporting requirements in HB 2459 will enable the collection of data from which further changes may be deemed warranted in the future. The Committee does not consider its work to be completed. If HB 2459 passes, the Committee stands ready to draft forms and instructions and is willing to reconvene in the future to reassess these issues once there is sufficient data available for analysis and review.

New Section 1

This section creates a central repository for asset seizure and forfeiture reporting. The Kansas Bureau of Investigation (KBI) will establish the repository and an associated public website, which will be operational by July 1, 2019. Also by the same date, the KBI is required to promulgate rules and regulations to implement the new statute.

On and after July 1, 2019, each seizing agency must report information about each seizure for forfeiture within 60 days after the final disposition of the forfeiture. In deciding what information must be reported, the Committee tried to strike a reasonable balance – ensuring that sufficient data would be collected to meet public policy concerns, while at the same time being cognizant of adding burden and expense for seizing agencies that must comply with the reporting requirements. The Committee also kept in mind that the cost for the KBI to create and maintain the repository increases the more complex and detailed the data to be collected becomes. The Committee agreed on general questions that must be answered and categories of data that must be collected, which are set forth in subsection (a).

A sample Kansas Asset Forfeiture Incident Report, which must be filled out for each seizure for forfeiture, is attached to this testimony at page 8. While this sample is not the exact report form that will be used after the rules and regulations process is completed, it is based on the categories set forth in the subsection (a) and gives an idea of the kind of information the Committee believes should be collected to answer public policy questions and ensure transparency.

Subsection (d) requires each law enforcement agency in Kansas to submit an annual forfeiture fund report to the asset seizure and forfeiture repository. Under current law, a city or county law enforcement agency must submit an annual report to the entity that has budgetary

authority over the agency. There have been reported compliance problems with this requirement, and even if done appropriately, the reports are not available to the public unless requested individually from each city and county governing body. The required report will include beginning balances, total deposits, and an itemized listing of expenditures for the preceding calendar year. A sample Annual Agency Financial Report is attached to this report at page 13 and requires each agency to separately account for federal forfeiture funds. The current requirements, now located in K.S.A. 60-4117(g), will remain in place until the new requirements become effective.

The Committee believes the new reporting system will serve multiple purposes. It will create transparency in asset seizure and forfeiture, an area in which transparency is currently lacking. The data that will become available as a result of the new reporting requirements will in the future enable a more focused debate on civil asset forfeiture in Kansas, with arguments based on Kansas data.

Section 2, amending K.S.A. 45-220, Procedures for obtaining access to or copies of records.

This section contains an amendment to K.S.A. 45-220, a statute in the Kansas Open Records Act. The KBI will maintain a public website that displays the seizure and forfeiture data submitted to the repository by law enforcement agencies. Pursuant to new subsection (h) of K.S.A. 45-220, any specific requests for the records submitted to the KBI – or for additional information – must be directed to the law enforcement agency from which the records originated.

Section 5, amending K.S.A. 60-4107, Seizure of property.

The first amendments in subsections (h) and (i) clarify that the county or district attorney has an affirmative duty to review and respond to each request individually. In spite of that duty, the “or fails to answer” language must be retained or the law enforcement agency would be left with no options should the county or district attorney neglect the duty to respond.

The amendment to subsection (h)(2) is intended to address the issue uncovered in the 2016 Legislative Post Audit (LPA) Report regarding how the Montgomery County Attorney pursued forfeitures for the Coffeyville Police Department. Under current law, if the county attorney declines to pursue a forfeiture case, a law enforcement agency may engage a private attorney to pursue the case as long as the county attorney approves. The Montgomery County Attorney was declining forfeiture cases in his capacity as county attorney and taking the cases instead in his capacity as a private attorney. The LPA Audit found this arrangement to present a clear conflict of interest.

The amendment makes clear that it is not allowed for a county or district attorney to approve the hiring of himself or herself as a private attorney, or an affiliated law firm. The language also prohibits an indirect financial interest, such as a county attorney approving a referral to a spouse or a spouse’s law firm. Similar amendments have been made in subsection (i), which prohibit the attorney general from approving the engagement of an attorney with whom the attorney general has a direct or indirect interest.

New subsection (j) prohibits a county attorney, district attorney, or the attorney general from requesting or receiving a referral fee or personal benefit, direct or indirect, from any proceeding conducted under KSASFA.

Section 6, amending K.S.A. 60-4109, Commencement of forfeiture proceedings.

The amendments to subsection (a) result in service provisions that conform more closely to service pursuant to the code of civil procedure. Under current law, subsection (a)(4) provides that notice is effective upon mailing, which allows a plaintiff – 30 days after mailing a notice of pending forfeiture – to apply for an order of forfeiture with no proof that the owner or interest holder received the notice. As amended, service by certified mail is effective pursuant to the code of civil procedure, which is upon delivery, not upon mailing.

The Committee acknowledged that this change could create difficulties for plaintiffs because a high number of mailed notices are returned as undeliverable, despite having been sent to addresses obtained from drivers licenses, vehicle registrations, and other such sources. To enable plaintiffs to proceed when a mailed notice is returned without delivery, subparagraph (a)(3)(C) has been amended to allow for service by publication if service by certified mail under subparagraphs (a)(3)(A) or (B) has failed.

Subparagraph (a)(4) contains a new requirement that plaintiffs include an affidavit with the notice of pending forfeiture. The affidavit must describe the “essential facts supporting forfeiture,” which would include a description of conduct that is covered under K.S.A. 60-4104 and facts that establish the property is subject to forfeiture under K.S.A. 60-4105. Under current law, the plaintiff is not required to factually support the forfeiture unless or until an owner or interest holder successfully responds to a notice of pending forfeiture such that the matter ends up in front of a judge. Requiring an affidavit much earlier in the process will compel the plaintiff to prove up the foundation of all cases, not just those that make it to hearing. Law enforcement officers take the signing of affidavits seriously and will carefully evaluate the facts in an affidavit before affixing his or her signature to that document. The new affidavit requirement would also negate any perception that cases can be improperly pursued in hopes of a default and an easy win for the plaintiff.

The final sentence of subsection (a)(4) was added to require also that Judicial Council forms be sent with the notice of pending forfeiture. Receiving the appropriate forms for petitioning for recognition of an exemption under K.S.A. 60-4110 or making a claim under K.S.A. 60-4111 will make it more practicable for an owner to defend his or her property, especially if the owner cannot afford to retain an attorney.

Section 7, amending K.S.A. 60-4110, Recognition of exemption.

In this section, the time by which a property owner or interest holder must file a claim or a petition for recognition of exemption is expanded from 30 days to 60 days after the effective date of the notice of pending forfeiture. This is intended to increase the likelihood that a property owner or interest holder actually receives notice and has time to act before the forfeiture action progresses. The time by which a plaintiff must respond to a petition for recognition of exemption is shortened from 120 days to 90 days.

The requirement in subsection (a)(2) that the claim or petition must comply with the requirements in K.S.A. 60-4111 and K.S.A. 60-4109, respectively, has been changed to require that the claim or petition “substantially comply.” See the discussion in Section 8 below regarding substantial compliance.

Section 8, amending K.S.A. 60-4111, Claims.

In subsection (a), the time by which a property owner or interest holder must file a claim is expanded from 30 days to 60 days after the effective date of the notice of pending forfeiture. The last sentence of the subsection regarding extension of time to file has been deleted. The Committee sees no reason for a special rule in KSASFA limiting filing extensions for claimants. With this specific language deleted, the regular rules of civil procedure and Supreme Court Rules will govern extensions as in any other civil case.

The amendments in subsection (b) are intended to reduce barriers in the current law that make it difficult for property owners and interest holders to get into the case to litigate their claims. The requirement that the claim and all supporting documents be in affidavit form and sworn to before a notary is deleted. The Committee believes it is sufficient that the claim be signed under penalty of perjury, as by an unsworn declaration under K.S.A. 53-601.

Under current law, there are seven pieces of information specifically required under K.S.A. 60-4111(b)(1) through (b)(7) to be included in a claim. These requirements represent a significant hurdle for pro se claimants, and sometimes even for attorneys representing claimants. If these requirements are not fully and properly met, the claim can be dismissed, leaving the claimant no reasonable way forward to defend his or her property. The amendments to subsection (b) are intended to make it easier for a property owner or interest holder to file a sufficient claim. The requirements in subsections (b)(1), (2), and (3), have been retained, and the specificity required in subsection (b)(4) has been reduced. The requirements in subsections (b)(5), (6), and (7) have been deleted. The Committee believes simplifying subsection (b)(4) and striking subsections (b)(5), (6), and (7) will make filing a proper claim far more manageable for a pro se owner and will still provide sufficient information to allow the plaintiff to investigate the claim and determine if the property is exempt.

A new subsection (c) has been added, which provides that substantial compliance with the requirements in subsection (b) is sufficient. This amendment is intended to ensure a more liberal construction of these requirements in the future and to explicitly depart from current case law. Although the Kansas Supreme Court has never addressed the issue, the Court of Appeals has held many times that the requirements of K.S.A. 60-4111 are mandatory, not directory. See *e.g.*, *State v. \$6,618.00 U.S. Currency*, 35 Kan. App. 2d 54, 128 P.3d 413 (2006). An owner who fails to meet all the requirements of K.S.A. 60-4111 is deprived of standing to file an answer and litigate the claim in the subsequent in rem forfeiture proceeding. *Id.*, at 59. The Court of Appeals has recognized that meeting KSASFA's requirements may be difficult for some owners, but has noted that "whether it is bad public policy to place these filing requirements on pro se parties is a question properly addressed to the legislature, not this court." *State v. One 1995 Chevrolet Caprice Classic/Impala SS*, 53 Kan. App. 2d 35, 382 P.3d 476 (2016).

New subsection (d) is intended to eliminate a Constitutional issue that exists under current law. A claimant who alleges a violation of the claimant's Fourth Amendment right against unreasonable search and seizure is unable to reach the issue of suppression of the evidence if the claimant also wishes to invoke the Fifth Amendment right against self-incrimination by failing to provide a piece of information required in the claim. This is because if the information is not

provided as required under K.S.A. 60-4111(b), the claim will be dismissed. The new language, which incorporates the applicable law regarding adverse influences as a consequence of invoking the Fifth Amendment in a civil case, will ensure a claimant is not forced to lie in the claim or choose between the claimant's Fourth and Fifth Amendment rights.

Section 9, amending K.S.A. 60-4112, Judicial proceedings, generally.

This section deletes two rebuttable presumptions in subsections (j) and (s) that benefit the plaintiff, and amends the presumption in subsection (k). These amendments are intended to require the plaintiff to prove every element of its case.

Section 10, amending K.S.A. 60-4112, Recognition of exemption.

The amendments to subsections (d), (e), and (f) mirror the amendments to K.S.A. 60-4111(b), (c), and (d). See Section 8 above.

Subsection (f) has been deleted. The Committee sees no reason to have special discovery rules in cases under KSASFA. With this specific language deleted, the regular rules of civil procedure and Supreme Court Rules will govern discovery as in any other civil case.

Section 11, amending K.S.A. 60-4114, In personam proceedings.

The time by which a property owner or interest holder must file a claim under subsection (f) is extended from 30 days to 60 days.

Section 12, amending K.S.A. 60-4117, Disposition of forfeited property; use of proceeds of sale.

The annual reporting requirements have been deleted from subsections (d)(1) and (2) and were moved to subsections (g)(1) and (2). After July 1, 2019, these reporting requirements expire and the reporting requirements in new Section 1 of the bill will apply.

The new language in subsection (e) is intended to clarify the permitted use by law enforcement agencies of forfeiture proceeds. New subsection (e)(2) contains an exclusive list of "special, additional law enforcement purposes" for which forfeiture proceeds may be used. The new provisions are adapted from the United States Department of Justice's guidelines governing the use of equitable sharing funds.

New subsection (e)(3) incorporates the LPA's recommended best practices for separately tracking revenue sources to avoid any commingling and requires tracking three separate categories of proceeds.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Civil Asset Forfeiture Advisory Committees are:

Rep. Fred Patton, Chair, District 50 State Representative and practicing attorney; Topeka

Marc Bennett, Sedgwick County District Attorney; Wichita

Rep. Gail Finney, District 84 State Representative and small business owner; Wichita

Vignesh Ganapathy, Director of Policy and the Racial Justice Project at ACLU of Kansas; Overland Park

Sen. David Haley, District 4 State Senator and public affairs counselor; Kansas City

Christopher M. Joseph, practicing attorney; Topeka

Ed Klumpp, Kansas Association of Chiefs of Police, Kansas Sheriffs Association, and Kansas Peace Officers Association; Tecumseh

Benet Magnuson, Executive Director at Kansas Appleseed; Lawrence

Josh Ney, Jefferson County Attorney; Oskaloosa

Hon. Ben Sexton, District Judge in Dickinson County; Abilene

Amanda Stanley, Legal Counsel for the League of Kansas Municipalities; Topeka

Kirk Thompson, Director of the Kansas Bureau of Investigation; Topeka

Melissa Wangemann, General Counsel for the Kansas Association of Counties; Topeka

Sarah Washburn, Legal Counsel for the Kansas Highway Patrol; Topeka

Hon. Marilyn Wilder, District Judge in Harvey County; Newton



**KANSAS BUREAU OF INVESTIGATION
 KANSAS ASSET SEIZURE & FORFEITURE REPOSITORY
 KANSAS ASSET FORFEITURE INCIDENT REPORT**

ADMINISTRATIVE INFORMATION

Date of report:

ORI of the seizing agency (lead agency if a multi-jurisdictional task force):

Agency Name:

Mailing Address:

City, State, Zip

Name of multi-jurisdictional task force, if applicable:

County of seizure

Date of seizure

Time of seizure

Location of seizure

Agency Case # (criminal)

Agency Case # (forfeiture)

District Court Case # (criminal)

District Court Case # (forfeiture)

Incident Information

Owner/possessor #1

Race **Country of residence**

Gender **State of residence**

Age

Arrested (related to forfeiture) Yes No

Federal prosecution Yes No

State prosecution Yes No

Additional owner/possessor:

Yes

Initiating Law Enforcement Activity

Directed interdiction action Call for service

- Vehicle stop/traffic violation
- Vehicle stop/other
- Investigation
- Pedestrian stop
- Warrant service

Primary Criminal Offense (Seizure)

- Distribution/Manufacturing of Controlled
- Theft
- Sex Offense
- Human Trafficking
- N/A
- Gambling
- Terrorism
- Computer/Cyber Crimes
- Other

Place of Seizure

- Highway/Street
- Residence
- Business/Commercial Property
- Airport
- Public Space
- Other
- Train Station
- Bus Station

Conveyance

- Private vehicle
- Commercial carrier
- Commercial vehicle
- Aircraft
- Train
- N/A

Property Seized for Forfeiture

- Currency
- Vehicles
- Personal Property
- Real Property
- Other

Proceeds Facilitation

\$	\$
\$	\$
\$	\$
\$	\$
\$	\$
\$	\$

Totals

Total of All Property Seized for Forfeiture

\$

Contraband Seized

Controlled Substances

Substance	<input type="text"/>
Quantity (in ounces)	<input type="text"/>
Quantity (in dosage unit)	<input type="text"/>
Estimated street value	<input type="text" value="\$"/>

Additional Controlled Substances

Yes

Weapons

	<input type="text"/>
Quantity	<input type="text"/>
Estimated value	<input type="text" value="\$"/>

Additional Weapons

Yes

Other

Description	<input type="text"/>
Quantity	<input type="text"/>
Estimated street value	<input type="text" value="\$"/>

Concealment Attempt

Contraband

Currency

Other property seized for forfeiture

Describe:

Other

Highway seizure - direction of travel

Source (state) of contraband / property - if known

Destination (state) of contraband or property - if known

Transfer to Federal Agency

- Joint investigation (federal participation)
- Adopted-processing (no federal involvement)
- Federal prosecution

Agency Disposition

- Return to owner
- Declined by prosecutor (forfeiture)
- Filed by prosecutor (forfeiture)

JUDICIAL INFORMATION

Criminal Case Related to Forfeiture

Individual(s) charged criminally with offense related to the forfeiture Yes No

Disposition-Criminal Case Related to Forfeiture

- Dismissed
- Not guilty
- Convicted
- Plea agreement
- Pending

Disposition-Forfeiture Case

- Not filed
- Settlement
- Forfeited - Uncontested/Default
- Forfeited/Contested

Forfeiture Case - Other

Plaintiff's counsel

Owner(s) represented by counsel Yes No

Ownership of forfeited property Claimed Denied

Interest holder identified Yes No
 Other person Yes No
 Financial institution Yes No
 Business Yes No

Forfeiture Disbursements

Currency

Property

Total Forfeited \$ \$

Cost of forfeiture Action

Safekeeping, publications, etc.: \$ \$

Plaintiff's attorneys fees: \$ \$

Shared proceeds:

Agency ORI: \$ \$

(List All):

<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>
<input type="text"/>	\$ <input type="text"/>	\$ <input type="text"/>

Total Costs -\$ -\$

Forfeiture proceeds - agency

Currency forfeited \$

Property forfeited \$

Comments:



**KANSAS BUREAU OF INVESTIGATION
 KANSAS ASSET FORFEITURE REPOSITORY
 KANSAS ASSET FORFEITURE ACT- ANNUAL AGENCY FINANCIAL REPORT**

Calendar Year:

ORI:

Agency Name:

Mailing Address:

City, State, Zip:

STATE FORFEITURE

Beginning account balance as of January 1:

Total year's deposits to the special law enforcement trust fund/
 forfeiture fund:

Expenditures from the special law enforcement trust fund/forfeiture fund:

Purpose:

<input type="checkbox"/> Training expenses	\$
<input type="checkbox"/> Evidence purchase funds	\$
<input type="checkbox"/> Law enforcement equipment	\$
<input type="checkbox"/> Administrative/multi-use equipment	\$
<input type="checkbox"/> Vehicles	\$
<input type="checkbox"/> LE operations	\$
<input type="checkbox"/> Joint LE/Non-LE use	\$
<input type="checkbox"/> Travel expenses	\$
<input type="checkbox"/> Building & Facilities	\$
<input type="checkbox"/> Employee/Partner/Citizen recognitions	\$
<input type="checkbox"/> Overtime/salary and benefits	\$
<input type="checkbox"/> Professional services	\$
<input type="checkbox"/> Victim programs & support	\$
<input type="checkbox"/> Prevention/awareness programs	\$
<input type="checkbox"/> Grant match	\$

Transfers to other LE agencies

\$ []

Other

\$ []

Total year's expenditures:

\$ []

Ending account balance as of December 31:

\$ []

Estimated value of property converted to agency use:

\$ []

PENDING STATE FORFEITURE

Beginning account balance as of January 1:

\$ []

Total year's deposits

\$ []

Total year's transfers:

-\$ []

Ending account balance as of December 31:

\$ []

Property Pending State Forfeiture:

Estimated value of property held as of December 31

\$ []

FEDERAL FORFEITURE

Beginning account balance as of January 1:

\$ []

Total year's deposits:

\$ []

Total year's expenditures:

Purpose:

Law enforcement operations and investigations

\$ []

Evidence purchase

\$ []

Training and education

\$ []

Law enforcement, public safety and detention facilities

\$ []

Law enforcement equipment

\$ []

Vehicles

\$ []

Joint law enforcement/public safety operations

\$ []

- Contracting for services
- Law enforcement travel and per diem
- Law enforcement awards and memorials
- Drug, gang, and other education or awareness programs
- Matching grants
- Transfers to other participating LE agencies
- Support of community-based programs
- Non-categorized expenditures/other
- Salaries
- Overtime

\$
\$
\$
\$
\$
\$
\$
\$
\$
\$

Total year's expenditures:

\$

Ending account balance as of December 31:

\$

Estimated value of property converted to agency use:

\$