

SB 106
House Judiciary Committee

Ronald Smith
Smith, Burnett & Hagerman, LLC
Larned, Kansas
March 18, 2021

Let me make it clear that I do not oppose any part of SB 106. It is not my intent to hold up the bill. All I'd like to see is a slight amendment to Section 41:

Sec. 41. On and after January 1, 2023 ~~{2022}~~, K.S.A. 58-2211 is hereby amended to read as follows: 58-2211. All conveyances, and other instruments affecting real estate must be acknowledged before a person authorized by the *revised* uniform law on notarial acts to perform notarial acts or, if acknowledged within this state, by a county clerk, register of deeds or mayor or clerk of an incorporated city, or said instrument is acknowledged in accordance with KSA 53-601, as amended.

The purpose of this amendment is to allow the law the 1989 legislature enacted to be used as intended.

Let me tell you why. There are several rules of construction the KS Supreme Court uses to interpret the laws enacted by the legislature. One of them is:

It is presumed that the legislature does not intend to enact useless or meaningless legislation. *Davey v. Hedden*, 260 Kan. 413, 419620, 920 P.2d 420 (1996); *Galindo v. City of Coffeyville*, 256 Kan. 455, 464665, 885 P.2d 1246 (1994).

In 1989 I was a lobbyist for the Kansas Bar Association. We helped enact KSA 53-601, allowing unsworn declarations to be used in lieu of notary acknowledgements on all but a few types of documents, including use on affidavit-like documents such as deeds.

Deeds and other documents like easements, nonproduction affidavits, affidavits of equitable interests ó these are affidavit-like documents. An unsworn declaration can be used.

I've listed current KSA 53-601 as the last page of my presentation.

What is an unsworn declaration? The one I used in my practice says the following:

UNSWORN DECLARATION

Pursuant to KSA 53-601 as amended, I declare and certify that I am an adult person and I believe myself to be under oath when making this declaration and that under penalty of perjury that I declare and certify the foregoing instrument is true and correct to the best of my knowledge and belief. I further declare and certify that under Kansas law this Declaration is deemed an adequate substitute for a sworn affidavit or verification and that I signed this Declaration on the date set forth below my signature.

[[name]]

Date: _____, 20_____

I've listed current KSA 53-601 as the last page of my presentation.

The Register of Deeds Association argue that KSA 58-2211, which is sec. 41 of 2021 SB 106, does not allow the use of an Unsworn Declaration (KSA 53-601) by grantor(s) on a real estate deed or affidavit or any other document affecting interests in real estate. They further state that the purpose of 58-2211 is to have an "original" document for filing in the Register of Deeds office.

If I can create an original document with a notary's signature, I can create it with an unsworn declaration.

Practicing attorneys often have clients sign documents that are to be filed in the Register of Deeds office in blue ink. My notary stamp uses blue ink.

The last amendment to KSA 58-2211 was in 1984. The unsworn declaration act 53-601 was enacted in 1989. It was intended the older law conform to the newer laws.

Going back to the legislative construction that I quoted at the beginning of my presentation, it is presumed the legislature did not do a meaningless act in 1989. They intended that 53-601 apply to deeds and other real estate documents because *they did not exempt real estate documents from application of the unsworn declarations law*, as they did with testamentary documents and oaths of office.

That's fine. An unsworn declaration can be signed in blue ink and acknowledged in blue ink and the document can represent the same thing as a deed with a notary stamp. It can be filed as an

original document. Requiring a notary stamp on a deed is not necessary for a valid original document.

When I wrote the Land Title and the Register of Deeds Associations about why unsworn declarations cannot be used on deeds, I get cited to old case law and a 1976 attorney General's opinion. 1989 legislation trumps all of that.

Further, their views do not square with current technology.

- I can sign electronic documents without a notary and open and close investment accounts that far exceed the value of a small house I am trying to record in the register of deeds office. Why is a deed more important than investment documents signed over the internet?
- Absent a timely objection, KSA 22-3437 allows forensic labs to certify the results of lab tests in criminal prosecutions as if they were testifying in person by signing an unsworn declaration. That's okay, but not deeds?
- I can do my taxes with Quicken and submit my finished product either by signing an unsworn declaration, or submitting the document electronically. But if I want to sign a transfer on death deed to my daughter, I have to find a notary?

There are those who will say one of the purposes of a notary is to determine the person signing the document is competent to sign the document. I don't know anywhere in statutes that say that's the duty of a notary. *The one place I've seen notaries called to testify about a signing is in litigation against the affiant who allegedly forged a deed, and the notary testifies as to whether they verbally put the affiant under oath before the affiant signed the document.* Notaries do not make decisions whether the signing person is competent to sign the document.

There may be some but I cannot find any instance whether the real estate deed is declared invalid because of lack of an original signature, or where the Register of Deeds had to show that there was an original document returned to the grantor.

If you recall in the 1980s, the *Posse Comitatus* was signing deeds declaring themselves to own land or houses in order to harass public officials. Presumably there were notary stamps on the documents. That didn't stop bogus deeds being filed, so obviously the fact there is an original signature has nothing to do with validity of a deed.

Federal law allows use of an unsworn declaration in lieu of a notary in all sorts of evidentiary situations:

Federal law, 28 USC 1746, Unsworn Declaration Under Penalty of Perjury, allows an **unsworn declaration** to be used, rather than a **sworn** or

affirmed affidavit made before a **notary**. The document must include the following statement above the signature: *õI declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). õ*

The feds use this law all over. Why doesn't Kansas?

Use of the Unsworn Declaration. Where would I use them?

1. In western Kansas, the distance between lawyers and clients is greater and greater. There are fewer lawyers.
 - a. I would like to use the unsworn declaration with shut-ins or people living on rural farmsteads, or nursing homes, whom I send a deed and cover letter and instruct them to sign where they see their name. I include a self-addressed stamped envelope to return the deed for filing.
 - b. If the competency of the signor is questioned, then I have them sign in front of a witness and get an unsworn document from the witness as to competency.
2. I'd use the unsworn declaration with all out of state affiants on deeds.
3. I sometimes meet clients to sign a deed on Saturday and my notary isn't available. I'd use the unsworn declaration.
4. There are several states on the west coast that will not use a Kansas notary acknowledgement. They have their own full page fancy acknowledgement they attach to a deed signed by a resident out there. All it does it double the cost of filing the deed in Kansas. I'd use an unsworn declaration and save my client a little money.
5. I represent several small towns as city attorney. I would use the unsworn declaration when I send a quit claim deed from the owner of blighted property deeding the property over to the city. They may not sign it, but I can at least try because it would save us a lot of litigation time and expense.

I'd be glad to answer questions.

KSA 53-601. Unsworn declarations; written declaration sufficient, form; exceptions; relationship to notarial acts. (a) Except as provided by subsection (b), whenever a law of this state or any rules and regulations, order or requirement adopted or issued thereunder requires or permits a matter to be *supported, evidenced, established or proved by the sworn written declaration, verification, certificate, statement, oath or affidavit of a person*, such matter may be supported, evidenced, established or proved with the same force and effect *by the unsworn written declaration, verification, certificate or statement* dated and subscribed by the person as true, under penalty of perjury, in substantially the following form:

(1) If executed outside this state: "I declare (or verify, certify or state) under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct. Executed on (date).

(Signature)"

(2) If executed in this state: "I declare (or verify, certify or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)"

(b) The provisions of subsection (a) do not apply to the following oaths:

(1) An oath of office.

(2) An oath required to be taken before a specified official other than a notary public.

(3) An oath of a testator or witnesses as required for wills, codicils, revocations of wills and codicils and republications of wills and codicils.

(c) A notarial act performed prior to the effective date of this act is not affected by this act. Nothing in this act diminishes or invalidates the recognition accorded to notarial acts by other laws of this state or rules and regulations adopted thereunder.

(d) On or after July 1, 1989, whenever an officer or partner listed in subsection (b) of K.S.A. [17-2718](#), subsection (c) of K.S.A. [17-7503](#), subsection (c) of K.S.A. [17-7504](#), subsection (c) of K.S.A. [17-7505](#), subsection (d) of K.S.A. [56-1a606](#) or subsection (d) of K.S.A. [56-1a607](#) and amendments thereto is required to execute a report before a notary or swear an oath before an officer authorized to administer oaths, in lieu thereof, such person may execute an unsworn declaration if such declaration is in substantial conformity with subsections (a), (b) and (c) of this section.

(e) On or after July 1, 1990, subsections (a), (b) and (c) of this section shall have general application. History: L. 1989, ch. 93, § 1; July 1.