

Approved: 1-19-93  
Date

## MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY

The meeting was called to order by Vice Chairman, Representative Tim Carmody at 3:35 p.m. on January 14, 1993 in room 313-S of the Statehouse.

All members were present except:

Representative Clyde Graeber - Excused  
Representative Gilbert Gregory -Excused

Committee staff present:

Jerry Donaldson, Legislative Research  
Jill Wolters, Revisor of Statutes  
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the Committee:

Randy Hearrell - Kansas Judicial Council  
Chuck Simmons - Chief Legal Counsel, Department of Corrections  
Brandon Myers - Kansas Human Rights Commission  
John Wine - General Counsel, Secretary of State

Randy Hearrell, Kansas Judicial Council, appeared before the Committee for several bill introductions.

The first involves K.S.A. 59-2704 which provides that a person missing for seven years shall be presumed to be dead. The legislature passed a statute last year that changed the presumption to five years. This proposed bill would just reconcile those changes. (Attachment #1)

Committee discussion followed. Representative Smith made a motion to have K.S.A. 59-2701 introduced as a Committee bill. Representative Garner seconded the motion. The motion carried.

The second would amend K.S.A. 59-104. Docket fees and court cost have been interpreted differently in each county, some charging \$10 and others charging \$95 for in-state probate pleadings. This would make sure that there is consistency. (Attachment #2)

Committee discussion followed. Representative Pauls made a motion to have K.S.A. 59-104 introduced as a Committee bill. Representative Smith seconded the motion. The motion carried.

Chairman O'Neal asked staff if these two requests could be introduced as one bill. With the Committee's consent, we will introduce this as one bill.

The third proposal that the Judicial Council requests is an amendment to K.S.A. 38-1583 which relates to the effect of termination of parental rights on inheritance rights of children. Under this proposal, a termination of parental rights under the Kansas Code for the Care of Children would not terminate the right of the child to inherit from the parent even where the parent's relinquished custody. (Attachment #3)

Committee discussion followed. Representative Smith made a motion to have K.S.A. 38-1583 introduced as a Committee bill. Representative Pauls seconded the motion. The motion carried.

The fourth Judicial Council proposal deals with K.S.A. 60-303 which has been amended but should not have been. The Kansas statute was consistent with the Federal Code of Civil Procedures. This is just a clean-up to put the bill back to its original form. (Attachment #4)

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.

## CONTINUATION SHEET

Minutes of the House Committee on Judiciary, Room 313-S, Statehouse, at 3:35 p.m. on January 14, 1993.

Committee discussion followed. Representative Mays made a motion to have K.S.A. 60-303 introduced as a Committee bill. Representative Wells seconded the motion. The motion carried.

Hearrell also asked that the Committee give permission for the staff to work on the Elective Share of Surviving Spouse bill and accept this as an formal introduction at the point when the Judicial Council approves this. (Attachment #5)

Committee discussion followed. Representative Smith made the motion to have this introduced pending the approval of the Judicial Council on or about January 29, 1993. Representative Rock seconded the motion. The motion carried.

Chuck Simmons, Chief Legal Counsel, Department of Corrections, appeared before the Committee with three request for bill introductions.

The first would amend K.S.A. 21-3808, dealing with obstruction of legal process or official duty to make clear that parole & authorized dispositions were included. (Attachment #6)

The second would amend the Kansas Tort Claims Act to add parole and non-prison sanctions to the definition of community service worker. (Attachment #7)

The third request would make it a severity level 10 person crime for a staff member to engage in consensual sexual relations with an inmate or parolee. (Attachment #8)

Committee discussion followed. Chairman O'Neal made the motion to have request #1 and request #3 introduced as one Committee bill. Representative Macy moves. Representative Adkins seconded the motion. The motion carried.

Representative Wells made a motion to have the second request introduced as a Committee bill. Representative Mays seconded the motion. The motion carried.

Brandon Myers, Kansas Human Rights Commission, appeared before the Committee to request a bill introduction which will amend the Kansas Act Against Discrimination. It would ameliorate certain interpretative decisions of the Kansas appellate courts which restrict the jurisdictional coverage of KAAD. It would also amend a procedural portion of the KAAD to eliminate an inconsistency between the Kansas Administrative Act and a section of the KADD which uses terminology predating the adoption of KAPA. (Attachment #9)

Committee discussion followed. Representative Wagnon made a motion to have this bill introduced as a Committee bill. Representative Bradley seconded the motion. The motion carried.

John Wine, General Counsel, Secretary of State, appeared before the Committee to request a bill introduction which would simplify the filing of corporate annual reports. Under this proposal, all would report the names and addresses of the investors owning five percent or more of the stock or capital, but the specific amount of ownership would no longer be required. (Attachment #10)

Representative Carmody made a motion to have this bill introduced as a Committee bill. Representative Adkins seconded the motion. The motion carried.

Chairman O'Neal called for a motion to introduce the Sentencing Commission request for a bill from the meeting on January 13, 1993. (See Minutes of 1-13-93 meeting, Attachment #1) Representative Carmondy made the motion. Representative Adkins seconded the motion. The motion carried.

The Committee adjourned at 4:45 p.m. The next Committee meeting is January 19, 1993 at 3:30 p.m. in room 313-S.



Article 27.—ESTATES OF ABSENTEES

Revisor's Note:

Former law (60-4001 to 60-4026) repealed by L. 1963, ch. 303, 60-2609.

**59-2701. Jurisdiction; absentee defined.** The district courts shall have jurisdiction to administer, in accordance with the provisions of this act, the property within this state of (a) any person who has disappeared and remains unheard from by the persons most likely to hear from him or her, or (b) any person who is reported by the United States department of defense to be a prisoner of war or missing in action. The word "absentee" as used in this act shall refer to such a person.

History: L. 1963, ch. 301, § 1; L. 1972, ch. 218, § 1; L. 1976, ch. 242, § 65; Jan. 10, 1977.

Source or prior law:

L. 1939, ch. 234, § 1.

Research and Practice Aids:

Absentees 4.

C.J.S. Absentees § 4.

**59-2702. Appointment of trustee.** A trustee may be appointed for the estate of any such absentee to administer the same until such time as he or she returns or is found to be dead in accordance with the subsequent provisions hereof. A petition for the appointment of such trustee may be filed by any person. Venue for the proceedings thereon shall be in accordance with the laws applicable to the appointment of conservators for nonresident's proposed conservatees. The petition shall include:

- (1) the name, age, and the last known residence of the absentee,
- (2) the fact of the absentee's disappearance and all known circumstances pertaining thereto, including the date and place of his or her last known whereabouts,
- (3) the names and addresses of his or her known next of kin and spouse, if any,
- (4) the names and addresses of any other

known persons who are likely to hear from the absentee, and

- (5) the general nature and probable value of his or her real and personal property.

Notice of the filing of the petition and of the hearing thereon shall be given in accordance with K.S.A. 59-2209 to 59-2211, inclusive, and copies thereof mailed to said next of kin, spouse if any, and the said other persons likely to hear from the absentee as shown by the petition. Upon the hearing the court shall appoint a trustee if satisfied of the truth of the allegations of the petition and that there is property of the absentee within the state subject to being lost or dissipated unless a trustee is appointed to manage and conserve the same.

History: L. 1963, ch. 301, § 2; L. 1965, ch. 346, § 51; Jan. 1, 1966.

Research and Practice Aids:

Absentees 5.

C.J.S. Absentees § 6 et seq.

**59-2703. Powers and duties of trustee.**

The provisions of the laws applicable to the oath, bond, inventory, accountings, debts, liabilities, powers, duties and discharge of conservators shall govern in the administration and management of the estates of such absentees and the trustees thereof.

History: L. 1963, ch. 301, § 3; L. 1965, ch. 346, § 52; Jan. 1, 1966.

Research and Practice Aids:

Absentees 5, 6.

C.J.S. Absentees §§ 5, 6 et seq., 12.

**59-2704. Absentee presumed dead.** An absentee shall be presumed to be dead for the purposes of this act if:

(1) the absentee shall remain unheard from by those persons most likely to hear from said absentee for a period of not less than ~~seven (7) years~~, and

(2) one or more persons who had a bona fide motive for locating the absentee have conducted a diligent search for the absentee in all places where said absentee's presence could reasonably be expected.

If no such search has been made with reference to an absentee who has been unheard from for more than ~~seven (7) years~~ and for whose estate a trustee has been appointed in accordance with this act, the district court may on its own motion order the trustee to conduct such search under the

direction of the court and pay the reasonable expenses thereof out of the estate.

History: L. 1963, ch. 301, § 4; L. 1976, ch. 242, § 66; Jan. 10, 1977.

Source or prior law:

L. 1939, ch. 234, § 10.

Research and Practice Aids:

Death 2(1).

C.J.S. Death § 6.

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five (5)

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**59-104. Docket fees and court costs. (a)**

*Docket fee.* Except as otherwise provided by law, no case shall be filed or docketed in the district court under the provisions of chapter 59 of the Kansas Statutes Annotated or of article 40 of chapter 65 of the Kansas Statutes Annotated [\*] without payment of an appropriate docket fee as follows:

Treatment of mentally ill .....	\$20
Treatment of alcoholism or drug abuse .....	20
Determination of descent of property .....	35
Termination of life estate .....	35
Termination of joint tenancy .....	35
Refusal to grant letters of administration .....	35
Adoption .....	35
Filing a will and affidavit under K.S.A. 59-618a .....	35
Guardianship .....	55
Conservatorship .....	55
Trusteeship .....	55
Combined guardianship and conservatorship .....	55
Final settlements or other final decrees in probate from another county of this state .....	10
Decrees in probate from another state .....	95
Probate of an estate or of a will .....	95

Certified probate  
proceedings under  
K.S.A. 59-213

(b) *Poverty affidavit in lieu of docket fee and exemptions.* The provisions of subsection (b) of K.S.A. 60-2001 and K.S.A. 60-2005, and amendments thereto, shall apply to probate docket fees prescribed by this section.

(c) *Disposition of docket fee.* Statutory charges for the law library and for the prosecuting attorneys' training fund shall be paid from the docket fee. The remainder of the docket fee shall be paid to the state treasurer for deposit in the state general fund.

(d) *Additional court costs.* Other fees and expenses to be assessed as additional court costs shall be approved by the court, unless specifically fixed by statute. Other fees shall include, but not be limited to, witness fees, appraiser fees, fees for service of process outside the state, fees for depositions, transcripts and publication of legal notice, executor or administrator fees, attorney fees, court costs from other courts and any other fees and expenses required by statute. All additional court costs shall be taxed and billed against the parties or estate as directed by the court. No sheriff in this state shall charge any district court in this state a fee or mileage for serving any paper or process.

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**59-213. Filing of probate proceeding**

documents. A duly certified copy of any document on file or of record in any probate proceedings in the district court of any county of the state may be filed in the district court of any other county of the state, and when so filed shall have the same force and effect in such other county as in the county of origin.

**EFFECT OF TERMINATION OF PARENTAL  
RIGHTS ON INHERITANCE RIGHTS OF CHILDREN**

38-1583. Considerations in termination.

(a) When the child has been adjudicated to be a child in need of care, the court may terminate parental rights when the court finds by clear and convincing evidence that the parent is unfit by reason of conduct or condition which renders the parent unable to care properly for a child and the conduct or condition is unlikely to change in the foreseeable future.

(b) In making a determination hereunder the court shall consider, but is not limited to, the following, if applicable:

(1) Emotional illness, mental illness, mental deficiency or physical disability of the parent, of such duration or nature as to render the parent unlikely to care for the ongoing physical, mental and emotional needs of the child;

(2) conduct toward a child of a physically, emotionally or sexually cruel or abusive nature;

(3) excessive use of intoxicating liquors or narcotic or dangerous drugs;

(4) physical, mental or emotional neglect of the child;

(5) conviction of a felony and imprisonment;

(6) unexplained injury or death of a sibling;

(7) reasonable efforts by appropriate public or private child caring agencies have been unable to rehabilitate the family; and

(8) lack of effort on the part of the parent to adjust the parent's circumstances, conduct or conditions to meet the needs of the child.

(c) In addition to the foregoing, when a child is not in the physical custody of a parent, the court, in proceedings concerning the termination of parental rights, shall also consider, but is not limited to the following:

(1) Failure to assure care of the child in the parental home when able to do so;

(2) failure to maintain regular visitation, contact or communication with the child or with the custodian of the child;

(3) failure to carry out a reasonable plan approved by the court directed toward the integration of the child into the parental home; and

(4) failure to pay a reasonable portion of the cost of substitute physical care and maintenance based on ability to pay. In making the above determination, the court may disregard incidental visitations, contacts, communications or contributions.

(d) The rights of the parents may be terminated as provided in this section if the court finds that the parents have abandoned the child or the child was left under such circumstances that the identity of the parents is unknown and cannot be ascertained, despite diligent searching, and the parents have not come forward to claim the child within three months after the child is found.

(e) The existence of any one of the above standing alone may, but does not necessarily, establish grounds for termination of parental rights. The determination shall be based on an evaluation of all factors which are applicable. In considering any of the above factors for terminating the rights of a parent, the court shall give primary consideration to the physical, mental or emotional condition and needs of the child. If presented to the court and subject to the provisions of K.S.A. 60-419, and amendments thereto, the court shall consider as evidence testimony from a person licensed to practice medicine and surgery, a licensed psychologist or a licensed social worker expressing an opinion relating to the physical, mental or emotional condition and needs of the child. The court shall consider any such testimony only if the licensed professional providing such testimony is subject to cross-examination.

(f) A termination of parental rights under the Kansas code for care of children shall not terminate the right of the child to inherit from the parent.

59-2114. Written consent required; acknowledgment; revocability of consent, when.

(a) Consent shall be in writing and shall be acknowledged before a judge of a court of record or before an officer authorized by law to take acknowledgments. If consent is acknowledged before a judge of a court of record, it shall be the duty of the court to advise the consenting person of the consequences of the consent. A consent is final when executed, unless the consenting party, prior to final decree of adoption, alleges and proves by clear and convincing evidence that the consent was not freely and voluntarily given. The burden of proving the consent was not freely and voluntarily given shall rest with the consenting party.

(b) Consent in all cases shall have been executed not more than six months prior to the date the petition for adoption is filed.

(c) A parent's consent to the adoption of such parent's child shall not terminate the right of the child to inherit from the parent.

59-2124. Relinquishment of child to agency.

(a) Any parent or parents or person in loco parentis may relinquish a child to an agency, and if the agency accepts the relinquishment in writing, the agency shall stand in loco parentis to the child and shall have and possess over the child all rights of a parent or legal guardian, including the power to place the child for adoption and give consent thereto.

(b) All relinquishments to an agency under K.S.A. 59-2111 through 59-2143, and amendments thereto, shall be in writing, in substantial conformity with the form for relinquishment contained in the appendix of forms following K.S.A. 59-2143, and amendments thereto, and shall be executed by:

- (1) Both parents of the child;
- (2) one parent, if the other parent is deceased or the other parent's relinquishment is found unnecessary under K.S.A. 59-2136, and amendments thereto; or
- (3) a person in loco parentis.

(c) The relinquishment shall be in writing and shall be acknowledged before a judge of a court of record or before an officer authorized by law to take acknowledgments. If the relinquishment is acknowledged before a judge of a court of record, it shall be the duty of the court to advise the relinquishing person of the consequences of the relinquishment.

(d) Except as otherwise provided, in all cases where a parent or person in loco parentis has relinquished a child to the agency pursuant to K.S.A. 59-2111 through 59-2143, and amendments thereto, all the rights of the parent or person in loco parentis shall be terminated, including the right to receive notice in a subsequent adoption proceeding involving the child. If a parent has relinquished a child to the agency pursuant to K.S.A. 59-2111 through 59-2143, and amendments thereto based on a belief that the child's other parent would relinquish the child to the agency, and such other parent does not relinquish such child to the agency, the rights of such parent who has relinquished a child to the agency shall not be terminated.

(e) A parent's relinquishment of a child shall not terminate the right of the child to inherit from such parent.

59-2136. Relinquishment and adoption; proceedings to terminate parental rights.

(a) The provisions of this section shall apply where a relinquishment or consent to an adoption has not been obtained from a parent and K.S.A. 59-2124 and 59-2129, and amendments thereto, state that the necessity of a parent's relinquishment or consent can be determined under this section.

(b) Insofar as practicable, the provisions of this section applicable to the father also shall apply to the mother and those applicable to the mother also shall apply to the father.

(c) In stepparent adoptions under subsection (d), the court may appoint an attorney to represent any father who is unknown or whose whereabouts are unknown. In all other cases the court shall appoint an attorney to represent any father who is unknown or whose whereabouts are unknown. If no person is identified as the father or a possible father, the court shall order publication notice of the hearing in such manner as the court deems appropriate.

(d) In a stepparent adoption, if a mother consents to the adoption of a child who has a presumed father under subsection (a)(1), (2) or (3) of K.S.A. 38-1114 and amendments thereto or who has a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction, the consent of such father must be given to the adoption unless such father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption or is incapable of giving such consent. In determining whether a father's consent is required under this subsection, the court may disregard incidental visitations, contacts, communications or contributions. In determining whether the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption, there

shall be a rebuttable presumption that if the father, after having knowledge of the child's birth, has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent.

(e) Except as provided in subsection (d), if a mother desires to relinquish or consents to the adoption of such mother's child, a petition shall be filed in the district court to terminate the parental rights of the father, unless the father's relationship to the child has been previously terminated or determined not to exist by a court. The petition may be filed by the mother, the petitioner for adoption, the person or agency having custody of the child or the agency to which the child has been or is to be relinquished. Where appropriate, the request to terminate parental rights may be contained in a petition for adoption. If the request to terminate parental rights is not filed in connection with an adoption proceeding, venue shall be in the county in which the child, the mother or the presumed or alleged father resides or is found. In an effort to identify the father, the court shall determine by deposition affidavit or hearing, the following:

(1) Whether there is a presumed father under K.S.A. 38-1114 and amendments thereto;

(2) whether there is a father whose relationship to the child has been determined by a court;

(3) whether there is a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction;

(4) whether the mother was cohabitating with a man at the time of conception or birth of the child;

(5) whether the mother has received support payments or promises of support with respect to the child or in connection with such mother's pregnancy; and

(6) whether any man has formally or informally acknowledged or declared such man's possible paternity of the child. If the father is identified to the satisfaction of the court, or if more than one man is identified as a possible father, each shall be given notice of the proceeding in accordance with subsection (f).

(f) Notice of the proceeding shall be given to every person identified as the father or a possible father by personal service, registered mail or in any other manner the court may direct. Proof of notice shall be filed with the court before the petition or request is heard.

(g) If, after the inquiry, the court is unable to identify the father or any possible father and no person has appeared claiming to be the father and claiming custodial rights, the court shall enter an order terminating the unknown father's parental rights with reference to the child without regard to subsection (h). If any person identified as the father or possible father of the child fails to appear or, if appearing, fails to claim custodial rights, such person's parental rights with reference to the child shall be terminated without regard to subsection (h).

(h) When a father or alleged father appears and asserts parental rights, the court shall determine parentage, if necessary pursuant to the Kansas parentage act. If a father desires but

is financially unable to employ an attorney, the court shall appoint an attorney for the father. Thereafter, the court may order that parental rights be terminated, upon a finding by clear and convincing evidence, of any of the following:

(1) The father abandoned or neglected the child after having knowledge of the child's birth;

(2) the father is unfit as a parent or incapable of giving consent;

(3) the father has made no reasonable efforts to support or communicate with the child after having knowledge of the child's birth;

(4) the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child's birth;

(5) the father abandoned the mother after having knowledge of the pregnancy;

(6) the birth of the child was the result of rape of the mother; or

(7) the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition. In making a finding under this subsection, the court may disregard incidental visitations, contacts, communications or contributions. In determining whether the father has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption, there shall be a rebuttable presumption that if the father, after having knowledge of the child's birth, has knowingly failed to provide a substantial portion of the child support as required by judicial decree, when financially able to do so, for a period of two years next preceding the filing of the petition for adoption, then such father has failed or refused to assume the duties of a parent.

(i) A termination of parental rights under this section shall not terminate the right of the child to inherit from the parent.

## BINDING EFFECT OF INJUNCTIONS ON NONPARTIES

60-303. Summons; by whom served.

(a) Methods of service of process within this state, except service by publication as provided in K.S.A. 60-307, and amendments thereto, are described in this section. Methods of out-of-state service of process are described in K.S.A. 60-308, and amendments thereto.

(b) Service by certified mail. Except if the attorney for the party or the party, if the party is not represented by an attorney, requests personal or residence service pursuant to subsection (c); if the attorney or the party requesting service elects to serve process by certified mail pursuant to this subsection; as provided in K.S.A. 60-903, ~~60-906~~ or 60-3104, and amendments thereto; or as otherwise provided by law, the sheriff shall serve any process by certified mail, evidenced by return receipt signed by any person or by restricted delivery, unless otherwise permitted by this article. The sheriff, attorney for the party seeking service or the party, if the party is not represented by an attorney, shall cause a copy of the process and petition or other document to be placed in an envelope addressed to the person to be served in accordance with K.S.A. 60-304, and amendments thereto, adequate postage to be affixed and the sealed envelope to be placed in the United States mail as certified mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered. The sheriff, party's attorney or the party, if the party is not represented by an attorney, shall execute a return on service stating the nature of the process, the date on which the process was mailed, and the name and address on the envelope containing the process mailed as certified mail return receipt requested. The sheriff, party or the party's attorney shall file the return on service and the return receipt or return envelope in the records of the action. Service of process shall be considered obtained under K.S.A. 60-203, and amendments thereto, upon the delivery of the certified mail envelope. If the certified mail envelope is returned with an endorsement showing refusal of delivery, the sheriff, serving party or the party's attorney shall send a copy of the process and petition or other document to be served to the defendant by ordinary, first-class mail. The mailing shall be evidenced by a certificate of mailing which shall be filed with the clerk. Service shall be considered obtained upon the mailing by ordinary, first-class mail. Failure to claim certified mail service is not refusal of service within the meaning of this subsection.

(c) Personal and residence service.

(1) When the plaintiff files a written request with the clerk for service other than by certified mail, service of process shall be made by personal or residence service. Personal service shall be made by delivering or offering to deliver a copy of the process and accompanying documents to the person to be served. Residence service shall be made by leaving a copy of the process and petition, or other document to be served, at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion residing therein. If service cannot be made upon an individual, other than a minor or a disabled person, by personal or residence service, service may be made by leaving a copy of the process and petition, or other document to be served, at the defendant's dwelling house or usual place of abode and mailing a notice that such copy has been left at such house or place of abode to

(2) When process is to be served under this subsection, the clerk of the court shall deliver the process and sufficient copies of the process and petition, or other document to be served to the sheriff of the county where the process is to be served or, if requested, to a person appointed to serve process or to the plaintiff's attorney.

(3) Service of all process under this subsection shall be made by a sheriff within the sheriff's county, by the sheriff's deputy, by an attorney admitted to the practice of law before the supreme court of Kansas or by some person appointed as a process server by a judge or clerk of the district court, except that a subpoena may also be served by any other person who is not a party and is not less than 18 years of age. Process servers shall be appointed freely and may be authorized either to serve process in a single case or in cases generally during a fixed period of time. A process server or an authorized attorney may make the service anywhere in or out of the state and shall be allowed the fees prescribed in K.S.A. 28-110 and amendments thereto, for the sheriff.

(4) In all cases when the person to be served, or an agent authorized by the person to accept service of process, refuses to receive copies thereof, the offer of the duly authorized process server to deliver copies thereof, and the refusal, shall be a sufficient service of the process.

(d) Acknowledgment or appearance. An acknowledgment of service on the summons is equivalent to service. The voluntary appearance by a defendant is equivalent to service as of the date of appearance.

#### 60-906. Form and scope of order.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the petition or other document, the act or acts sought to be restrained; and shall be binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in concert or participation with them who receive actual notice of the order by personal service or otherwise. The order may be issued and served on Sunday or on a legal holiday.

ELECTIVE SHARE OF SURVIVING SPOUSE

Section 2-201. Elective Share.

(a) [Elective-Share Amount.] The surviving spouse of a decedent who dies domiciled in a resident of this State has a right of election, under the limitations and conditions stated in this Part Act, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, in accordance with the following schedule:

If the decedent and the spouse were married to each other:	The elective-share percentage is:
Less than 1 year . . . . .	Supplemental Amount Only
1 years but less than 2 years . . . . .	3% of the augmented estate
2 years but less than 3 years . . . . .	6% of the augmented estate
3 years but less than 4 years . . . . .	9% of the augmented estate
4 years but less than 5 years . . . . .	12% of the augmented estate
5 years but less than 6 years . . . . .	15% of the augmented estate
6 years but less than 7 years . . . . .	18% of the augmented estate
7 years but less than 8 years . . . . .	21% of the augmented estate
8 years but less than 9 years . . . . .	24% of the augmented estate
9 years but less than 10 years . . . . .	27% of the augmented estate
10 years but less than 11 years . . . . .	30% of the augmented estate
11 years but less than 12 years . . . . .	34% of the augmented estate
12 years but less than 13 years . . . . .	38% of the augmented estate
13 years but less than 14 years . . . . .	42% of the augmented estate
14 years but less than 15 years . . . . .	46% of the augmented estate
15 years or more . . . . .	50% of the augmented estate

If the decedent and the surviving spouse were married to each other more than once, all periods of marriage to each other are added together for purposes of this subsection; periods between marriages are not counted.

(b) [Supplemental Elective-Share Amount.] If the sum of the amounts described in Sections 2-202(b)(3) and (4), 2-207(a)(1) and (3), and that part of the elective-share amount payable from the decedent's probate and reclaimable estates under Sections 2-207(b) and (c), the value of the use of the homestead valued as a life estate for Kansas inheritance tax purposes and family allowances pursuant to K.S.A. 59-403 and 59-505 is less than \$50,000 \$100,000, the surviving spouse is entitled to a supplemental elective-share amount equal to \$50,000

\$100,000, minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's reclaimable estate in the order of priority set forth in Sections 2-207(b) and (c).

(c) **[Non-Resident.]** The right, if any, of the surviving spouse of a decedent who dies ~~domiciled outside~~ a nonresident of this State to take an elective share in property in this State is governed by ~~the law of the decedent's domicile at death~~ K.S.A. Chapter 59, Article 8.

### **Applicable UPC Comment**

**Purpose and Scope of Revisions.** The revision of this section is the first step in the overall plan of implementing a partnership or marital-sharing theory of marriage, with a support theory back-up.

**Subsection (a).** Subsection (a) implements the partnership theory by increasing the maximum elective-share percentage of the augmented estate to fifty percent, but by phrasing that ultimate entitlement in so that it does not reach the maximum fifty-percent level until the marriage has lasted at least 15 years. If the decedent and the surviving spouse were married to each other more than once, all periods of marriage to each other are added together for purposes of subsection (a); periods between marriages are not counted.

**Subsection (b).** Subsection (b) implements the support theory of the elective share by providing a [\$50,000] supplemental elective-share amount, in case the surviving spouse's assets and other entitlements are below this figure.

**Cross Reference.** To have the right to an elective share under subsection (a), the decedent's spouse must survive the decedent. Under Section 2-702(a), the requirement of survivorship is satisfied only if it can be established that the spouse survived the decedent by 120 hours.

### **PLAC Comment**

In subsection (a), the phrase "domiciled in" was stricken and the phrase "a resident of" was inserted in lieu thereof. In line 3, the word "Part" was stricken and the word "Act" was inserted in lieu thereof. Language from the UPC comment was added at the end of the subsection to read as follows: "If the decedent and the surviving spouse were married to each other more than once, all periods of marriage are added together for the purposes of subsection (a); periods between marriages are not counted." The committee added the language to the statute to clarify the rule in such a situation.

In subsection (b), the supplemental elective-share amount is set at \$100,000 and this is followed throughout the code. The UPC supplemental elective-share amount is \$50,000 plus homestead, exempt property and statutory allowances, which three items total approximately

\$43,000. The PLAC has combined these into the \$100,000 amount, which is substantially the same result. The phrase "the value of the use of the homestead valued as a life estate for Kansas inheritance tax purposes and family allowances pursuant to K.S.A. 59-403" was inserted.

In subsection (c), the phrase "domiciled outside" was stricken and the phrase "a non-resident of" was inserted in lieu thereof. Also, the phrase "the law of the decedent's domicile at death" was stricken and "K.S.A. Chapter 59, Article 8", was inserted in lieu thereof, thus continuing the current Kansas provisions.

## **Section 2-202. Augmented Estate.**

### **(a) [Definitions]**

(1) In this section:

(i) "Bona fide purchaser" means a purchaser for value in good faith and without notice of an adverse claim. ~~The notation of a state documentary fee on a recorded instrument pursuant to [insert appropriate reference] is prima facie evidence that the transfer described therein was made to a bona fide purchaser.~~

(ii) "Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that he or she possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

(iii) "Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent by an exercise of the power could have created an interest, present or future, in himself or herself or his or her creditors.

(iv) "Probate estate" means property, whether real or personal, movable or immovable, wherever situated, that would pass by intestate succession if the decedent died without a valid will.

(v) "Right to income" includes a right to payments under an annuity or similar contractual arrangement.

(vi) "Value of property owned by the surviving spouse at the decedent's death" and "value of property to which the surviving spouse succeeds by reason of the decedent's death" ~~include~~ includes ~~the commuted value of any present or future interest then held by the surviving spouse and the commuted value of amounts payable to the surviving spouse after the decedent's death under any trust, life insurance settlement option, annuity contract, public or private pension,~~

~~disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal Social Security system~~ finally established for Kansas Inheritance Tax purposes.

(2) In subsections (b)(2)(iii) and (iv), "transfer" includes an exercise or release of a power of appointment, but does not include a lapse of a power of appointment.

(b) **[Property Included in Augmented Estate.]** The augmented estate consists of the sum of:

(1) the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances ~~and exemptions~~, and enforceable ~~claims~~ demands;

(2) the value of the decedent's reclaimable estate, which is composed of all property, whether real or personal, movable or immovable, wherever situated, not including in the decedent's probate estate, of any of the following types:

(i) property to the extent the passing of the principal thereof to or for the benefit of any person, other than the decedent's surviving spouse, was subject to a presently exercisable general power of appointment held by the decedent alone, if the decedent held that power immediately before his or her death or if and to the extent the decedent, while married to his or her surviving spouse and during the two-year period next preceding the decedent's death, released that power or exercised that power in favor of any person other than the decedent or the decedent's estate, spouse, or surviving spouse;

(ii) property, to the extent of the decedent's unilaterally severable interest therein, held by the decedent and any other person, except the decedent's surviving spouse, with right of survivorship, if the decedent held that interest immediately before his or her death or if and to the extent the decedent, while married to his or her surviving spouse and during the two-year period next preceding the decedent's death, transferred that interest to any person other than the decedent's surviving spouse;

(iii) proceeds of insurance, including accidental death benefits, on the life of the decedent payable to any person other than the decedent's surviving spouse, if the decedent owned the insurance policy, had the power to change the beneficiary of the insurance policy, or the insurance policy was subject to a presently exercisable general power of appointment held by the decedent alone immediately before his or her death or if and to the extent the decedent, while married to his or her surviving spouse and during the two-year period next preceding the decedent's death, transferred that policy to any person other than the decedent's surviving spouse; and

(iv) property transferred by the decedent to any person other than a bona fide purchaser at any time during the decedent's marriage to the surviving spouse, to or for the benefit of any person, other than the decedent's surviving spouse, if the transfer is any of the following types:

(A) any transfer to the extent that the decedent retained at the time of or during the two-year period next preceding his or her death the possession or enjoyment of, or right to income from, the property;

(B) any transfer to the extent that, at the time of or during the two-year period next preceding the decedent's death, the income or principal was subject to a power, exercisable by the decedent alone or in conjunction with any other person or exercisable by a nonadverse party, for the benefit of the decedent or the decedent's estate;

(C) any transfer of property, to the extent the decedent's contribution to it, as a percentage of the whole, was made during the two-year period next preceding the decedent's death, by which the property is held, at the time of or during the two-year period next preceding the decedent's death, by the decedent and another, other than the decedent's surviving spouse, with right of survivorship; or

(D) any transfer made to a donee during the two-year period next preceding the decedent's death to the extent that the aggregate transfers to any one donee in either of the years exceed \$10,000.00;

(3) the value of property to which the surviving spouse succeeds by reason of the decedent's death, other than by homestead allowance, ~~exempt property~~, family allowance, testate succession, or intestate succession, including the proceeds of insurance, including accidental death benefits, on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, exclusive of the federal Social Security system; and

(4) the value of property owned by the surviving spouse at the decedent's death, reduced by enforceable ~~claims~~ demands against that property or that spouse, plus the value of amounts that would have been includible in the surviving spouse's reclaimable estate had the spouse predeceased the decedent. But amounts that would have been includible in the surviving spouse's reclaimable estate under subsection (b)(2)(iii) are not valued as if he or she were deceased.

(c) [Exclusions.] Any transfer or exercise or release of a power of appointment is excluded from the decedent's reclaimable estate (i) to the extent the decedent received adequate and full consideration in money or money's worth for the transfer, exercise, or release or (ii) if irrevocably made with the written consent or joinder of the surviving spouse.

(d) [Valuation.] Property is valued as of the decedent's death, but property irrevocably transferred during the two-year period next preceding the decedent's death which is included in the decedent's reclaimable estate under subsection (b)(2)(i), (ii), and (iv) is valued as of the time of the transfer. If the terms of more than one of the subparagraphs or sub-subparagraphs of subsection (b)(2) apply, the property is included in the augmented estate under the subparagraph or sub-subparagraph that yields the highest value. For the purposes of this subsection, an "irrevocable transfer of property" includes an irrevocable exercise or release of a power of appointment.

**(e) [Protection of Payors and Other Third Parties.]**

(1) Although under this section a payment, item of property, or other benefit is included in the decedent's reclaimable estate, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or spouse's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written notice of an intention to file a petition for the elective share or that a petition for the elective share has been filed.

(2) The written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the county of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under Section 2-205(d), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under Section 2-205(a) or, if filed, the demand for an elective share is withdrawn under Section 2-205(c), the court shall order disbursement to the designated beneficiary. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the Court.

(3) Upon petition to the ~~probate~~ district court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this section.

**(f) [Protection of Bona Fide Purchasers; Personal Liability of Recipient.]**

(1) A person who purchases property from a recipient for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this Part Act to return the payment, item of property, or benefit nor is liable under this Part Act for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit included in the decedent's reclaimable estate is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, as provided in Section 2-207.

(2) If any section or part of any section of this Part Act is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's reclaimable estate, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of that payment or the value of that item of property or benefit, as provided in Section 2-207, to the person who would have been entitled to it were that section or part of that section not preempted.

**UPC Comment**

Under the pre-1990 and 1990 Code, the decedent's probate estate is first reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims. The term "claims" is defined in Section 1-201 as including "liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate."

**Purpose and Scope of Revisions.** The revisions of this section implement a key component of the overall plan for redesigning the elective share, as described in the General Comment to Part 2. The elective-share percentage, determined by the length of the marriage under Section 2-201, is applied to the augmented estate. Under Section 2-202(b) (4), the augmented estate includes the value of property owned by the surviving spouse at the decedent's death plus the value of amounts that would have been includible in the surviving spouse's reclaimable estate had the spouse predeceased the decedent, reduced by enforceable claims against that property or that spouse. (Note that amounts that would have been includible in the surviving spouse's reclaimable estate under subsection (b) (2) (iii) are not valued as if he or she were deceased. Thus, if, at the decedent's death, the surviving spouse owns a \$1 million life insurance policy on his or her life, payable to his or her sister, that policy would not be valued at its face value of \$1 million, but rather could be valued under the method used in the federal estate tax under Treas. Reg. Sec. 20.2031-8.)

The purpose of combining the estates and reclaimables of both spouses is to implement a partnership or marital-sharing theory. Under that theory, there is a fifty/fifty split of the property acquired by *both* spouses. Hence the redesigned elective share includes the survivor's net assets in the augmented-estate entity. (Under a different rationale, no longer appropriate under the redesigned system, the pre-1990 version of Section 2-202 also added the value of property owned by the surviving spouse, but only to the extent the owned property had been derived from the decedent. An incidental benefit of the redesigned system is that this tracing-to-source feature of the pre-1990 version is eliminated.)

Under the pre-1990 Code, the decedent's probate estate was also augmented by adding the value of specified inter-vivos transfers made by the decedent during the marriage. The purpose was to protect the surviving spouse against so-called "fraud on the spouse's share." The revisions of Section 2-202 not only continue but strengthen this feature of the pre-1990 Code by extending the spouse's elective-share entitlement to property the decedent owned in substance as well as in form. The general theory of revised Section 2-202(b) (2) (i) is that a decedent who, during life, alone had a power to make himself or herself the full technical owner of property was in substance the owner of that property for purposes of the elective share. Whether the decedent created that power or it was created by another, and whether that power was created before or after the marriage, are irrelevant. The only relevant criteria are whether the decedent held that power at (or immediately before) death or (while married and during the two-year period prior to the decedent's death) irrevocably exercised or released it. If the decedent (during marriage) released or allowed such a power to lapse at death, the decedent in effect transferred the property subject to the power to the persons who benefit from a nonexercise of the power.

If the decedent and the surviving spouse were married to each other more than once, transactions that took place during any of their marriages to each other are treated as having taken place "while married to his or her surviving spouse" and "during the decedent's marriage to the surviving spouse."

Although the pre-1990 Code did not include life insurance, annuities, etc., payable to other persons in the augmented estate, the revisions do include their value; this move recognizes that such arrangements could, under the pre-1990 Code, have been used to deplete the estate and reduce the spouse's elective-share entitlement. Subsection (e) provides protection to "payors" and other third parties who made payments or took any other action before receiving written notice of the spouse's intention to make an election under this ~~Part~~ Act or that an election has been made. The term "payor" is defined in section 1-201 as meaning "a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments."

#### PLAC Comment

In subsection (a)(1)(i), the committee struck the second sentence because Kansas has no documentary fee law.

Subsection (a)(1)(vi) was amended by striking the definition and inserting in lieu thereof, "includes the commuted value as finally established for Kansas inheritance tax purposes.

Subsection (b)(1) was amended by striking "homestead allowance" and inserting in lieu thereof "homestead", by striking "exemptions" and by striking "claims" and inserting in lieu thereof "demands", thus using the Kansas terminology.

Subsection (b)(3) was amended by striking "homestead allowance" and inserting in lieu thereof, "homestead", by striking "exempt property", thus using the Kansas terminology.

Subsection 2-202(e)(3) was changed by striking "probate" and inserting in lieu thereof "district".

Subsection 2-202(f) was amended by striking "probate" and inserting "district" to correctly name the Kansas court involved.

### **Section 2-203. Right of Election Personal to Surviving Spouse.**

~~(a) [Surviving Spouse Must be Living at Time of Election.] The right of election may be exercised only by a surviving spouse who is living when the petition for the elective share is filed in the court under Section 2-205(a). If the election is not exercised by the surviving spouse personally, it may be exercised on the surviving spouse's behalf by his [or her] conservator, guardian, or agent under the authority of a power of attorney.~~

~~(b) [Incapacitated Surviving Spouse.] If the election is exercised on behalf of a surviving spouse who is an incapacitated person, that portion of the elective share and supplemental elective share amounts due from the decedent's probate estate and recipients of the decedent's reclaimable estate under Section 2-207(b) and (c) and must be placed in a custodial trust for the benefit of the surviving spouse under the provisions of the [Enacting state] Uniform Custodial Trust Act, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse who is an incapacitated person. The trustee must administer the trust in accordance with the following terms and such additional terms as the court determines appropriate:~~

~~(1) Expenditures of income and principal may be made in the manner, when, and to the extent that the trustee determines suitable and proper for the surviving spouse's support, without court order but with regard to other support, income, and property of the surviving spouse [exclusive of] [and] benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the surviving spouse must qualify on the basis of need.~~

~~(2) During the surviving spouse's incapacity, neither the surviving spouse nor anyone acting on behalf of the surviving spouse has a power to terminate the trust; but if the surviving spouse regains capacity, the surviving spouse then acquires the power to~~

~~terminate the trust and acquire full ownership of the trust property free of trust, by delivering to the trustee a writing signed by the surviving spouse declaring the termination.~~

~~(3) Upon the surviving spouse's death, the trustee shall transfer the unexpended trust property in the following order: (i) under the residuary clause, if any, of the will of the predeceased spouse against whom the elective share was taken, as if that predeceased spouse died immediately after the surviving spouse; or (ii) to that predeceased spouse's heirs under Section 2-711.]~~

(a) The right of election to the elective-share amount may be exercised by the surviving spouse or by the personal representative of a deceased surviving spouse or on behalf of a disabled surviving spouse by the court pursuant to K.S.A. 59-2234.

(b) The right of election to the supplemental elective-share amount, homestead or statutory allowance may be exercised by the surviving spouse, conservator, agent under a power of attorney, guardian ad litem appointed for the surviving spouse or by the court on behalf of a disabled spouse pursuant to K.S.A. 59-2234.

#### UPC Comment

**Subsection (a).** Subsection (a) is revised to make it clear that the right of election may be exercised only by or on behalf of a living surviving spouse. If the election is not made by the surviving spouse personally, it can be made on behalf of the surviving spouse by the spouse's conservator, guardian, or agent. In any case, the surviving spouse must be alive when the election is made. The election cannot be made on behalf of a deceased surviving spouse.

**Subsections (b) and (c).** If the election is made on behalf of a surviving spouse who is an "incapacitated person," as defined in section 5-103(7), that portion of the elective-share and supplemental elective-share amounts which, under Section 2-207(b) and (c), are payable from the decedent's probate and reclaimable estates must go into a custodial trust under the Uniform Custodial Trust Act, as adjusted in subsection (c).

If the election is made on behalf of the surviving spouse by his or her guardian or conservator, the surviving spouse is by definition an "incapacitated person." If the election is made by the surviving spouse's agent under a durable power of attorney, the surviving spouse is presumed to be an "incapacitated person"; the presumption is rebuttable.

The terms of the custodial trust are governed by the Uniform Custodial Trust Act, except as adjusted in subsection (c).

The custodial trustee is authorized to expend the custodial trust property for the use and benefit of the surviving spouse to the extent the custodial trustee considers it advisable. In determining the amounts, if any, to be expended for the spouse's benefit, the custodial trustee is directed to take into account the spouse's other support, income, and property; these items would include governmental benefits such as Social Security and Medicare.

Bracketed language in subsection (c)(2) (and in Alternative subsection (b)(1)) gives enacting states a choice as to whether governmental benefits for which the spouse must qualify on the basis of need, such as Medicaid, are also to be considered. If so, the enacting state should include the bracketed word "and" but not the bracketed phrase "exclusive of" in its enactment; if not, the enacting state should include the bracketed phrase "exclusive of" and not include the bracketed word "and" in its enactment.

At the surviving spouse's death, the remaining custodial trust property does not go to the surviving spouse's estate, but rather under the residuary clause of the will of the predeceased spouse whose probate and reclaimable estates were the source of the property in the custodial trust, as if the predeceased spouse died immediately after the surviving spouse. In the absence of a residuary clause, the property goes to the predeceased spouse's heirs. See section 2-711.

**Alternative Subsection (b).** For states that have not enacted the Uniform Custodial Trust Act, an Alternative subsection (b) is provided under which the court must set aside that portion of the elective-share and supplemental elective-share amounts which, under Sections 2-207(b) and (c), are due from the decedent's probate and reclaimable estates and must appoint a trustee to administer that property for the support of the surviving spouse, in accordance with the terms set forth in Alternative subsection (b).

**Planning for an Incapacitated Surviving Spouse Not Disrupted.** Note that the portion of the elective-share or supplemental elective-share amounts that go into the custodial or support trust is that portion due from the decedent's probate and reclaimable estates under Section 2-207(b) and (c). These amounts constitute the involuntary transfers to the surviving spouse under the elective-share system. Amounts voluntarily transferred to the surviving spouse under the decedent's will, by intestacy, or by nonprobate transfer, if any, do not go into the custodial or support trust. Thus, estate planning measures deliberately established for a surviving spouse who is incapacitated are not disrupted. For example, the decedent's will might establish a trust that qualifies for or that can be elected as qualifying for the federal estate tax marital deduction. Although the value of the surviving spouse's interests in such a trust count toward satisfying the elective-share amount under Section 2-207(a)(1), the trust itself is not dismantled by virtue of Section 2-203(b) in order to force that property into the nonqualifying custodial or support trust.

**Rationale.** The approach of this section is based on a general expectation that most surviving spouses are, at the least, generally aware of and accept their decedents' overall estate plans are not antagonistic to them. Consequently, to elect the elective share, and not have the disposition of that part of it that is payable from the decedent's probate and reclaimable estates under Sections 2-207(b) and (c) governed by subsections (b) and (c), the surviving spouse must

not be an incapacitated person. When the election is made by or on behalf of a surviving spouse who is not an incapacitated person, the surviving spouse has personally signified his or her opposition to the decedent's overall estate plan.

If the election is made on behalf of a surviving spouse who is an incapacitated person, subsections (b) and (c) control the disposition of that part of the elective-share amount or supplemental elective-share amount payable under Sections 2-207(b) and (c) from the decedent's probate and reclaimable estates. The purpose of subsections (b) and (c), generally speaking, is to assure that that part of the elective share is devoted to the personal economic benefit and needs of the surviving spouse, but not to the economic benefit of the surviving spouse's heirs or devisees.

### PLAC Comment

In a situation in which a surviving spouse with a right of election dies prior to making the election the stricken UPC provisions mandated a trust for an incapacitated spouse and denied election when a spouse died before the right of election was exercised. The PLAC is of the opinion that, to the extent the surviving spouse had an accrued interest in the combined estates in excess of property titled in the survivor's name, the successor of a surviving spouse who dies before making the election should be able to succeed to that amount on the death of the surviving spouse to the beneficiaries of the second spouse to die.

### **Section 2-204. Waiver of Right to Elect and of Other Rights.**

(a) The right of election of a surviving spouse and the rights of the surviving spouse to either the homestead allowance, exempt property, and or the family allowance, or any of them both of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, consent to any instrument, or waiver signed by the surviving spouse.

(b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

(1) he or she did not execute the waiver voluntarily; or

(2) the waiver was unconscionable when it was executed and, before execution of the waiver, he or she:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and

(iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, ~~exempt property~~, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass to him or her from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

#### UPC Comment

Apart from minor stylistic changes, this section is revised to incorporate the standards by which the validity of a premarital agreement is determined under the Uniform Premarital Agreement Act Section 6.

The right to homestead allowance, exempt property and family allowance are conferred by the provisions of Part 4. The right to disclaim interests is recognized by Section 2-801.

The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property, seem desirable in view of the common desire of parties to second and later marriages to insure that property derived from the prior spouse passes at death to the joint children (or descendants) of the prior marriage instead of to the later spouse. The operation of a property settlement in anticipation of separation or divorce as a waiver and renunciation takes care of most situations arising when a spouse dies while a divorce suit is pending.

#### PLAC Comment

In 2-204(a) the phrases "homestead allowance" is changed to "homestead", and "exempt property" is stricken, thus using the Kansas terminology. It is the opinion of the committee that the UPC intended to permit a waiver by a consent to a will and the change is intended to clarify the section.

In 2-204(b) the word "or" was inserted at the end of subsection 2-204 (b)(1). 2-204(b) contains language identical to that contained in K.S.A. 23-807, the Uniform Premarital Agreement Act.

Note that 2-204(a) and (c) allow a prenuptial waiver of the homestead rights.

In 2-204(d) the phrases "homestead allowance" is changed to "homestead", and "exempt property" is stricken, thus using the Kansas terminology.

### **Section 2-205. Proceeding for Elective Share; Time Limit.**

(a) Except as provided in subsection (b), the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within ~~nine~~ six months after the date of the decedent's death, or within six months after ~~the probate of the decedent's will is admitted to probate~~, whichever limitation later expires. The surviving spouse must give notice of the time and place set for hearing in such manner as ordered by the court, to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share. Except as provided in subsection (b), the decedent's reclaimable estate, described in Section 2-202(b)(2), is not included within the augmented estate for the purpose of computing the elective share, if the petition is filed more than ~~nine~~ six months after the decedent's death.

(b) Within ~~nine~~ six months after the decedent's death, the surviving spouse may petition the court for an extension of time for making an election. If, within ~~nine~~ six months after the decedent's death, the spouse gives notice of the petition to all persons interested in the decedent's reclaimable estate, the court for good cause shown by the surviving spouse may extend the time for election. If the court grants the spouse's petition for an extension, the decedent's reclaimable estate, described in Section 2-202(b)(2), is not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) The surviving spouse may withdraw ~~his [or her] demand~~ the petition for an elective share at any time before entry of a final determination by the court.

(d) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under Section 2-207. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than he or she would have been under Section 2-207 had relief been secured against all persons subject to contribution.

(e) An order or judgment of the court may be enforced by the surviving spouse, as necessary, ~~in suit for to obtain~~ contribution or payment in other courts of this State or other jurisdictions. The decedent's personal representative shall not be required to enforce contributions from the assets of the reclaimable estate.

#### UPC Comment

This section is revised to coordinate the terminology with that used in revised section 2-202 and with the fact that an election can be made by a conservator, guardian, or agent on behalf of a surviving spouse, as provided in section 2-203(a).

#### PLAC Comment

In 2-205(a) the nine-month period after date of death was shortened to six months to correspond with the period during which the will may be admitted under Kansas law. If the will is filed under K.S.A. 59-618a or 59-2287, the six-month period will not start to run until the will is admitted to probate. The section speaks to the question of whether the right to an elective share was ever barred in cases of unadministered estates. The section clears included non-probate transfers to persons other than the surviving spouse of the lien of any possible elective share proceeding, unless the spouse's action is within six months. Notice pursuant to K.S.A. 59-2208 is preferred in most situations, but in certain situations notice pursuant to K.S.A. 59-2209 may be required. It is anticipated notice will be filed and hearing will be set at a later date.

In 2-205(b) the time was shortened from nine months to six months and "cause" was changed to "good cause".

In 2-205(c) the phrase "his or her demand" was stricken and the phrase "the petition" was inserted in lieu thereof.

In 2-205(d) the phrase "he or she" was stricken.

Subsection 2-205(e) was amended to clarify that the right and responsibility of enforcement is the surviving spouse's and is not the responsibility of the personal representative.

#### **Section 2-206. Effect of Election on Statutory Benefits.**

If the right of election is exercised by or on behalf of the surviving spouse, the surviving spouse's homestead ~~allowance, exempt property,~~ and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

### UPC Comment

The title of this section is revised to correspond to the section's content. The homestead, exempt property, and family allowances provided by Article II, Part 4, are not charged to the electing spouse as a part of the elective share. Consequently, these allowances may be distributed from the probate estate without reference to whether an elective share right is asserted.

### PLAC Comment

The section was amended by striking "homestead allowance" and "exempt property" and inserting in lieu thereof "homestead", thus using the Kansas terminology.

#### **Section 2-207. Charging Spouse with Owned Assets and Gifts Received; Liability of Others for Balance of Elective Share.**

(a) **(Elective-Share Amount Only.)** In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's reclaimable estate:

(1) amounts included in the augmented estate which pass or have passed to the surviving spouse by testate or intestate succession;

(2) amounts included in the augmented estate under Section 2-202 (b)(3);

(3) amounts included in the augmented estate which would have passed to the spouse but were disclaimed; and

(4) amounts included in the augmented estate under Section 2-202(b)(4) up to the applicable percentage thereof. For the purposes of this subsection, the "applicable percentage" is twice the elective-share percentage set forth in the schedule in Section 2-201(a) appropriate to the length of time the spouse and the decedent were married to each other.

(5) The value of any real estate recovered pursuant to K.S.A. 59-505.

(b) **[Unsatisfied Balance of Elective-Share Amount; Supplemental Elective-Share Amount.]** If, after the application of subsection (a), the elective-share amount is not fully satisfied or the surviving spouse is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and that portion of the decedent's reclaimable estate other than amounts irrevocably transferred within two years before the decedent's death are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's

reclaimable estate are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and that portion of the decedent's reclaimable estate in proportion to the value of their interest therein.

**(c) [Unsatisfied Balance of Elective-Share and Supplemental Elective-Share Amount.]**

If, after the application of subsections (a) and (b), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's reclaimable estate is so applied that liability for the unsatisfied balance of the elective-share or supplemental elective-share amount is equitably apportioned among the recipients of that portion of the decedent's reclaimable estate in proportion to the value of their interests therein.

**(d) [Liability of Recipients of Reclaimable Estate and Their Donees.]** Only original recipients of the reclaimable estate described in Section 2-202(b)(2), and the donees of the recipients of the reclaimable estate to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the reclaimable estate or to pay the value of the amount for which he or she is liable.

**UPC Comment**

**Purpose and Scope of Revisions.** Section 2-207, as revised, is an integral part of the overall redesign of the elective share. It establishes the priority to be used in determining the source of the elective-share amount.

**Subsection (a).** Subsection (a) applies only to the elective-share amount determined under Section 2-201(a), not to the supplemental elective-share amount determined under Section 2-201(b). Under subsection (a), the following are counted first toward satisfying the elective-share amount (to the extent they are included in the augmented estate):

(1) amounts that pass or have passed to the surviving spouse by testate or intestate succession;

(2) amounts included in the augmented estate under Section 2-202(b)(3), i.e., the value of property to which the surviving spouse succeeds by reason of the decedent's death (other than by homestead allowance, exempt property, family allowance, testate succession, or intestate succession), including the proceeds of insurance (including accidental death benefits) on the life of the decedent and benefits payable under a retirement plan in which the decedent was a participant, exclusive of the Federal Social Security system.

(3) amounts that would have passed to the spouse but were disclaimed, the theory being that the spouse is not compelled to accept the benefits devised by the decedent, but if these benefits are rejected, the values involved are charged to the electing spouse as if the devises were accepted, and

(4) amounts included in the augmented estate under Section 2-202(b)(4) up to the applicable percentage thereof, the applicable percentage being twice the elective-share percentage as determined under Section 2-201(a). (The phrase "amounts included in the augmented estate under Section 2-202(b) (4)" refers to the value of property owned by the surviving spouse at the decedent's death, reduced by enforceable claims against that property or that spouse, plus the value of property that would have been includible in the spouse's reclaimable estate had the surviving spouse predeceased the decedent.)

If the combined value of these amounts equals or exceeds the elective-share amount, the surviving spouse is not entitled to any further amount from the decedent's probate estate or recipients of the decedent's reclaimable estate, unless the surviving spouse is entitled to a supplemental elective-share amount under Section 2-201(b).

**Subsections (b) and (c).** Subsections (b) and (c) apply to both the elective-share amount and the supplemental elective-share amount, if any. As to the elective-share amount determined under Section 2-201(a), the decedent's probate and reclaimable estates become liable only if and to the extent that the amounts described in subsection (a) are insufficient to satisfy the elective-share amount. The decedent's probate and reclaimable estates are fully liable for the supplemental elective-share amount determined under Section 2-201(b), if any.

Subsections (b) and (c) establish a layer of priority within the decedent's probate and reclaimable estates. The decedent's probate estate and that portion of the decedent's reclaimable estate that was not irrevocably transferred within two years before the decedent's death are liable first. Only if and to the extent that those amounts are insufficient does the remaining portion of the decedent's reclaimable estate become liable.

Note that the exempt property and allowances provided by Sections 2-401, 2-402, and 2-403 are not charged against, but are in addition to the elective-share and supplemental elective-share amounts.

### PLAC Comment

The committee made no changes in the UPC draft, except to preserve the survivor's right under K.S.A. 59-505, to elect up to one-half of the transfers of real estate made by the decedent during marriage while the spouse is or had been a resident of Kansas and without spouse's consent.

## **Section 2-402. Homestead Allowance.**

Where this is no homestead or the homestead is valued at less than \$25,000 a decedent's surviving spouse is entitled to a homestead allowance of ~~[\$15,000]~~ not to exceed \$25,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to ~~[\$15,000]~~ \$25,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share.

### **UPC COMMENT**

As originally adopted in 1969, the bracketed dollar amount was \$5,000. To adjust for inflation, the bracketed amount was increased to \$15,000 in 1990.

See Section 2-802 for the definition of "spouse," which controls in this Part. Also, see Section 2-104. Waiver of homestead is covered by Section 2-204. "Election" between a provision of a will and homestead is not required unless the will so provides.

A set dollar amount for homestead allowance was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under Section 2-204. The "small estate" line is controlled largely, though not entirely, by the size of the homestead allowance. This is because Part 12 of Article III dealing with small estates rests on the assumption that the only justification for keeping a decedent's assets from his creditors is to benefit the decedent's spouse and children.

Another reason for a set amount is related to the fact that homestead allowance may prefer a decedent's minor or dependent children over his or her other children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of the decedent.

### **PLAC COMMENT**

The dollar amount suggested in the UPC was changed to \$25,000, which K.S.A. 59-403 provides is the maximum allowance in Kansas. This is a new right under Kansas law and provides money when there is no homestead. When there is a homestead with a value in excess of \$25,000 the spouse is entitled to the homestead pursuant to Article 15, Section 9 of the Kansas Constitution.

**Section 1-104. Severability.**

If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given affect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

Section \_\_\_\_\_. K.S.A. 1990 Supp. 59-403 is hereby amended to read as follows:  
59-403. Allowance to spouse and minor children. When a resident of the state dies testate or intestate, the surviving spouse shall be allowed, for the benefit of such spouse and the decedent's minor children during the period of their minority, from the personal or real property of which the decedent was possessed or to which the decedent was entitled at the time of death, the following:

(1) The wearing apparel, family library, pictures, musical instruments, furniture and household goods, utensils and implements used in the home, one automobile, and provisions and fuel on hand necessary for the support of the spouse and minor children for one year.

(2) A reasonable allowance of not less than \$1,500 nor more than \$25,000 in money or other personal or real property at its appraised value in full or part payment thereof, with the exact amount of such allowance to be determined and ordered by the court, after taking into account the condition of the estate of the decedent.

The property shall not be liable for the payment of any of decedent's debts or other demands against the decedent's estate, except liens thereon existing at the time of the decedent's death. If there are no minor children, the property shall belong to the spouse; if there are minor children and no spouse, it shall belong to the minor children. The selection shall be made by the spouse, if living, otherwise by the guardian of the minor children. In case any of the decedent's minor children are not living with the surviving spouse, the court may make such division as the court deems equitable.

DEPARTMENT OF CORRECTIONS  
STATE OF KANSAS

LEGISLATIVE PROPOSAL NO. \_\_\_\_\_

"CLEAN-UP"

"SUBSTANTIVE"

DRAFT NO.	DATE

Introduce Through \_\_\_\_\_

APPROVED BY GOVERNOR

Yes

No

Notes and comments:

DOC PERSONNEL TO FOLLOW UP:

An Act Concerning: the obstruction of legal process or official duty; amending K.S.A. 21-3808 and repealing the existing section.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

1           Sec. 1. K.S.A. 21-3808 is hereby amended to read as follows: 21-3808. Obstructing  
2 legal process or official duty is knowingly and willfully obstructing, resisting or opposing any  
3 person authorized by law to serve process in the service or execution or in the attempt to serve  
4 or execute any writ, warrant, process or order of a court, or in the discharge of any official  
5 duty.

6           Obstructing legal process or official duty in a case of felony, or resulting from parole or  
7 any authorized disposition for a felony, is a class E felony. Obstructing legal process or official  
8 duty in a case of misdemeanor, or resulting from any authorized disposition for a misdemeanor,  
9 or a civil case is a class A misdemeanor.

10           Sec. 2. K.S.A. 21-3808 is hereby repealed.

11           Sec. 3. This act shall take effect and be in force from and after its publication in the  
12 statute book.

13

14

15

*amended  
by Sec.  
152 of  
SB 479  
effective  
July 1, 1993*

**DEPARTMENT OF CORRECTIONS  
STATE OF KANSAS**

LEGISLATIVE PROPOSAL NO. \_\_\_\_\_

<input type="checkbox"/>	"CLEAN-UP"	DRAFT NO.	DATE
<input type="checkbox"/>	"SUBSTANTIVE"		

Introduce Through \_\_\_\_\_

APPROVED BY GOVERNOR  Yes  
 No

Notes and comments:
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DOC PERSONNEL TO FOLLOW UP:

An Act Concerning: Definitions

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

1           Sec. 1.       As used in K.S.A. 75-6101 through 75-6118, and amendments thereto,  
2 unless the context clearly requires otherwise:

3           (a)       "State" means the state of Kansas and any department or branch of state  
4 government or any agency, authority, institution or other instrumentality thereof.

5           (b)       "Municipality" means any county, township, city, school district or other political  
6 or taxing subdivision of the state, or any agency, authority, institution or other instrumentality  
7 thereof.

8           (c)       "Governmental entity" means state or municipality.

9           (d)       "Employee" means any officer, employee, servant or member of a board,  
10 commission, committee, division, department, branch or council of a governmental entity,  
11 including elected or appointed officials and persons acting on behalf for in service of a  
12 governmental entity in any official capacity whether with or without compensation and a  
13 charitable health care provider. Employee includes any steward or racing judge appointed  
14 pursuant to K.S.A. 1990 1991 Supp. 74-8818 and amendments thereto, regardless of whether  
15 the services of such steward or racing judge are rendered pursuant to contract as an independent  
16 contractor, but does not otherwise include any independent contractor under contract with a

1 governmental entity but does include a person who is a employee of a nonprofit independent  
2 contractor, other than a municipality, under contract to provide educational or vocational training  
3 to inmates in the custody of the secretary of corrections and who is engaged in providing such  
4 service in an institution under the control of the secretary of corrections provided that such  
5 employee does not otherwise have coverage for such acts and omissions within the scope of their  
6 employment through a liability insurance contract of such independent contractor. Employee  
7 also includes former employees for acts and omissions within the scope of their employment  
8 during their former employment with the governmental entity.

9 (e) "Community service work" means public or community service performed by a  
10 person

11 (1) as a result of a contract of diversion entered into by such person as authorized by law,

12 (2) pursuant to the assignment of such person by a court to a community corrections  
13 program,

14 (3) as a result of suspension of sentence or as a condition of ~~probation~~ a nonprison  
15 sanction, as defined by the Kansas sentencing guidelines act, pursuant to court order,

16 (4) in lieu of a fine imposed by court order or

17 (5) as a condition of placement ordered by a court pursuant to K.S.A. 38-1663 and  
18 amendments thereto or

19 (6) as a condition of parole, conditional release or post release supervision, as defined  
20 by the Kansas sentencing guidelines act, as ordered by the Kansas parole board or by the  
21 secretary of corrections.

22 (f) "Charitable health care provider" means a person licensed by the state board of  
23 healing arts as an exempt licensee or a health care provider as the term "health care provider"  
24 is defined under K.S.A. 65-4921, and amendments thereto, who has entered into an agreement  
25 with:

26 (1) The secretary of health and environment under K.S.A. ~~1990~~ 1991 Supp. 75-6120,  
27 and amendments thereto, who, pursuant to such agreement, renders professional services to a  
28 person who has provided information which would reasonably lead the health care provider to  
29 make the good faith assumption that such person meets the definition of medically indigent  
30 person as defined by this section and who renders such professional services gratuitously and

1 who is considered an employee of the state of Kansas under K.S.A. ~~1990~~ 1991 Supp. 75-6120,  
2 and amendments thereto; or

3 (2) a local health department that is part of the pilot programs established under  
4 K.S.A. 1991 Supp. 65-226 and amendments thereto who, pursuant to such agreement, renders  
5 professional service to medically indigent persons or persons receiving medical assistance from  
6 the programs operated by the department of social and rehabilitation services gratuitously or for  
7 a fee paid by the local health department.

8 (g) "Medically indigent person" means a person who lacks resources to pay for  
9 medically necessary health care services and who meets the eligibility criteria for qualification  
10 as a medically indigent person established by the secretary of health and environment under  
11 K.S.A. ~~1990~~ 1991 Supp. 65-6120, and amendments thereto.

12  
13 Sec. 2. This act shall take effect and be in force from and after its publication in the  
14 statute book.

**DEPARTMENT OF CORRECTIONS  
STATE OF KANSAS**

**LEGISLATIVE PROPOSAL NO. \_\_\_\_\_**

<input type="checkbox"/>	"CLEAN-UP"	<input type="checkbox"/>	DRAFT NO.	DATE
<input type="checkbox"/>	"SUBSTANTIVE"	<input type="checkbox"/>		
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Introduce Through \_\_\_\_\_

APPROVED BY GOVERNOR  Yes  
 No

Notes and comments:

DOC PERSONNEL TO FOLLOW UP:

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An Act Concerning: crimes and punishment; creating the crime of unlawful sexual relations and prescribing the penalty therefor.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF KANSAS:

- 1       Sec. 1. (a) Unlawful sexual relations is engaging in consensual sexual intercourse or  
2 sodomy with a person who is not married to the offender if:
- 3       (1) The offender is an employee of the department of corrections or the employee of  
4 a contractor who is under contract to provide services in a correctional institution and the person  
5 with whom the offender is engaging in consensual sexual intercourse or sodomy is an inmate;
- 6       (2) the offender is a parole officer and the person with whom the offender is engaging  
7 in consensual sexual intercourse or sodomy is an inmate who has been released on parole or  
8 conditional release or post release supervision under the supervision and control of the offender;
- 9       (c) For purposes of this act:
- 10       (1) "correctional institution" means the same as provided by K.S.A. 75-5202 and  
11 amendments thereto;
- 12       (2) "inmate" means the same as prescribed by K.S.A. 75-5202 and amendments  
13 thereto;
- 14       (3) "parole officer" means the same as prescribed by K.S.A. 75-5202 and  
15 amendments thereto; and

1           (4) "post release supervision" means the same as defined in the Kansas sentencing  
2 guidelines act; and

3           (d) Unlawful sexual relations is a severity level 10 person felony.  
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5           Sec. 2. This act shall take effect and be in force from and after its publication in the  
6 statute book.  
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**TESTIMONY OF BRANDON L. MYERS, CHIEF LEGAL  
COUNSEL, KANSAS HUMAN RIGHTS COMMISSION,  
BEFORE THE HOUSE JUDICIARY COMMITTEE,  
JANUARY 14, 1993**

The Kansas Human Rights Commission (KHRC, formerly known as the Kansas Commission on Civil Rights/KCCR) seeks introduction of a bill in the 1993 Legislative session which will amend the Kansas Act Against Discrimination (KAAD) to ameliorate certain interpretative decisions of the Kansas appellate courts which restrict the jurisdictional coverage of the KAAD. In addition the bill would amend a procedural portion of the KAAD to eliminate an inconsistency between the Kansas Administrative Procedures Act (KAPA) which now governs KHRC public hearing proceedings, and a section of the KAAD which uses terminology predating the adoption of KAPA.

The first proposed amendment seeks to adopt the limited religious institution exemption of Title VII of the Federal Civil Rights Act of 1964, as amended, into the KAAD's definition of "employer" at K.S.A. 44-1002(b). This is prompted by the Kansas Court of Appeals decision (16 Kan. App. 2d 237 (1991)), affirmed on review by the Kansas Supreme Court in Zion Lutheran Church of Prairie Village, Kansas vs The Kansas Commission on Civil Rights, 251 Kan. 206 (1992), which held that the church in operating a day care center open to the public and employing in excess of 25 employees, was not an "employer" under the KAAD which cannot discriminate in employment on the basis of race, religion, color, sex, national origin, ancestry or disability. The courts held that the definition only includes "...nonsectarian corporations...", and thereby totally excludes "sectarian" corporations and entities from the employment discrimination prohibitions of the KAAD. The courts held that this interpretation was in line with the previous Kansas Supreme

Court ruling in Van Scoyck vs St. Mary's Assumption Parochial School, 224 Kan. 304 (1978).

KHRC seeks the amendment in this session because all our arguments existing on this point under this caselaw have been exhausted with the Zion decision, and the courts indicated it was now a matter to broach with the Legislature. Also the caselaw disrupts our worksharing relationship with Federal EEOC because KAAD coverage is not in substantial conformity with Federal Title VII which they administer. We have closed or are closing or not accepting what will probably amount to 50 complaints per year without this amendment.

The second group of amendments stem from the cases of KCCR vs City of Independence, 218 Kan. 243 (1975), Howard vs KCCR, 218 Kan. 248 (1975) and KCCR vs Topeka USD 501, 243 Kan. 137 (1988). These decisions all deal with coverage of the KAAD under K.S.A. 44-1009 (c) (3) and the KAAD prohibitions against discrimination by places of "public accommodations." Despite K.S.A. 44-1009 (c) (3)'s indication that, as "public accommodations" discrimination, discriminatory conduct of governmental entities is ostensibly prohibited by the KAAD, the Supreme Court has indicated in the above cases that no such coverage exists regarding the vast majority of activities, facilities, etc. provided by governmental entities. The court held that places of public accommodation are "those which are held out as open to the general public and which members of the public generally are invited to patronize and otherwise visit." (KCCR vs U.S.D. 501, P. 142) Therefore, since police departments and law enforcement entities, (Howard and Independence cases) as well as public schools (USD 501 case)

are not generally places of that nature, racially discriminatory arrest procedures or other law enforcement conduct, as well as allegations of racial segregation in schools, are not KAAD-covered. Utilizing this approach, practically no conduct of governmental agencies is KAAD-prohibited. Literally all services, duties, conduct, programs of state and local government, unless the government solicits the public generally to patronize and enjoy them, can be provided discriminatorily without violating the KAAD because such conduct does not fit neatly into the idea of a "place of public accommodation" like a store, restaurant, motel, etc. Thus, we seek a separate category of coverage for discrimination in governmental services beyond the current scope of "public accommodations."

We were specifically asked to pursue this at this time by request of the KHRC Advisory Committee, which is composed of numerous members of the public and representatives of groups concerned with civil rights and human rights issues. The request originated from Indian/Native American tribal representatives noting the lack of a KHRC administrative system and forum to turn to over recent allegations of discriminatory treatment extended toward Native Americans by police departments, and harassment extended toward them in public schools. The timing of an request is also relative to the exhaustion of all our arguments that would make inroads on the issue by the 501 decision of the Supreme Court. In the 501 decision the Court said our recourse was to the legislature.

The last change relates to merely making the KAAD language as to disqualification of a public hearing presiding officer more consistent with KAPA, which began to govern KHRC public hearing procedure a few

years ago. This is just another loose end we have come upon in adjusting to KAPA and is a relatively innocuous proposal for change.

## THE KANSAS ACT AGAINST DISCRIMINATION

44-1001. Title of act; declaration of state policy and purpose. This act shall be known as the Kansas act against discrimination. It shall be deemed an exercise of the police power of the state for the protection of the public welfare, safety, health and peace of the people of this state. The practice or policy of discrimination against individuals in employment relations, in relation to free and public accommodations, in governmental activities, programs, services, conduct, duties or facilities, or in housing by reason of race, religion, color, sex, disability, national origin or ancestry or in housing by reason of familial status is a matter of concern to the state, since such discrimination threatens not only the rights and privileges of the inhabitants of the state of Kansas but menaces the institutions and foundations of a free democratic state. It is hereby declared to be the policy of the state of Kansas to eliminate and prevent discrimination in all employment relations, to eliminate and prevent discrimination, segregation, or separation in all places of public accommodations covered by this act, to eliminate and prevent discrimination in all governmental activities, programs, services, conduct, duties or facilities, and to eliminate and prevent discrimination, segregation or separation in housing.

It is also declared to be the policy of this state to assure equal opportunities and encouragement to every citizen regardless of race, religion, color, sex, disability, national origin or ancestry, in securing and holding, without discrimination, employment in any field of work or labor for which he is properly qualified, to assure equal opportunities to all persons within this state to full and equal public accommodations, to assure equal opportunities to any governmental services, activities, programs, conduct, duties, and facilities, and to assure equal opportunities in housing without distinction on account of race, religion, color, sex, disability, familial status, national origin or ancestry. It is further declared that the opportunity to secure and to hold employment, the opportunity for full and equal public accommodations as covered by this act, the opportunity for full and equal governmental services, activities, programs, conduct, duties and facilities, and the opportunity for full and equal housing are civil rights of every citizen.

To protect these rights, it is hereby declared to be the purpose of this act to establish and to provide a state commission having power to eliminate and prevent segregation and

discrimination, or separation in employment, in all places of public accommodations covered by this act, in all governmental activities, conduct, duties, facilities, services and programs, and in housing because of race, religion, color, sex, disability, national origin or ancestry and in housing because of familial status, either by employers, labor organizations, employment agencies, realtors, financial institutions or other persons as hereinafter provided.

44-1002. Definitions. When used in this act:

(a) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy or receivers,

The term "person" shall also include a department or agency of the State of Kansas or all political and municipal subdivisions thereof.

(b) "Employer" includes any person in this state employing four or more persons, and any person acting directly or indirectly for an employer, labor organization, nonsectarian corporations, organizations engaged in social service work and the state of Kansas and all political and municipal subdivisions thereof, but shall not include a non-profit fraternal or social association or corporation or a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

\*\*\*\*

(g) "Unlawful employment practice" includes only those unlawful practices and acts specified in K.S.A. 44-1009 and amendments thereto and includes segregate or separate.

(h) "Public accommodations" means any person who caters or offers goods, services, facilities and accommodations to the public. Public accommodations include, but are not limited to, any lodging establishment or food service establishment, as defined by K.S.A. 36-501 and amendments thereto; any bar, tavern, barbershop, beauty parlor, theater, skating rink, bowling alley, billiard parlor, amusement park, recreation park, swimming pool, lake, gymnasium, mortuary or cemetery which is open to the public; or any public transportation facility. Public accommodations do not include a religious or nonprofit fraternal or social association or corporation.

(i) "Unlawful discriminatory practice" means: (1) Any discrimination against persons, by reason of their race, religion, color, sex, disability, national origin or ancestry;—

~~(A) In any place of public accommodations; or~~

~~(B) in the full and equal use and enjoyment of the services, facilities, privileges and advantages, programs, activities, conduct or duties of any institution, department or agency of the state of Kansas or any political subdivision or municipality thereof, including but not limited to decisions and actions of public schools with regard to student admissions and attendance at schools, all actions of police departments, sheriff departments and other law enforcement entities in making arrests, responding to requests for assistance and other related law enforcement activities, duties, services and conduct; and;~~

(2) any discrimination against persons in regard to membership in a nonprofit recreational or social association or corporation by reason of race, religion, sex, color, disability, national origin or ancestry if such association or corporation has 100 or more members and: (A) Provides regular meal service; and (B) receives payment for dues, fees, use of space, use of facility, services, meals or beverages, directly or indirectly, from or on behalf of nonmembers.

This term shall not apply to a religious or private fraternal and benevolent association or corporation; and

~~(3) any discrimination against persons, by reason of their race, religion, color, sex, disability, national origin or ancestry in the full and equal use and enjoyment of the services, facilities, privileges and advantages, programs, activities, conduct or duties of any institution, department or agency of the state of Kansas or any political subdivision or municipality thereof, including but not limited to decisions and actions of public schools with regard to student admissions and attendance at schools, all actions of police departments, sheriff departments and other law enforcement entities in making arrests, responding to requests for assistance and other related law enforcement activities, duties, services and conduct.~~

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44-1004. Powers and duties of commission. The commission shall have following functions, powers and duties:

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(4) To receive, initiate, investigate and pass upon complaints alleging discrimination in employment, public accommodations, governmental activities, conduct, duties, facilities, programs or services and housing because of race, religion, color, sex, disability, national origin or ancestry and complaints alleging discrimination in housing because of familial status.

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(7) To apply to the district court of the county where the respondent resides or transacts business, or where a respondent governmental entity is located for enforcement of any conciliation agreement by seeking specific performance of such agreement.

44-1009. Unlawful employment practices; unlawful discriminatory practices.

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(c) It shall be an unlawful discriminatory practice:

(1) For any person, as defined herein being the owner, operator, lessee, manager, agent or employee of any place of public accommodation to refuse, deny, or make a distinction, directly or indirectly, in offering its goods, services, facilities, and accommodations to any person as covered by this act because of race, religion, color, sex, disability, national origin or ancestry, except where a distinction because of sex is necessary because of the intrinsic nature of such accommodation.

(2) For any person, whether or not specifically enjoined from discriminating under any provisions of this act, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

~~(3) For any person, to refuse, deny, make a distinction, directly or indirectly, or discriminate in any way against persons because of the race, religion, color, sex, disability, national origin or ancestry of such persons in the full and equal use and enjoyment of the services, facilities, privileges, and advantages, of any institution, department or agency of the state of Kansas or any political subdivision or municipality thereof.~~

(d) It shall be an unlawful discriminatory practice:

(1) For any person, to refuse, deny, make a distinction, directly or indirectly, or discriminate in any way against persons because of the race, religion, color, sex, disability, national origin or ancestry of such persons in the full and equal use and enjoyment of the services, facilities, privileges, advantages, programs, activities, conduct or duties of any institution, department or agency of the state of Kansas or any political subdivision or municipality thereof.

(2) For any person, whether or not specifically enjoined from discriminating under any provisions of this act, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

## KANSAS ACT AGAINST DISCRIMINATION

### 1993 LEGISLATIVE PROPOSAL

44-1040. Request for change of hearing commission or examiner. ~~(a) If either Any party in a hearing required by the Kansas act against discrimination has cause to believe and does believe that on account of the personal bias, prejudice or interest of any or all of the hearing commissioners or hearing examiner, such party cannot obtain a fair and impartial decision, such party shall request a change of commissioners or examiners. Such change request shall state the facts and the reasons for belief that bias, prejudice or an interest exists and shall be presented to the chairman of the commission~~ may petition for the disqualification of a presiding officer in accordance with the provisions of the 77-514 and amendments thereto.

~~(b) If the person whose disqualification is requested shall determine not to grant the petition, the requesting party may timely petition the chairman of the commission to reconsider the person's petition for disqualification. The petition for reconsideration shall be filed within 15 days after service of the presiding officer's order.~~ The chairman of the commission, upon a finding that administrative bias, prejudice or interest exists, shall reassign the case to a different commissioner or examiner.

## New system would ease filing of annual reports

### UCC searches can be faxed

Uniform Commercial Code searches can be faxed to customers with a prepaid account or Visa or Mastercard. These customers can telephone their search request to our UCC office and expect them back within 24 hours.

Prepaid account and credit card customers can always order searches by telephone, even when fax service is not requested. To request a search, see the telephone directory on reverse side.

### Filings must include account numbers

Prepaid account customers are reminded that their prepaid account number must be on Uniform Commercial Code documents intended for filing. It is suggested that the number be placed in the upper right hand corner of the UCC form, just under the perforation. Failure to include the account number could delay your filing.

Secretary of State Bill Graves today solicited public response to a proposal that would increase the ease of filing corporate annual reports.

If public response is favorable, Graves said he will seek legislative approval of the proposal in 1993.

Persons wishing to comment should write the Office of the Secretary of State, 2nd Floor, State Capitol, Topeka, KS 66612-1594.

Graves said under the new system:

- Truly public information, such as the corporation's officers and directors, would be

available more quickly and at less government expense.

- Balance sheet information would no longer be made public.
- Computation of franchise tax would be streamlined.

Graves said the amount of franchise tax each corporation pays would be one of eight amounts based on categories of Kansas net worth. Some corporations would pay more and some would pay less, depending upon their position within a category.

For example, a corporation with a shareholders' equity attributable to Kansas of \$52,000 now pays a franchise tax of \$52. Under the proposal, the tax for the category would be \$75. On the other hand, a corporation now paying \$99 would see its tax reduced to \$75. The categories and corresponding tax appear in the chart above.

All annual reports would be due July 1 and the tax would be based on financial information for the most recent tax year end in the previous calendar year. Because a balance sheet does not need to accompany the report, there will be no need or provision for extensions of time to file the report. Penalty and forfeiture provisions for failure to file would remain unchanged.

The transition between the two systems would be accomplished by applying the old system to tax years ending on or before December 31, 1993. Reports for tax years

ending January 1, 1994 through December 31, 1994 would be due on July 1, 1994.

Graves' proposal also would affect investor information. Currently, corporations report the name, address and number of shares held by investors owning five percent or more of the stock.

There is no similar requirement for limited partnerships or limited liability companies.

Under this proposal, all would report the names and addresses of the investors owning five percent or more of the stock or capital, but the specific amount of ownership would no longer be required.

One additional change would permit a nonprofit corporation to reinstate by paying the privilege fee for each year a report wasn't filed; however, it would only need to file the past three annual report forms.

### Proposed franchise tax formula

Equity or Capital .....	Franchise Tax
\$0 - \$30,000 .....	\$20.00
\$30,001 - \$50,000 .....	\$40.00
\$50,001 - \$100,000 .....	\$75.00
\$100,001 - \$250,000 .....	\$175.00
\$250,001 - \$500,000 .....	\$375.00
\$500,001 - \$1,000,000 .....	\$750.00
\$1,000,001 - \$2,500,000 .....	\$1,500.00
\$2,500,001+ .....	\$2,500.00