

Approved: 2-11-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 10:05 a.m. on February 4, 1993 in Room 514-S of the Capitol.

All members were present except: All present.

Committee staff present: Michael Heim, Legislative Research Department
Jerry Ann Donaldson, Legislative Research Department
Gordon Self, Revisor of Statutes
Michelle Smith, Legislative Intern
Sue Krische, Committee Secretary

Conferees appearing before the committee:

John Wine, Secretary of State's Office
Bill Martin, General Counsel and Trust Officer, Smith County State Bank, Smith Center, KS
Janet Stubbs, Kansas Property Rights Coalition
Helen Pedigo, Kansas Sentencing Commission

Others attending: See attached list

SB 108 - Amendments to the Kansas limited liability company act.

John Wine, Secretary of State's Office, appeared in support of SB 108 and explained that Kansas' limited liability company act, adopted in 1990, has resulted in the formation of 330 organizations under the act. Mr. Wine stated SB 108 contains nine improvements to the act as listed in his written testimony (Attachment 1). He indicated the amendments to sections 1, 4, 6, 7 and 8 of the act are cleanup in nature. Section 9 adds fax filing. Comments of Dale G. Schedler on the amendments to sections 2, 3 and 5 were provided to the members (Attachment 2).

SB 121 - Standards for trust investments by fiduciaries

Bill Martin, General Counsel and Trust Officer, Smith County State Bank, Smith Center, KS, testified in support of SB 121 on behalf of the Kansas Bankers Association (Attachment 3). Mr. Martin stated SB 121 amends K.S.A. 17-5004 and intends to implement standards for investment of assets held in a fiduciary capacity that follow what is termed "modern portfolio theory," i.e., look not at investments in isolation but look at the whole portfolio. SB 121 makes five fundamental alterations to criteria for prudent investing as cited in attachment 3. Senator Bond asked if a co-trustee/family member would have the same fiduciary responsibilities under the law as a bank trustee and Mr. Martin stated in his opinion he or she would.

Chairman Moran closed the hearings and assigned SB 108 and SB 121 to the Civil Law Subcommittee to review and report back to the full committee.

Senator Brady moved to recommend favorably for confirmation by the Senate Mr. Harry Perry and Mr. Larry Erne to the Board of the State Board of Indigents' Defense Services. Senator Martin seconded. Motion carried.

INTRODUCTION OF BILLS

Janet Stubbs, Kansas Property Rights Coalition, requested introduction of the Private Property Rights Protection Act (Attachment 4). The bill would establish the policy that no person may be deprived of the use of private property without due process of law and no private property may be taken or damaged by governmental action without just compensation having first been made. Senator Oleen moved introduction of the Private Property Rights Protection Act. Senator Ranson seconded. Motion carried.

Helen Pedigo, Kansas Sentencing Commission, requested for introduction five bills recommended by the first Consolidation Task Force to address problems presently existing in field services (Attachment 5). Senator Vancrum moved introduction of the five bills. Senator Bond seconded. Motion carried.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 10:05 a.m. on February 4, 1993.

Senator Emert requested introduction of a bill to eliminate the Advisory Board of the State Board of Indigents' Defense Services. Senator Ranson seconded. Motion carried.

The meeting was adjourned at 11:00 a.m. The next meeting is scheduled for February 5, 1993.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 2-4-93

[illegible]

Bill Graves
Secretary of State



2nd Floor, State Capitol
Topeka, KS 66612-1594
(913) 296-2236

STATE OF KANSAS
TESTIMONY BEFORE THE SENATE
JUDICIARY COMMITTEE
Senate Bill No. 108

February 4, 1993

The office of the Secretary of State supports SB 108 and encourages this committee to favorably recommend it for passage.

In 1990, Kansas became the fourth state to adopt a limited liability company act. In 1991, a number of small improvements were made to the act. This bill contains suggestions for further improvements made by members of an informal committee of fourteen attorneys and certified public accountants who work with these business entities.

§ 1 • The first section makes a technical correction by deleting the word "corporate."

§ 2 • Section two clarifies the authority of members and managers to act on behalf of the company.

§ 3 • This section deals with distributions made to members of the company.

§ 4 • Section four would delete the requirement that articles be amended when capital is withdrawn. The articles no longer contain this information.

§ 5 • The rights of creditors of the company are clarified in section five.

SJ
2-4-93
Attachment 1

§ 6 • This section provides that only the organizer of the company needs to sign the articles. The 1991 amendments attempted to authorize this practice but this statutory provision was overlooked.

§ 7 • If a foreign company is managed by managers rather than the members, this section would permit it to list the managers on its application instead of its members.

§ 8 • Section eight clarifies that a certificate of merger should be filed when a merger, authorized by the 1991 amendments, occurs.

§ 9 • The final section gives limited liability companies the opportunity to file documents by FAX. This provision would give companies the same privilege that corporations have used successfully since 1990.

Again, the office of the Secretary of State encourages this committee to favorably report SB 108 for passage.

Thank you.

John Wine, General Counsel

L. L. C. CONTACT PEOPLE

Stanley G. Andeel
Foulston & Siefkin
700 Fourth Financial Center
Wichita, KS 67202-2295
(316) 267-6371
FAX (316) 267-6345

T. C. Anderson
KS Society of Certified Public Accts.
400 Croix
PO Box 5654
Topeka, KS 66605
(913) 267-6460
FAX (913) 267-9278

Brad Bradley
Hinkle, Eberhart & Elkouri
2000 Epic Center
301 N. Market
Wichita, KS 67202-4820
(316) 267-2000
FAX (316) 264-1518

John Gerdes
Fleeson, Gooing, Coulson & Kitch
PO Box 997
125 N. Market, Suite 1600
Wichita, KS 67201
(316) 267-7361
FAX (316) 267-1754

Richard F. Hayse
Morris, Laing, Evans, Brock & Kennedy
914 Merchants National Bank
Topeka, KS 66612-1216
(913) 232-2662
FAX (913) 232-9983

Al Joseph
155 North Market
Suite 830
Wichita, KS 67202
(316) 265-9650
FAX (316) 264-3455

John R. Luttjohann
Wendling, Noe, Nelson & Johnson
1500 Bank IV Tower
Topeka, KS 66603
(913) 233-4226
FAX (913) 233-6830

Alson R. Martin
Shook, Hardy & Bacon
Building #40, Corporate Woods
9401 Indian Creek Parkway
PO Box 251-28
Overland Park, KS 66225
(913) 451-6060
FAX (913) 451-8879

Thomas G. Peebles
Kennedy & Coe
United Building
PO Box 1100
Salina, KS 67402-1100
(913) 825-1561
FAX (913) 825-5371

Dale G. Schedler
Lewis, Rice & Fingersh
Corporate Woods, Building #40
9401 Indian Creek Parkway, Suite 1100
Overland Park, KS 66210
(913) 451-8500
FAX (913) 451-8512

R. Scott Shackelford
Morrison, Hecker, Curtis, Kuder & Parrish
1700 Bryant Building
1102 Grand Avenue
Kansas City, MO 64106-2370
(816) 842-5910
FAX (816) 474-4208

John Wine
Office of the Secretary of State
2nd Floor, State Capitol
Topeka, KS 66612
(913) 296-2236
FAX (913) 296-4570

John Ensley
Goodell, Stratton, Edmonds & Palmer
515 S. Kansas Ave.
Topeka, KS 66603
(913) 233-0593
FAX (913) 233-8870

James Thomas
Gage & Tucker
2345 Grand Ave., Ste. 2800
Kansas City, MO 64141
(816) 292-2122
FAX (816) 292-2001

MEMORANDUM

TO: Senate Judiciary Committee
FROM: Dale G. Schedler
DATE: February 4, 1993
RE: Kansas S.B. 108

Existing K.S.A. 17-7614 provides certain rules as to who may sign documents on behalf of a limited liability company. As drafted, the section does not clearly indicate the authority of members in a manager-managed limited liability company to bind the limited liability company.

The amendments to K.S.A. 17-7614 clarify that a member in a manager-managed limited liability company has no authority to act for the limited liability company unless expressly authorized to do so.

Existing K.S.A. 17-7615 does not adequately address how distributions from the limited liability company to its members are to be shared in the absence of agreement among the parties. Moreover, it does not address whether the limited liability company may make a distribution in kind of property.

The amendment to this section provides that, unless the parties otherwise agree, the distributions shall be made equally to the members and no member has the right to compel a distribution in kind.

DGS/mc

f:\cw\dgs\memos\senjudco.204

5J
2-4-93
Attachment 2

TESTIMONY OF WILLIAM Q. MARTIN
General Counsel and Trust Officer

THE SMITH COUNTY STATE BANK & TRUST COMPANY
136 S. Main
Smith Center, Kansas 66967
(913) 282-6682

February 4, 1993

To: Senate Judiciary Committee
Jerry Moran, Chair

Re: Senate Bill 121

Good afternoon:

My name is Bill Martin. I am General Counsel and Trust Officer for The Smith County State Bank & Trust Company, Smith Center, Kansas. My appearance today is at the request of the Kansas Bankers Association, Trust Division.

I handle tax and legal matters that affect trusts and wills for which The Smith County State Bank & Trust Company serves in a fiduciary capacity. In my position, I also direct, review and administer investments held by The Smith County State Bank & Trust Company as a trustee or other fiduciary position.

K.S.A. 17-5004 is a state statute (originally enacted in 1949) as a codification of the "prudent man rule" which is the cornerstone for investment standard by Kansas fiduciaries. Senate Bill 121 is a proposed amendment to this statute and is intended to implement standards for investment of assets held in a fiduciary capacity that follow what is termed "modern portfolio theory".

The Prudent Man Rule was adopted by statute or case law in most American jurisdictions to replace the old and restrictive "legal list" statutes which gave specific lists of which investments were per se prudent.

However, the intended purpose of the prudent man rule has been lost as it has been interpreted by various court decisions on a case by case basis. Various cases were treated as precedents establishing general rules which resulted in specific case results and flexible principles becoming crystallized into specific rules prescribing the types and characteristics of permissible investments. Therefore, based on some degree of risk that was perceived in the abstract to be excessive, broad categories of investments came to be classified as "speculative" and imprudent per se.

The old Prudent Man Rule also has an inherent difference and basic conflict with what is termed "modern portfolio theory". Because investment information and theory concerning financial markets have changed over the time, the actual practice of progressive Kansas fiduciaries has also changed. Senate Bill 121 simply codifies what is the actual investment philosophy and practice of investment management as practiced today by Kansas fiduciaries.

Senate Bill 121 is based on The Prudent Investor Rule as developed by the American Law Institute (ALI) and is similar to the investment statute recently adopted by Illinois. Six other states (California, Delaware, Georgia, Tennessee, Minnesota and Washington) had previously enacted their own "modern" versions of the Rule.

SJ
2-493
Attachment 3

Senate Bill 121 makes five fundamental alterations to criteria for prudent investing.

1. The standard of prudence is applied to the portfolio as a whole rather than each individual investment reviewed in isolation.
2. A risk and return analysis is the basis for investment decisions, rather than an absolute prohibition against risk taking or speculation.
3. The duty to diversify is considered of such central importance that it is specifically incorporated into the rule.
4. No investment or category of investment is proscribed.
5. The delegation of investment functions is permitted subject to certain safeguards.

The new Act emphasizes risk management rather than risk avoidance. Modern experience with inflation dictates a greater sensitivity to the needs of today and tomorrow.

Many of the familiar concepts of the former rule continue to apply.

- The fundamental duty of loyalty and impartiality
- Trustee must exercise reasonable care, skill and caution
- Trustee has the duty to diversify investments unless there is a good reason not to do so
- Prudence involves a standard of conduct and not of performance

Senate Bill 121 also underscores the duty to incur only reasonable and appropriate costs. The proposed legislation also allows, but does not require the fiduciary to consider related trusts and assets of beneficiaries when making investment decisions.

Senate Bill 121 is not a radical departure from the current law, but does afford greater flexibility in making investment decisions to enhance yield and value for the benefit of clients of a Kansas fiduciary.

I support the enactment of Senate Bill No. 121.

Thank you.

COALITION SEEKS KANSAS LEGISLATION

Patterned after the 48-member coalition for property rights protection in Arizona, the Kansas Property Rights Coalition is growing. The purpose of the coalition is straightforward: to seek passage by the Kansas Legislature in 1993 and the signature of the Governor on the Private Property Rights Protection Act.

We believe it should be the policy of the State of Kansas - **CLEARLY ARTICULATED IN STATUTORY LANGUAGE** - that no person may be deprived of the use of private property without due process of law and no private property may be taken or damaged by governmental action without just compensation having first been made. We ask for legislation to establish an orderly, consistent process that better enables governmental bodies to evaluate proposed regulatory or administrative actions that may result in a "taking" of private property.

To the members of the coalition, a "constitutional taking" or a "taking" means: because of some governmental action private property is taken or the value of the property is so diminished that compensation is required by the U.S. Constitution and by Kansas law. A governmental action would mean: proposed rules or emergency rules by some state agency that, if adopted and enforced, may limit the use of private property. Governmental action could also mean proposed or implemented licensing or permitting procedures or conditions which limit the use of private property. Also, governmental action could mean: required dedications or exactions from owners of private property by a state agency.

It's important to know the coalition does not intend to halt growth. It does not intend to halt the legitimate exercise of the power of eminent domain when formally and constitutionally utilized.

It would be the hope of the coalition that Kansas legislation would clearly establish guidelines to assist state agencies in the identification of governmental actions that have constitutional takings implications. Where there is a taking, even though that action constitutes less than complete deprivation of all use or value of property, there should be compensation, just as there should be when governmental actions are separate and distinct concerning full or complete taking of private property, or even if the action is only temporary in nature.

M.S. Mitchell, Chairman, Kansas Property Rights Coalition

SJ
2-4-93
Attachment 4

REQUEST FOR BILL PROPOSAL

by the

Kansas Sentencing Commission

February 4, 1993

I come before you today to request bills recommended by our Consolidation Task Force which will provide some relief to problems presently existing in field services. These recommendations would be implemented in lieu of consolidating field services.

1. A single field services agency will supervise and manage each client.
 - a. Develop a uniform risk and needs assessment form, which will be used to determine the appropriate supervision level for the client.
 - b. Develop objective classification criteria to determine programs necessary to encourage rehabilitation of the client.
 - c. Mandate and provide a procedure for conducting and recording staffing conferences between agencies whose supervision is duplicated.
2. A uniform data base will be developed.
 - a. Develop one data base that would provide standardized information to the state presently unavailable to all three areas.
 - b. Provide the ability to check for duplication and to inform the affected officers so they can resolve duplications.
 - c. Provide feedback to individual agencies on a regular basis to encourage effective planning and resource allocation.
3. Allow for a restitution trustee in each district.
 - a. The position may be salaried or paid on a percentage of the restitution collected.
 - b. Implementing this would allow field services officers to supervise more clients.
 - c. By making restitution a civil matter, the district is more likely to collect. The trustee, an attorney, may set off the amount of restitution against any money held for, or owed to the offender by the state. This procedure is not presently available to field services officers.
4. Provide for standard training of the three agencies mandating 40 hours pre-service and 40 hours per year thereafter.
5. A bill relating to dispositions
 - a. Authorize "direct placement" into Community Corrections, rather than "assignment" from probation to Community Corrections.
 - b. Increase fees in misdemeanor cases, from a \$25 one-time fee to a \$30 yearly fee.
 - c. Increase fees in felony cases from a \$50 one-time fee to a \$60 yearly fee.
 - d. Set maximum probation terms at 5 years for a B felony and 3 years for C, D, E and unclassified felonies. These terms would not apply to K.S.A. Chapter 21, Article 35 crimes.

SJ

2-4-93

Attachment 5