

Approved: 4-28-93
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 9:30 a.m. on March 22, 1993 in Room 514-S of the Capitol.

All members were present except: All present.

Committee staff present: Michael Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Sue Krische, Committee Secretary

Conferees appearing before the committee:

Others attending: See attached list

Chairman Moran took up the Criminal Law Subcommittee report (Attachment 1). Senator Emert reported that the first and last bills on the report--SB 243 and SB 266--were previously passed out of Committee favorably. The Subcommittee recommends amending HB 2458 by deleting the establishment of a Victims Rights Review Committee but retaining the provision waiving the \$100 threshold of economic loss for sexual assault victims. The bill also provides for confidentiality of information needed to determine eligibility for compensation. Senator Emert made a motion to amend HB 2458 as recommended by the Criminal Law Subcommittee and to report HB 2458, as amended, favorably for passage. Senator Ranson seconded. Motion carried.

Senator Emert advised that HB 2459 addresses notice to victims in municipal court cases. The Subcommittee recommends amending HB 2459 to provide that notice to victims is not required for acts or omissions in violations of ordinances of cities except in cases which if filed in district court would fall under KSA Chapter 21, Sections 33, 34, 35 and 36. Senator Emert moved to amend HB 2459 as recommended by the Criminal Law Subcommittee and to report HB 2459, as amended, favorably for passage. Senator Vancrum seconded. Motion carried.

The Chairman turned to final action on HB 2008. Senator Petty moved that HB 2008 be amended to provide for dental identification before cremation. Senator Parkinson seconded. Motion carried. Senator Parkinson moved to amend HB 2008 by adopting the amendments recommended by the Office of Judicial Administration regarding compensation for inquest and the insertion of "clerk of the district court" to clarify intent in Section 7(b) of the bill. Senator Rock seconded. Motion carried. Senator Parkinson moved to amend HB 2008 to clarify that if the coroner determines the remains are not of evidentiary value the coroner shall notify the State Historical Society. Senator Petty seconded. Motion carried. The Committee discussed the amendment to Section 8(b) of the bill requested by the KBI to require hand and feet prints for future identification of the remains. The Committee did not act on this request. Senator Parkinson moved to amend HB 2008 as suggested by the Medical Society to put the deputy district coroner under the Tort Claims Act and in new Section 17 to provide that moneys be distributed from the Coroner's Fund to each county based on number of deaths in the county to assist in paying the expenses of district coroners. Senator Emert seconded. Motion carried. Chip Wheelen explained the request of the Medical Society to retain in the bill the provision that the Medical Society make nominations to the County Commissioners of qualified applicants for the position of district coroner and to delete the language that states "the appointee may be one of the persons nominated or some other qualified person." The Medical Society feels this language would possibly allow the appointment of an unqualified person to be district coroner. Senator Rock moved to amend HB 2008 by deleting the language "the appointee may be one of the persons nominated or some other qualified person." The motion died for lack of a second. Senator Parkinson moved to recommend HB 2008, as amended, favorably for passage. Senator Emert seconded. Motion carried.

Senator Harris submitted the report of the Civil Law Subcommittee on the following bills: SB 147, SB 356, HB 2132, and HB 2315 (Attachment 2). The Subcommittee received testimony on SB 147 from Harold T. Walker, City Attorney, Kansas City, KS (Attachment 3) and recommended no action on the bill at this time. Senator Bond moved that SB 147 be recommended to the LCC for interim study as it pertains to intercity housing to be studied along with collateral issues concerning not-for-profit rehab of urban dwellings. Senator Martin seconded. Motion carried.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY, Room 514-S Statehouse, at 9:30 a.m. on March 22, 1993.

Senator Harris explained that SB 356 confers a right of action against someone who abuses powers and authorities of a durable power of attorney. Testimony to the Subcommittee by Arris Johnson, Speaker of the Kansas Silver Haired Legislature (Attachment 4) and the Kansas Department on Aging (Attachment 5) is included. The Subcommittee recommended striking the reference to attorneys' fees. The Committee took no action on the bill.

The Civil Law Subcommittee report on HB 2097 and HB 2460 was reviewed by Senator Harris and testimony on the bills in subcommittee meeting was included (Attachment 6). The Committee took no action on HB 2460. HB 2097 is a clean up of the Probate Code to clarify that the filing of probate proceedings is subject to the same docket fee of \$11.50 in every county. Senator Harris moved to recommend HB 2097 favorably for passage and placed on the consent calendar. Senator Vancrum seconded. Motion carried.

Senator Harris submitted the testimony received by the Civil Law Subcommittee on HB 2315 (Attachment 7) and stated HB 2315 expands the use of payable on death designations (non-probate transfers) to deposit accounts and financial institutions and motor vehicle titles. Senator Harris reported there are considerable differences among conferees on this bill and it was decided to hold the bill over to allow time to work out compromises for consideration next session.

Senator Vancrum explained that HB 2132 would allow tenants to provide and maintain services agreed upon with the landlord. Current law does not allow for this eventuality, but requires that all manufactured home park owners provide services to their tenants such as removal of garbage and outlets for electric, water and sewer services. (See testimony on HB 2132--Attachment 8) Senator Vancrum moved to recommend HB 2132 favorably for passage. Senator Ranson seconded. Motion carried.

Senator Bond reported that the Family Law Subcommittee recommends no action on SB 280 which pertains to restitution or community service by a juvenile offenders' parents.

HB 2272 would open to the public the official files of juvenile felons. The Family Law Subcommittee recommends passage of the bill. Senator Oleen moved to recommend HB 2272 favorably for passage. Senator Bond seconded. Senator Vancrum questioned if the open files would apply to statutory rape if both parties are under age 18. Senator Vancrum made a substitute motion to amend HB 2272 to exempt consensual acts that would be rape only because of the age of the victim and to recommend HB 2272, as amended, favorably for passage. Senator Emert seconded. Motion carried.

Regarding the subcommittee recommendations on SB 172 and HB 2355, Senator Emert advised that Senator Parkinson's driving age bill allowing permits at age 15 was amended into HB 2355 by the Subcommittee. In addition, the Subcommittee did not feel that .08 BAC addresses the real drinking and driving problems of the state and the .08 BAC is removed from HB 2355 by the Subcommittee. The Subcommittee also did not feel that Sedgwick or any other county should be allowed to vary the penalties for DUI and recommends the penalties be kept uniform according to state law. Regarding the open container law, the Subcommittee recommends returning to the old language of the law pertaining to open containers with the addition of a provision for affirmative defense. The Subcommittee chose not to adopt provisions regarding lower tolerance levels for ages 18-21. The Subcommittee recommended removing the no-diversion provision on page 25, line 41 when the BAC is .15 or higher. To address concerns of the Sentencing Commission, the Subcommittee chose to maintain that the third offense of DUI is a felony, but excepting it from the sentencing guidelines. The Subcommittee recommended a provision that on a first DUI conviction and .15 or more BAC the Court may, at its discretion, require an ignition interlock device. A provision is included in the amended HB 2355 allowing for taking of the license plate on fourth and subsequent convictions. Senator Emert moved adoption of the Subcommittee report to amend HB 2355. Senator Vancrum seconded. Senator Brady made a substitute motion to amend HB 2355 by adopting the Subcommittee report and also add .08 BAC. Senator Ranson seconded. Substitute motion failed. Senator Bond made a substitute motion to send HB 2355 to Interim study. Senator Martin seconded. Substitute motion failed. Back to the original motion, Senator Emert made a substitute motion to amend HB 2355 according to the Subcommittee report and to adopt the amendments requested by the Department of Revenue in (Attachment 9) and to recommend HB 2355, as amended, favorably for passage. Senator Rock seconded. Substitute motion carried.

The meeting was adjourned at 11:00 a.m. The next meeting is scheduled for March 23, 1993.

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 3-22-9

[illegible]

MEMORANDUM

TO: Senator Jerry Moran

FROM: Senator Tim Emert

DATE: March 16, 1993

Re: Judiciary Criminal Law Subcommittee

Your Judiciary Criminal Law Subcommittee met at 11:00 A.M. and 5:00 P.M. on March 16, 1993 to consider bills that were assigned to that committee.

All the bills considered and the recommendations indicated are being made:

Passed Out Favorably
Senate Bill 243 - A bill which would allow the victim or victims' family to address the court if the victim or the victims' family so request at the time of sentencing of the defendant.

Recommendation: The committee recommends this favorably for passage.

House Bill 2458 - This is a bill that is an act concerning crime victims: relating to claims for compensation. Would have established a victim's rights review committee and provided for confidentiality of the records.

The committee recommends the bill be amended so that the new Section 1 creating or establishing a victim's rights review committee would be stricken from the bill. The remainder of the bill would remain intact permitting sex offenses to be exempt from the provision that "compensation may not be awarded if the economic loss is less than \$100" and would also provide that records used to obtain compensation would remain confidential but could be released by court order and would be available to the victim.

Recommendation: The committee recommends this bill favorably for passage as amended.

House Bill 2459 - The bill addresses notice to victims in municipal court cases.

The committee recommends the amendment of this bill to provide basically that notice to victims is not required for acts or omissions in violations of ordinances of cities except in cases which if filed in district court would fall under KSA Chapter 21, Sections 33, 34, 35 and 36.

Recommendation: The committee recommends the bill favorably for passage as amended.

SJ
3-22-93
Attachment 1

*Passed
Out
Favorably*

Senate Bill 266 - This bill regards the rights of a victim where the victim's family is to be present at juvenile offender proceedings. The committee recommends the following amendments to that bill:

1. This right for the victim or victim's family to be notified and be present at any hearings would only apply in cases where the juvenile is charged with an act which would have been a felony if the juvenile were an adult.

2. On line 19 of the bill should be amended so that following the word "testifying" insert a coma, strike the word "and". On line 21 after the word thereto strike "or victim's family" and insert "and such members of the victim's family as the court deems appropriate".

3. The right to attend these hearings by the victim and/or victim's family should be limited to the adjudication hearing and the disposition hearing except that this right shall not extend to a portion of the disposition hearing which is described in KSA 38-1661 and pertains to the social history of the offender and his family.

4. In line 42 insert a coma after the word "children". On line 43 strike the word "or", after the word "parents" insert a coma, and add the words "legal guardian, siblings, step-parent or grandparents".

Recommendation: The committee, with these amendments recommend the bill favorably for passage.

1-2

State of Kansas

Senate

SENATOR MIKE HARRIS

9828 HARVEST CT

WICHITA, KANSAS 67212

316-721-4968



STATE CAPITOL—136-N

TOPEKA, KANSAS 66612-1504

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VICE CHAIRMAN: COMMERCE

JUDICIARY

MEMBER: GOVERNMENT ORGANIZATION
TRANSPORTATION AND UTILITIES

JUDICIARY SUBCOMMITTEE ON CIVIL LAW

SB-147 - Abatement of conditions on property under order of Kansas City, Kansas.

Recommendation: No action recommended.

SB-356 - Providing civil cause of action against persons who abuse powers and authorities of a durable power of attorney.

Recommendation: Leave bill in tact except: strike language in Section I. (c) - lines 22 through 24 - amended.

HB-2132 - Landlord & tenant agree to waive certain landlord duties under mobile home parks residential and tenant act.

Recommendation: Moved out of committee favorable.

HB-2315 - Nonprobate transfers of financial accounts and motor vehicles.

Recommendation: No action recommended.

A handwritten signature in blue ink that reads "Mike Harris". The signature is written in a cursive, stylized font.

SENATOR MIKE HARRIS, CHAIRMAN

MH:mfh

Attachments: SB-147 (1)
SB-356 (2)
HB-2132(2)
HB-2315(4)

SJ

3-22-93

Attachment 2

TESTIMONY OF THE CITY OF KANSAS CITY, KANSAS,
BY HAROLD T. WALKER, CITY ATTORNEY,
IN REGARD TO SENATE BILL NO. 147

The City of Kansas City, Kansas, as part of an urban, metropolitan complex, experiences the same type of problems as other urban areas. The abandonment and neglect of residential structures within low income areas occur because of the owner's financial inability or the lack of economic feasibility to maintain the property in a habitable condition. As a result, such properties are left unused, unrepaired, and property taxes unpaid. These residential structures are eventually sold at a tax sale to land speculators hoping that during their ownership an opportunity will occur that makes their investment worthwhile. If not, the cycle is repeated with the property once again placed on the tax rolls for sale.

The moving force behind Senate Bill No. 147 is to break this cycle of disuse and provide a mechanism by which low income persons may acquire a starter home that is maintained with taxes paid. Presently, a mechanic's lien may attach when a person provides services and materials to the repair and improvement of a structure pursuant to an agreement between the parties and when the receiving party fails thereafter to pay for said materials and services. The lien acquired serves to protect the interest of the provider.

In Senate Bill 147, the idea was to provide a mechanism by which the City may authorize the repair of a residential structure by a person or public service organization with or without a contract with the titled owner and acquire a lien to protect such a provider. The intent would be for the City to allow interested, low-income persons to acquire an ownership interest in residential real estate that could not be deprived without due process of law and which in most cases would provide a sufficient financial interest that would discourage the owner from reacquiring possession of the property.

Senate Bill No. 147, however, does not in its present form go far enough. The original idea was to provide a legal mechanism by which a qualifying person could take possession of an abandoned residential structure, make repairs as necessary to return the same to a habitable condition, and maintain possession against the titled owner unless that person paid the full and fair market value for the improvements made to the property. In essence, one might compare this to acquiring title by adverse possession but doing so in a shorter period of time. Several key points need to be made in reference to this concept:

(1) **Abandoned property**

This could be defined as property that has not been inhabited for a specified period of time or upon which taxes have not been paid for a minimum of three years, or a combination of these and other physical characteristics of the condition of the property.

SJ
3-22-93
Attachment 3

(2) **Due Process**

A need would exist for publication, the posting of notice or in some sufficient manner notifying the owner that unless certain repairs are made within a designated period of time, a certain individual would be authorized to take possession and make those repairs for which he, the titled owner, would be liable if he desired to reacquire possession.

(3) **Mechanic's Lien**

A mechanic's lien would attach from the moment that any repairs were made in the favor of the provider of the materials and services with or without contract and with or without consent of the titled owner. A person could only be dispossessed of the premises through payment of the lien and a procedure would be established by which the titled owner could be dispossessed of title through foreclosure of the mechanic's lien.

(4) **Abatement or Remission of Past Due Taxes**

Any property acquired by definition would probably have past due taxes owing to the County. These taxes would either be abated or in some way remitted, allowing the low income person to pay a portion of the taxes over a period of time.

(5) **Qualifications**

Acquisition would be limited to one house per family or household with that family or person meeting certain financial guidelines established by State law or the City ordinance adopting procedures pursuant to State authority.

The intention would be that in low income areas of a municipality, a city could offer an alternative to demolition which leaves a vacant lot that is not likely to be in-filled with new construction. This would allow low income persons to acquire a home, contribute additional taxes, and prevent the erosion of the inner city where residential stability, family life, and new residents would add to the long-term survivability and quality of City life.

While the City endorses adoption of Senate Bill No. 147, the scope of the proposed amendment does not go far enough to test this concept. Within our City, several organizations, most notably 20 Good Men, stand willing to make repairs on behalf of low income persons to make the home habitable, but assurances are needed that upon making these repairs, the person holding title cannot then step forward, evict the resident, and be benefitted from the improvements made. It is our belief that this idea could serve as a model for cities throughout our state to preserve older sections of their city, provide an alternative to other forms of public housing, and take advantage of existing housing stock without significantly impacting the rights of owners unwilling to make repairs and who simply engage in rank speculation on properties. Cities would not be as likely to be forced into demolition and the result could be a winning one for all parties. While we certainly endorse Senate Bill No. 147, it is our hope that this committee will adopt these comments and request revisions to the existing proposal to incorporate the points made in this testimony.

Testimony for SB 356

I am Arris Johnson, Speaker of the Kansas Silver Haired Legislature. I am here to speak in favor of SB 356 which would provide protection and recovery for those who have suffered and will suffer some form of abuse from those who hold a durable power of attorney. This bill was passed by the Kansas Silver Haired Legislature in 1991 and again in 1992, and this body strongly feels that there is a real necessity for this legislation, supporting it by a vote of 108 yeas, 1 nay and 1 abstention. Our Silver Haired Legislature bills originate from the ground level of our constituency in such places as meal sites, senior citizen meetings, visits with the elderly by our legislators, etc. You are well aware that this segment of our society is growing and now, according to the latest census, represents approximately 450,000 who are 60 and older in Kansas. As this population grows, so do such problems as abuse and we feel a real necessity for protection from it.

One need only to read or listen to the media to become aware that such abuse occurs often and we feel certain that those cases which we are aware of are only a fraction of those which occur. The Kansas Department on Aging tells me that they have received 141 complaints from those who have suffered some form of abuse in the past few months.

If Kansas were to have a law which allows those who have been abused or those who have a vested interest in such abuse (family members, relatives, etc.) to pursue some form of recovery, we as Silver Haired Legislators believe it would be very helpful. We urge your positive consideration of this legislation.

Thank you.

SJ
3-22-93
Attachment 4

Testimony
Before
Senate Judiciary Subcommittee on Civil Law
by
Kansas Department on Aging
March 15, 1993

The durable power of attorney is a valuable tool for all older Kansans as they plan for their future financial decision making. It is a necessary tool for families who are providing planning for the care of an Alzheimer's patient.

Certainly the durable power of attorney can be abused. A person can be coerced, intimidated or forced to give another person the durable power of attorney. The person, agent, who holds the power of attorney can use the power granted to misuse the funds or to steal or misappropriate the funds or property.

During fiscal year 1992, 141 complaints were filed with the Long Term Care Ombudsman against agents of durable powers of attorney, conservators and responsible parties. The State Long Term Care Ombudsman states that at least 50% of the complaints related to misuse of funds by persons controlling residents monies. Our aging toll free line has received many calls from friends and family members of Older Kansans who have had their home, their bank accounts or their investments stolen or misappropriated.

SB 356 provides a civil mechanism to allow wrongs to be addressed. Criminal statutes dealing with theft and fraud exist, as do civil laws dealing with misuse of fiduciary duty. They are however seldom used to prosecute property crimes against the elderly. Older Kansans whose money or property has been stolen are not considered to be good witnesses due to their reluctance to prosecute in all likelihood a child or grandchild, their incompetence, their fragility or advanced age.

We request that SB 356 be amended to allow the right of action to the aggrieved principal plus those who will take upon the death of the principal under the will or by the laws of intestate succession. In most cases the principal will be incompetent or at a minimum confused and exploited and be unable to bring a cause of action. Under SB 356 the right to bring the action would then fall to the agent under the durable power of attorney or the very person accused of theft.

Family members are often outraged when one member of the family using a durable power of attorney, steals or misuses funds belonging to their older relative. Family members would, on occasion, go to court to try to get the money back. They have a vested interest. We believe SB 356 should allow them a right of action.

We encourage you to consider our proposed amendment and to pass SB 356 as amended.

ST
3-22-93
Attachment 5

TO: Senate Judiciary Subcommittee on Civil Law
FROM: Kansas Department on Aging
RE: SB 356

Proposed Amendment:

(b) ~~A~~*The following who are* aggrieved as provided in subsection (a) may bring an action to recover actual damages or a civil penalty, in a sum set by the court or not more than \$5,000, whichever is greater:

- (1) the principal*
- (2) any person who will take under the will of the principal*
- (3) any person who will take by the laws of intestate succession upon the death of the principal.*

State of Kansas

Senate

SENATOR MIKE HARRIS

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COMMITTEE ASSIGNMENTS

VICE CHAIRMAN: COMMERCE
JUDICIARY

MEMBER: GOVERNMENT ORGANIZATION
TRANSPORTATION AND UTILITIES

JUDICIARY SUBCOMMITTEE ON CIVIL LAW

March 15, 1993 @ 5:05 p.m.

HB-2097 - Probate code; docket fees & length of time an absentee is presumed dead.

Recommendation: Recommended to full committee to be placed on consent calendar.

HB-2460 - Provisions in limited partnership agreements, not in certificate.

Recommendation: Recommended to full committee to be placed on consent calendar.

SB-147, SB-356, HB-2132, and HB-2315 will be discussed and possible recommendations made at 12:30 p.m., Thursday, March 18, 1993 in Room 254-E.

SENATOR MIKE HARRIS, CHAIRMAN

A handwritten signature in dark ink, appearing to read "Mike Harris", written over a horizontal line.

MH:mfh

Attachments: Re: SB-2097 (2)
SB-2460 (1)

SJ
3-22-93
Attachment 6

March 15, 1993

1993 HB 2097

Sec. 1. The proposed amendment was provided by Robert B. Berkley, a lawyer from Salina. His letter, which is attached, sets out his reasons for requesting the proposed amendment.

The Judicial Council Probate Law Advisory Committee supports Mr. Berkley's recommendation and the office of Judicial Administration has reviewed the bill and did not object.

Sec. 2. In 1992, the Legislature passed the Uniform Simultaneous Death Act (K.S.A. 58-708 et. seq.). In reviewing the 1992 legislation, the Probate Law Advisory Committee found a conflict between K.S.A. 1992 Supp. 58-712 and K.S.A. 59-2704, which is in the article of the Probate Code entitled "Estates of Absentees."

K.S.A. 1992 Supp. 58-712(5) reads as follows:

"(5) An individual whose death is not established under the preceding paragraphs who is absent for a continuous period of five years, during which the individual has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. Such individual's death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier."

K.S.A. 59-2704 reads as follows:

"An absentee shall be presumed 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."

The problem before the Committee was the conflict between the five year and seven year time periods. The five year time period is considered to be the more modern time period and is the time period contained in UPC 1-107.

*Senate Judiciary Civil Law Sub-
3/15/93 Attachment 4-1/4*

APR 2

LAW OFFICES

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April 23, 1992

627 6743

Senator Ben Vidricksen
State Capitol, Third Floor
Topeka, KS 66612

Dear Senator Vidricksen:

K.S.A. 59-213 provides: "The 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."

K.S.A. 59-104 prescribes the docket fees and court costs applicable to the itemized proceedings listed therein and the various amounts. One of the items is "Final settlements or other final decrees in probate from another county of this state" and the filing fee therefore is \$10.

At a meeting of the Clerks' Advisory Council in Topeka, Kansas, on September 13, 1991, their minutes reflect: "In Probate cases the filing fee for partial transcripts should be \$95 if there is no final decree. The filing fee for a final settlement of [sic] other final decree the fee is \$10 according to K.S.A. 50-104 [sic]."

Often times it is necessary to file a partial transcript of a probate case being probated in one county in the probate court of another county because the domiciliary estate owns real estate in the second county and the executor is in the process of selling that real estate.

In most instances we have not had any problem of filing the partial transcript and paying a filing fee of \$10. However, recently in attempting to file a partial transcript in Lincoln County the clerk of the court notified me of the minutes from the September 13, 1991, council meeting mentioned above and provided me with a copy. Her request was that this estate pay \$95 for filing the partial transcript over in her county when the estate had

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Senator Ben Vidricksen
April 23, 1992
Page 2

already paid a \$95 fee for the probate of the estate in the county of origin.

I am confident the legislature intended a fee of \$10 to be applicable in any case being filed pursuant to K.S.A. 59-213.

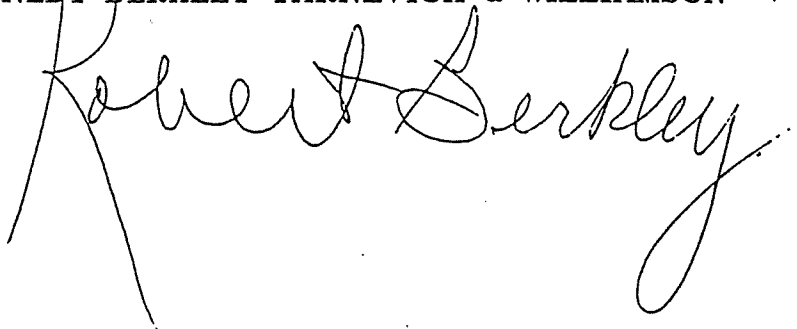
Please refer this letter to the technical correction division of the Kansas legislature. I think all that needs to be done to correct the matter is to amend K.S.A. 59-104 to delete the following: "Final settlements or other final decrees in probate from another county of this state" and insert in lieu thereof the following: "Certified probate proceedings under K.S.A. 59-213."

Thank you kindly for your assistance.

Yours very truly,

KENNEDY BERKLEY YARNEVICH & WILLIAMSON

By:

A large, stylized handwritten signature in dark ink, appearing to read "Robert Berkley". The signature is written over the printed name of the firm.

RBB/gld

b-4
3/4

PROBATE LAW ADVISORY COMMITTEE

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(Revised 01/93)

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**Legislative Information
for the Kansas Legislature**

**TO: Members, Senate Judiciary
Subcommittee On Civil Law**
FROM: Ron Smith, KBA General Counsel
SUBJ: HB 2097

Summary

KBA supports the attached cleanup to the probate code.

BACKGROUND

HB 2097 is the Judicial Council bill. We have no problem with it. We would like to use it for an amendment.

Two years ago, KBA sought legislation which amended K.S.A. 59-403 which amended the spouse and minor children living expense law to allow judges to make provisions for sale of *real as well as personal property* for spousal/children expenses while an estate is probated. This the legislature did, Chp. 166, 1991 Session laws.

The probate section of the Bar indicates that a similar amendment to K.S.A. 59-2287(a)(1), when courts refuse to grant letters of administration, should also have been made. 59-2287(a)(1) states:

"(a) The district court, in its discretion, may refuse to grant letters in the following cases: (1) When the value of personal property owned by the decedent is not

greater in amount than is allowed by law as exempt property and the allowance to the surviving spouse or minor children under K.S.A. 59-403 and amendments thereto.

We suggest the following amendment to 59-2287(a)(1):

"(a) The district court, in its discretion, may refuse to grant letters in the following cases: (1) When the value of *real or personal property* owned by the decedent is not greater in amount than is allowed by law as exempt property and the allowance to the surviving spouse or minor children under K.S.A. 59-403 and amendments thereto.

This brings 59-403 and 59-2287(a)(1) into logical conformity.

The amendment is recommended by the Probate Section of the Bar, and the Board of Governors.

Thank you.

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.

*Senate Judiciary Civil Law
Subcomm Attachment 5-11*



**Legislative Information
for the Kansas Legislature**

**TO: Members, Senate Judiciary
Committee**
FROM: Ron Smith, KBA General Counsel
SUBJ: HB 2460

SUMMARY:

The recommended changes in this bill bring the Kansas Uniform Limited Partnership Act into balance with the Uniform Laws Commission's most recent view on the topic.

KBA POSITION

The Board of Governors of the KBA support this legislation.

BACKGROUND

Kansas has adopted the Revised Uniform Limited Partnership Act. This Act greatly shortens and simplifies the Certificate of Limited Partnership which must be filed with the Secretary of State to form a limited partnership.

While the certificate has been greatly simplified, numerous provisions remain in the Act to the effect that if one wants to take advantage of statutorily authorized provisions you must set the provisions down in the Certificate of Limited Partnership.

Most other states which have adopted the Revised Act have also

amended these sections to provide that you can take advantage of the provisions by putting them in the certificate. The Act as presently drafted is a trap for those who file a certificate containing only the minimum requirements of the Act and put the substantive provisions in the partnership agreement.

Some of the substantive provisions put in the partnership agreement in all likelihood will have no effect because the Revised Act requires they be put in the certificate.

HB 2460 makes the appropriate changes to those sections of the Revised Act so that the agreement itself contains procedure how to handle the questions that might arise in the partnership.

Thank you.

This legislative analysis is provided in a format easily inserted into bill books. We hope you find this convenient.

*Sen Judiciary Civil Law Sub-
Comm 3/15/93 Attachment 8-11*

TIM CARMODY
REPRESENTATIVE, SIXTEENTH DISTRICT
10710 W. 102ND STREET
OVERLAND PARK, KS 66214



TOPEKA

ROOM 175-W
STATE CAPITOL
TOPEKA, KANSAS 66612-1504
(913) 296-7695

HOUSE OF
REPRESENTATIVES
MEMORANDUM

COMMITTEE ASSIGNMENTS
VICE-CHAIR: JUDICIARY
MEMBER: APPROPRIATIONS
LABOR & INDUSTRY
KPERS STUDY COMMISSION

TO: Senate Judiciary Committee Members

FROM: Rep. Tim Carmody

RE: Testimony in support of HB 2315

DATE: March 15, 1993

Mr. Chairman and members of the Senate Judiciary Committee:

House Bill 2315 is a modest attempt to expand the use of payable on death designations on certain types of property in the state of Kansas. Also called non-probate transfers, the concept is that an owner or owners have the opportunity to pass designated property directly to beneficiaries without the necessity of cumbersome and time consuming probate court determinations and without the inherent risks of unplanned disposition that might arise from a joint tenancy situation. This bill is a scaled down version of proposals introduced in 1991 and 1992 which attempted to incorporate and apply the concept to all types of property (real estate, etc.). That proposal has been under study by the Judicial Council since 1991 and I recognize that if that proposal were enacted into Kansas law there might be a significant change in several areas of probate procedure and real property law.

Therefore, I have introduced HB 2315 which applies only to deposit accounts and financial institutions and motor vehicle titles. At the present time, Kansas has narrowly drawn statutes that apply to savings and loans, credit unions and banks which allow the owner of such an account to designate the beneficiary to receive that account upon the death of the owner. However, these statutes only apply in a situation when there is one individual owner of the account. There are other questions left unanswered in present law which HB 2315 attempts to address.

SJ
3-22-93
Attachment 7

House Bill 2315 is modeled on a Colorado statute but forms of these statutes exist in many states. In 1990 Missouri adopted a comprehensive non-probate transfer bill that applies to all types of property and that is the proposal that is being studied by the Judicial Council.

I attach a copy of the fiscal note on this matter which indicates there should be no impact. A question was raised in floor debate in the House on this bill about the effect on the Kansas Inheritance Tax and my response, which I have since verified with the Inheritance Tax Division, is that inheritance tax is a tax on the beneficiary or transferee of property. The procedure allowed in HB 2315 would not result in any property or any transfer being exempt from taxation. Its main purpose is ease in the transfer of title and it is not a tax mitigation statute.

In conclusion, I ask your favorable consideration of HB 2315.

STATE OF KANSAS



DIVISION OF THE BUDGET

Room 152-E

State Capitol Building

Topeka, Kansas 66612-1504

(913) 296-2436

FAX (913) 296-0231

Joan Finney
Governor

Gloria M. Timmer
Director

February 19, 1993

The Honorable Michael O'Neal, Chairperson
Committee on Judiciary
Statehouse, Room 426-S
Topeka, Kansas 66612

Dear Representative O'Neal:

SUBJECT: Fiscal Note for HB 2315 by Representative Carmody

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2315 is respectfully submitted to your committee.

HB 2315 concerns the nonprobate transfer of financial accounts and motor vehicles. HB 2315 would provide for the transfer of checking accounts, savings accounts, certificate of deposits, share accounts, and motor vehicles to the beneficiary upon the death of the owner. HB 2315 would not apply to financial accounts established for partnerships, joint ventures, or business purposes.

Contracts for deposits would indicate the ownership of the accounts, the rights at death, and the beneficiary of the accounts for the execution of a nonprobate transfer. To execute the nonprobate transfer of a vehicle, the registration of a motor vehicle would indicate the beneficiary of the vehicle.

No state or local fiscal impact is anticipated upon passage of this act.

Sincerely,

A handwritten signature in cursive script that reads "Gloria M. Timmer".

Gloria M. Timmer
Director of the Budget

cc: Judi Stork, Banking

TESTIMONY ON HB 2315

AN ACT concerning nonprobate transfers;
relating to financial accounts

Presented to the
SENATE JUDICIARY SUBCOMMITTEE ON CIVIL LAW

MARCH 15, 1993

by the
KANSAS CREDIT UNION ASSOCIATION

Mr. Chairman, members of the Subcommittee:

I am Jerel Wright, Governmental Affairs Director of the Kansas Credit Union Association. Our association enjoys the voluntary membership of all but 3 of the 177 credit unions in Kansas.

Credit Unions currently title the ownership of member accounts using an account agreement which establishes a joint tenancy with rights of survivorship and not as tenants in common. A Payable on Death (POD) account form is typically executed in conjunction with the account to designate the beneficiaries as is authorized under K.S.A. 17-2263 of the credit union act.

Credit unions are very familiar and comfortable with the use of POD designations as described in HB 2315. Our interest in testifying today is for clarification of a few of the finer points in this bill.

First, § 19 (page 9, lines 9 through 15) establishes the financial institution's right to set-off or lien equal to the proportion to which the party is entitled under § 7...or an equal share with all parties. Under § 7 the party is entitled to the amount of their net contribution.

We believe this creates a potential conflict with the credit union law under K.S.A. 17-2212(a) which declares... A credit union shall have a lien and right of setoff on the shares and on the dividends or other earnings payable thereon for and to the extent of any obligation of the member or other shareholder and of any fines and penalties payable by the member or other shareholder. We have incorporated this lien and right of setoff into our account agreement by stating ... Any owner may pledge any money in this account as security on loans.

Does the language subject to any contractual provision (§ 19 (page 9, line 10)), confirm the credit union's right to setoff and lien based on joint tenancy ?

Second, § 6 (Page 4, lines 35 through 41) indicates that ownership rights between the parties are governed by the terms of the account unless a controversy arises between the parties.

Does this section clearly establish that ownership rights under sections 7 through 12 only apply when there is a controversy ?

Third, § 5 authorizes the account owners to designate an agent.

How will this designation affect any past or future agency designation ?

Which agent would have the right to deal with the account ?

Finally, we would like to suggest an effective date of January 1, 1994 which would allow for adjustments to the changes.

Thank you, Mr. Chairman for your time. I would be happy to respond to questions at your direction.

Date	CU ACCOUNT NO.	FULL NAME (last, first, middle)		
	SOCIAL SECURITY NO.	Street Address		
	City	State	Zip	
	Employer	Div. or Dept.		
	Date of Birth	Home Ph.	Work Ph.	
	If joining through a relative: name	employer	relationship	
	I hereby make application for membership in the Credit Union 1 of Kansas.			
This application approved Membership Officer	UNDER PENALTIES OF PERJURY, I CERTIFY:			
	(1) That the number shown on this form is my correct taxpayer identification number, and (2) That I am not subject to backup withholding either because I have not been notified that I am subject to backup withholding as a result of a failure to report all interest or dividends, or the Internal Revenue Service has notified me that I am no longer subject to backup withholding.			
	Signature _____			Date _____

ACCOUNT AGREEMENT

The Credit Union is authorized to recognize any signature below in the transaction of any business for this account.

The owners of this account agree that all money paid in on this account, with accumulations, shall be owned by all of them and the survivors of them as joint tenants and not as tenants in common.

Any owner may pledge any money in this account as security on loans.

The credit union's right or authority can only be changed or terminated by written notice to the credit union which shall not affect transactions already made.

The credit union is not obligated to stop payment on any check, draft or other money transfer.

Account owners agree to pay charges for all returned checks, drafts, or other failures of payment or deposit, and for fees for account maintenance, activity, and membership as may be fixed by the Board of Directors.

The credit union shall have no obligation to notify any account owner of a garnishment.

Money cannot be withdrawn until collected. Any expense incurred relative to collection of funds may be charged to the account.

The account owners agree to notify the credit union in writing of any error within 60 days.

The account owners authorize the credit union to send any information to them at their last address as shown in writing and signed by any of them.

All items are credited subject to final payment and to receipt of proceeds of final payment in cash or solvent credits by the credit union.

The credit union may forward items to correspondents and shall not be liable for negligence of correspondents selected with due care not for losses in transit, and each correspondent shall not be liable except for its own negligence. Items and their proceeds may be handled by any Federal Reserve member in accordance with any common Federal Reserve member usage, with any practice or procedure that a Federal Reserve member may use or permit another member to use, or with any other lawful means.

The credit union may charge back, at any time prior to midnight on its business day next following the day of receipt, any item drawn on the credit union which is ascertained to be drawn against insufficient funds or otherwise not good or payable. An item received after the credit union's regular daily cutoff hour shall be deemed received the next business day.

I consent that any person or organization may give or receive information in the consideration of this account.

Member		
Signature _____		Date _____
Joint Owner		
Signature _____		SSN _____
Joint Owner		
Signature _____		SSN _____

CONTRACT FOR DESIGNATION OF BENEFICIARY ON A PAYABLE ON DEATH SHAREHOLDER ACCOUNT

I/We, being owner(s) of shareholder Account No. _____ in the _____ Credit Union, do hereby revoke any former Contract for Designation of Beneficiary on Payable on Death Shareholder Account, if any, heretofore made for the Account No. _____, written above and do hereby contract with the Credit Union that any money in my/our account at the time of my/our death shall be payable to _____, and _____, equally, hereinafter referred to as the beneficiary or beneficiaries, as the case may be.

I/We retain the right during my/our lifetime both to withdraw funds in this account and deposit as shareholdings, in whole or in part, as though no beneficiary had been named, and to change this contract by designation of other or additional beneficiaries. The interest of any beneficiary or beneficiaries shall not be interpreted to vest until my/our death.

I/We further agree that no change in the designation of beneficiary shall be valid unless executed in the form and manner acceptable to the Credit Union at the time of the change and delivered to the Credit Union prior to my/our death. Any accounts held as joint tenants with right of survivorship, and not as tenants in common, must be signed by all owners to make a new beneficiary designation.

KS 206.150 (Contract for POD) Rev. 2/86 Printed in U.S.A.
by Union Labor 11367

On my/our death the shareholder account or any part thereof or any interest thereon shall be paid by the Credit Union to the designated beneficiary or beneficiaries. The receipt of the person so paid shall release and discharge the Credit Union for any such payment.

I/We agree that the Credit Union may properly refer to this contract as payable on death or the abbreviated designation P.O.D. or POD.

If more than one person signs this contract and we are owners of an account or other moneys described herein as joint tenants with right of survivorship and not as tenants in common, then this contract is not meant to destroy such relationship, but to apply after the death of the last of the said joint owners.

Signed and dated this _____ day of _____, 19_____,
at _____ m. o'clock at _____, Kansas.

Witness:

K.S.A. 17-2263

7-7



The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

March 15, 1993

To: Senate Subcommittee on Judiciary

Re: **HB 2315** - Nonprobate transfers

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before this subcommittee regarding **HB 2315**. We are generally in support of this bill, for although it may cause some confusion and extra work for our industry at its inception, we believe that it will be beneficial in the long run.

This bill does call for some major changes in the financial account relationship and it may take some time to iron out all the details. We have suggested two amendments which you will find on the attached sheets. Both amendments are designed to clarify some issues of concern to us.

In addition, we are asking that the effective date for this bill be moved from becoming effective at publication in the statute book, to an effective date of January 1, 1994. This would give the financial industry and others affected by the changes, time to make necessary preparations for the new law, such as changes in documentation and methods of opening and paying out on accounts.

With these amendments, we would ask that you consider **HB 2315** favorably for passage.


Kathleen A. Taylor
Associate General Counsel



7-8

1 At death of party, ownership passes to surviving parties.
2 _____ MULTIPLE-PARTY ACCOUNT WITH RIGHT OF SURVIVORSHIP AND
3 POD (PAY ON DEATH) DESIGNATION
4 [Name One Or More Beneficiaries]:
5 _____
6 At death of last surviving party, ownership passes to POD beneficiaries and
7 is not part of last surviving party's estate.
8 _____ MULTIPLE-PARTY ACCOUNT WITHOUT RIGHT OF SURVIVORSHIP
9 At death of party, deceased party's ownership passes as part of deceased
10 party's estate.
11 AGENCY (POWER OF ATTORNEY) DESIGNATION [Optional]
12 Agents may make account transactions for parties but have no ownership
13 or rights at death unless named as POD beneficiaries.
14 [To Add Agency Designation To Account, Name One Or More Agents]:
15 _____
16 [Select One And Initial]:
17 _____ AGENCY DESIGNATION SURVIVES DISABILITY OR INCAPACITY OF
18 PARTIES
19 _____ AGENCY DESIGNATION TERMINATES ON DISABILITY OR INCAPAC-
20 ITY OF PARTIES
21 (b) A contract of deposit that does not contain provisions in sub-
22 stantially the form provided in subsection (a) is governed by the
23 provisions of this act applicable to the type of account that most
24 nearly conforms to the depositor's intent.
25 Sec. 5. (a) By a writing signed by all parties, the parties may
26 designate as agent of all parties on an account a person other than
27 a party.
28 (b) Unless the terms of an agency designation provide that the
29 authority of the agent terminates on disability or incapacity of a
30 party, the agent's authority survives disability and incapacity. The
31 agent may act for a disabled or incapacitated party until the authority
32 of the agent is terminated.
33 (c) Death of the sole party or last surviving party terminates the
34 authority of an agent.
35 Sec. 6. The provisions of sections 7 through 12 concerning ben-
36 eficial ownership as between parties or as between parties and ben-
37 eficiaries apply only to controversies between those persons and their
38 creditors and other successors, and do not apply to the right of those
39 persons to payment as determined by the terms of the account.
40 Sections 13 through 19 govern the liability, and set-off rights of
41 financial institutions that make payments pursuant to it.
42 Sec. 7. (a) In this section, "net contribution" of a party means
43 the sum of all deposits to an account made by or for the party, less

1 all payments from the account made to or for the party which have
2 not been paid to or applied to the use of another party and a
3 proportionate share of any charges deducted from the account, plus
4 a proportionate share of any interest or dividends earned, whether
5 or not included in the current balance. The term includes deposit
6 life insurance proceeds added to the account by reason of death of
7 the party whose net contribution is in question.

8 (b) During the lifetime of all parties, an account belongs to the
9 parties in proportion to the net contribution of each to the sums on
10 deposit, unless there is clear and convincing evidence of a different
11 intent. As between parties married to each other, in the absence of
12 proof otherwise, the net contribution of each is presumed to be an
13 equal amount.

14 (d) A beneficiary in an account having a POD designation has no
15 right to sums on deposit during the lifetime of any party.

16 (e) An agent in an account with an agency designation has no
17 beneficial right to sums on deposit.

18 Sec. 8. (a) Except as otherwise provided in this section, on death
19 of a party sums on deposit in a multiple-party account belong to the
20 surviving party or parties. If two or more parties survive and one is
21 the surviving spouse of the decedent, the amount to which the
22 decedent, immediately before death, was beneficially entitled under
23 section 7 belongs to the surviving spouse. If two or more parties
24 survive and none is the surviving spouse of the decedent, the amount
25 to which the decedent, immediately before death, was beneficially
26 entitled under section 7 belongs to the surviving parties in equal
27 shares, and augments the proportion to which each survivor, im-
28 mediately before the decedent's death, was beneficially entitled un-
29 der section 7, and the right of survivorship continues between the
30 surviving parties.

31 (b) In an account with a POD designation:

32 (1) On death of one or two or more parties, the rights in sums
33 on deposit are governed by subsection (a).

34 (2) On death of the sole party or the last survivor of two or more
35 parties, sums on deposit belong to the surviving beneficiary or ben-
36 eficiaries. If two or more beneficiaries survive, sums on deposit
37 belong to them in equal and undivided shares, and there is no right
38 of survivorship in the event of death of a beneficiary thereafter. If
39 no beneficiary survives, sums on deposit belong to the estate of the
40 last surviving party.

41 (c) Sums on deposit in a single-party account without a POD
42 designation, or in a multiple-party account that, by the terms of the
43 account, is without right of survivorship, are not affected by death

(c) If a creditor's claim attaches to one party's proportionate share of an account, any sum remaining shall belong to the parties as determined in subparagraph (b) above.

1 a will, executed at the same time as the instrument or subsequently.

2 Sec. 23. A beneficiary designation under a written instrument
3 or law, that authorizes a transfer of the motor vehicle pursuant to
4 a written designation of beneficiaries, transfers the right to receive
5 the motor vehicle to the designated beneficiaries who survive, ef-
6 fective on death of the owner, or last to die of two or more joint
7 owners, if the beneficiary designation is executed and delivered in
8 proper form to the transferor prior to the death of the owner.

9 Sec. 24. (a) A motor vehicle may be held or registered in ben-
10 eficiary form by including in the name in which the motor vehicle
11 is held or registered, a direction to transfer the motor vehicle on
12 death of the owner, or last to die of two or more joint owners, to
13 a person or persons designated by the owner or joint owners as
14 beneficiary.

15 (b) A motor vehicle is registered in beneficiary form by showing
16 on the title evidencing ownership of the property, the name of the
17 owner or joint owners, and the estate by which two or more owners
18 hold the motor vehicle with right of survivorship, followed in sub-
19 stance by the words "transfer on death to (names of
20 beneficiaries)." In lieu of the words "transfer on death to" the ab-
21 breviation "TOD" may be used.

22 (c) A transfer on death direction may only be placed on a title
23 evidencing ownership of property by the transferor or a person au-
24 thorized by the transferor.

25 (d) A transfer on death direction transfers the owner's or surviving
26 joint owner's interest in the motor vehicle to the designated ben-
27 eficiaries who survive, effective on the owner's or surviving joint
28 owner's death, if the motor vehicle is registered in beneficiary form
29 prior to the death of the owner or last to die of two or more joint
30 owners.

31 (e) A title evidencing ownership of a motor vehicle, that contains
32 a transfer on death direction designating beneficiaries, written as
33 part of the name in which the motor vehicle is held or registered,
34 is conclusive evidence in the absence of fraud, duress or undue
35 influence, or evidence of clerical mistake by the transferor or its
36 transfer agent, that the direction was regularly made by the owner
37 or joint owners and accepted by the transferor, and was not revoked
38 or changed prior to the death giving rise to the transfer. The trans-
39 feror shall have no obligation to retain the original writing, if any,
40 by which the owner or joint owners caused the motor vehicle to be
41 registered in beneficiary form, more than six months after the trans-
42 feror has mailed or delivered to the owner or owners, at the address
43 shown on the title that shows the manner in which the motor vehicle

subject to existing liens and encumbrances,

1 designation in such manner.

2 (e) An attorney in fact, personal custodian or conservator may
3 not revoke or change survivorship rights of joint owners or the
4 persons named in a beneficiary designation, unless the agreement,
5 instrument or law governing the nonprobate transfer expressly so
6 authorizes or the revocation or change is approved by a court. This
7 provision shall not prohibit the authorized withdrawal, sale, pledge
8 or other present transfer of the motor vehicle by an attorney in fact,
9 personal custodian or a conservator notwithstanding the fact that the
10 effect of the transaction may be to extinguish a beneficiary's right
11 to receive a transfer of the motor vehicle at the death of all owners.

12 (f) A conveyance or assignment during the owner's lifetime of
13 the owner's entire interest in the motor vehicle subject to a non-
14 probate transfer arrangement, with or without consideration, and the
15 loss or destruction of the motor vehicle, terminates rights under a
16 beneficiary designation and all interest of the beneficiaries in the
17 motor vehicle and in the proceeds from the motor vehicle or in any
18 payment or substitute motor vehicle received by the owner.

19 Sec. 27. (a) A beneficiary designation, revocation or change, under
20 a written instrument or law that authorizes a transfer of the
21 motor vehicle pursuant to a written designation of beneficiaries and
22 a beneficiary assignment of a contract right, is effective when delivered
23 in proper form to the transferor or contract obligor prior to the owner's
24 death, together with any instrument that the transferor may require to be
25 endorsed or surrendered incident to the designation, revocation or change of
26 beneficiaries.

27 (b) A request to make, revoke or change a beneficiary designation is in
28 proper form when it complies with the requirements of the transferor and
29 any governing instrument, including necessary signatures, witnesses, proof
30 of execution, delivery, acceptance, registration and a surrender of any
31 certificate or instrument evidencing ownership of the motor vehicle.

32 (c) When a beneficiary designation, revocation or change is subject to
33 acceptance by a transferor, the transferor's acceptance of the beneficiary
34 designation, revocation or change relates back and is effective when the
35 request was received by the transferor.

36 Sec. 28. This act shall take effect and be in force from and after
37 its publication in the statute book.
38

January 1, 1994.



Jeffrey D. Sonnich, Vice-President

Suite 512
700 Kansas Avenue
Topeka, Kansas 66603
(913) 232-8215

March 15, 1993

TO: SENATE JUDICIARY SUBCOMMITTEE ON CIVIL LAW
FROM: JEFFREY SONNICH, KANSAS-NEBRASKA LEAGUE OF SAVINGS
RE: H.B. 2315 (NON-PROBATE TRANSFERS; FINANCIAL ACCOUNTS)

Mr. Chairman. Members of the Committee. The Kansas-Nebraska League of Savings Institutions appreciates the opportunity to comment on H.B. 2315 relating to nonprobate transfers of financial accounts.

Since 1979 Kansas banks, savings and loans, and credit unions have had the ability to contract with customers for "payable-on-death" accounts. These P.O.D. accounts are utilized quite extensively to ensure that deposits in excess of \$100 thousand are federally insured.

Most accounts however are designated as "joint tenancy with right of survivorship and not as tenants in common". This type of account allows equal access to the parties designated on the account. Should one of the joint tenants die the financial institution is authorized to deal with the survivor, or survivors, as sole and absolute owner, or owners of the account.

While we feel that the intent of H.B. 2315 has merit, several areas of the bill may need clarification:

Section 5 allows an agent to be designated on an account with authority to act on behalf of the party or parties if the party or parties become disabled or incapacitated. If a separate durable power of attorney is authorized under K.S.A 58-610 in the event of incapacity and that individual is different than the agent designated on the account which individual has control of the account?

Sec. 18 (b) would deny protection from claims for a financial institution if payments were made after receiving written notice that payments should not be permitted. What specifically and in what form should the notice be presented? Should the notice be delivered by certified mail to ensure an identifiable paper trail?

Sec. 12 (a) and Sec. 12 (b) state the terms "a deposit of community property" and "tenancy by the entireties". Neither is used as a legal term under Kansas law and should be stricken from the bill.

Jeffrey Sonnich
Vice President

7-13

Credit Unions
Pract

17-2263

CORPORATIONS

17-2263. Contracts for payment of shareholders' accounts to beneficiaries upon shareholders' deaths; rights of shareholder during lifetime; change of beneficiary. An individual adult or minor, hereafter referred to as the shareholder, may enter into a written contract with any credit union located in this state providing that the balance of the shareholder's account, or the balance of the shareholder's legal share of an account, at the time of death of the shareholder shall be made payable on the death of the shareholder to one or more persons or, if the persons predecease the owner, to another person or persons, hereafter referred to as the beneficiary or beneficiaries. If any beneficiary is a minor at the time the account, or any portion of the account, becomes payable to the beneficiary and the balance, or portion of the balance, exceeds the amount specified by K.S.A. 59-3003 and amendments thereto, the moneys shall be payable only to a conservator of the minor beneficiary.

Transfers pursuant to this section shall not be considered testamentary or be invalidated due to nonconformity with the provisions of chapter 59 of the Kansas Statutes Annotated.

Every contract authorized by this section shall be considered to contain a right on the part of the shareholder during the shareholder's lifetime both to withdraw funds on deposit in the account in the manner provided in the contract, in whole or in part, as though no beneficiary has been named, and to change the designation of beneficiary. The interest of the beneficiary shall be considered not to vest until the death of the shareholder.

No change in the designation of the beneficiary shall be valid unless executed in the form and manner prescribed by the credit union and delivered to the credit union prior to the death of the shareholder.

For the purposes of this section, the balance of the shareholder's account or the balance of the shareholder's legal share of an account shall not be construed to include any portion of the account which under the law of joint tenancy is the property of another joint tenant of the account upon the death of the owner.

As used in this section, "person" means any individual, individual or corporate fiduciary or nonprofit religious or charitable organization as defined by K.S.A. 79-4701 and amendments thereto.

History: L. 1979, ch. 177, § 5; L. 1980,

ch. 166, § 3; L. 1982, ch. 104, § 2; L. 1984, ch. 51, § 3; July 1.

17-2264. Same; duties of credit union; release and discharge thereof. When the shareholder and the credit union have entered into a contract authorized in K.S.A. 17-2263 and amendments thereto, the shareholder's account subject to the contract or any part of or interest on the account shall be paid by the credit union to the shareholder or pursuant to the shareholder's order during the shareholder's lifetime. On the shareholder's death, the deposit account or any part of or interest on the account shall be paid by the credit union to the designated beneficiary or beneficiaries. If any designated beneficiary is a minor at the time the account, or any portion of the account, becomes payable to the beneficiary and the balance, or portion of the balance, exceeds the amount specified by K.S.A. 59-3003 and amendments thereto, the credit union shall pay the moneys or any interest on them only to a conservator of the minor beneficiary. The receipt of the conservator shall release and discharge the credit union for the payment.

History: L. 1979, ch. 177, § 6; L. 1984, ch. 51, § 4; July 1.

17-2265. Fees for credit unions insured by guarantee corporations; disposition. In addition to other fees authorized by law, the credit union administrator shall fix and collect appropriate fees among all state-chartered credit unions which are insured by guarantee corporations regulated by the administrator for the administration of the provisions of K.S.A. 17-2250 to 17-2261, inclusive. The credit union administrator shall remit all fees collected under this section to the state treasurer. Upon receipt thereof, the state treasurer shall deposit the entire amount thereof in the state treasury and shall credit the entire amount of such deposit to the credit union fee fund.

History: L. 1980, ch. 27, § 69; L. 1981, ch. 103, § 11; July 1.

17-2266. Transfer of moneys from guarantee corporations examination fund to credit union fee fund. On the effective date of this act, the director of accounts and reports shall transfer all the moneys from the guarantee corporations examination fund to the credit union fee fund. On the effective date of this act, all of the outstanding obligations and liabilities of the guarantee corporations examination fund

be commenced for the dissolution of such association in the manner provided by law.

(b) Whenever any savings and loan association shall fail to give notice that it does not maintain insurance upon its accounts and deposits as required under the provisions of K.S.A. 17-5825 and amendments thereto, the savings and loan commissioner shall notify such association that a continuation of such failure will result in the revocation of its authority to do business in this state. If after receipt of such notice the association fails or refuses to comply, the commissioner shall, after a hearing or an opportunity for a hearing has been given to such association in accordance with the provisions of the Kansas administrative procedure act, grant an extension of time in the manner authorized by K.S.A. 17-5825 and amendments thereto or revoke its authority to transact business in this state. Thereupon, proceedings shall be commenced for the dissolution of such association in the manner provided by law.

History: L. 1975, ch. 142, § 5; L. 1988, ch. 356, § 63; July 1, 1989.

17-5828. Contracts for payment to beneficiaries upon deposit account owners' deaths; rights of owners during lifetime; change of beneficiary. Subject to the provisions of this section and K.S.A. 17-5829 and amendments thereto, an individual adult or minor, hereafter referred to as the owner, may enter into a written contract with any savings and loan association located in this state providing that the balance of the owner's deposit account, or the balance of the owner's legal share of a deposit account, at the time of death of the owner shall be made payable on the death of the owner to one or more persons or, if the persons predecease the owner, to another person or persons, hereafter referred to as the beneficiary or beneficiaries. If any beneficiary is a minor at the time the account, or any portion of the account, becomes payable to the beneficiary and the balance, or portion of the balance, exceeds the amount specified by K.S.A. 59-3003 and amendments thereto, the moneys shall be payable only to a conservator of the minor beneficiary.

Transfers pursuant to this section shall not be considered testamentary or be invalidated due to nonconformity with the provisions of chapter 59 of the Kansas Statutes Annotated.

Every contract authorized by this section shall be considered to contain a right on the part of the owner during the owner's lifetime

both to withdraw funds on deposit in the account in the manner provided in the contract, in whole or in part, as though no beneficiary has been named, and to change the designation of beneficiary. The interest of the beneficiary shall be considered not to vest until the death of the owner and, if there is a claim pursuant to subsection (g) of K.S.A. 39-709 and amendments thereto, until such claim is satisfied.

No change in the designation of the beneficiary shall be valid unless executed in the form and manner prescribed by the savings and loan association and delivered to the savings and loan association prior to the death of the owner.

For the purposes of this section, the balance of the owner's deposit account or the balance of the owner's legal share of a deposit account shall not be construed to include any portion of the account which under the law of joint tenancy is the property of another joint tenant of the account upon the death of the owner.

As used in this section, "person" means any individual, individual or corporate fiduciary or nonprofit religious or charitable organization as defined by K.S.A. 79-4701 and amendments thereto.

History: L. 1979, ch. 177, § 3; L. 1980, ch. 166, § 4; L. 1982, ch. 104, § 3; L. 1984, ch. 51, § 5; L. 1992, ch. 150, § 5; April 30.

CASE ANNOTATIONS

3. IRA as revocable inter vivos trust subject to rights of nonconsenting surviving spouse determined. *McCarthy v. State Bank of Fredonia*, 14 K.A.2d 552, 555, 795 P.2d 940 (1990).

17-5829. Same; duties of association; release and discharge thereof. When the owner and the savings and loan association have entered into a contract authorized in K.S.A. 17-5828 and amendments thereto, the owner's deposit account subject to the contract or any part of or interest on the account shall be paid by the savings and loan association to the owner or pursuant to the owner's order during the owner's lifetime. On the owner's death, the deposit account or any part of or interest on the account may be paid by the savings and loan association to the secretary of social and rehabilitation services for a claim pursuant to subsection (g) of K.S.A. 39-709 and amendments thereto or, if there is no such claim or if any portion of the account remains after such claim is satisfied, to the designated beneficiary or beneficiaries. If any designated beneficiary is a minor at the time the account, or any portion of the account, becomes payable to the

beneficiary and the balance, or portion of the balance, exceeds the amount specified by K.S.A. 59-3003 and amendments thereto, the savings and loan association shall pay the moneys or any interest on them only to a conservator of the minor beneficiary. The receipt of the conservator shall release and discharge the savings and loan association for the payment.

History: L. 1979, ch. 177, § 4; L. 1984, ch. 51, § 6; L. 1992, ch. 150, § 6; April 30.

17-5830. Trust powers; generally. The commissioner is authorized and empowered to grant by special permit to any savings and loan association organized under the laws of this state whose principal office is located in the state of Kansas, the right to act as trustee, corporate agent or in any other fiduciary capacity in which trust companies and banks incorporated under the laws of Kansas are permitted to act. The commissioner may approve and issue a special permit to such state savings and loan association to act in one or more of such fiduciary capacities. Any state savings and loan association having been granted trust authority by the commissioner may add "and trust company" to its corporate name. Such trust powers shall be subject to the following:

(a) The association exercising any or all of the powers enumerated in this section shall segregate all assets held in any fiduciary capacity from general assets of the association, and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. Such books and records shall be open to the inspection of, and subject to the supervision of, the commissioner;

(b) the Kansas bank commissioner, may have access to examination reports made by the savings and loan commissioner insofar as such reports relate to the trust department of such association but nothing in this section shall be construed as authorizing such state banking authority to examine the books, records and assets of such associations;

(c) no association shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the association awaiting investment shall be carried in a separate account and shall not be used by the association in the conduct of its business unless it shall first set aside in

Savings & Loans

the legal representative of the decedent and shall constitute a full discharge and release from any further claim for such payment to the same extent as if such payment had been made to an executor or administrator of the decedent's estate.

(b) The provisions of subsection (a) hereof shall apply only if an affidavit has been made and filed with the appropriate governmental office or private company responsible for the benefit by the surviving spouse or other relative by whom or on whose behalf request for payment is made and such affidavit shows (1) the date of death of the deceased, (2) the relationship of the affiant to the deceased, (3) that no executor or administrator for the deceased has qualified or been appointed, and (4) that, to the affiant's knowledge, there exists at the time of the filing of such affidavit, no relative of a closer degree of kindred to the deceased than the affiant.

History: L. 1967, ch. 322, § 1; L. 1979, ch. 179, § 1; July 1.

59-1507b. Payment of certain moneys on deposit to certain relatives; discharge and release; affidavit. When a resident of the state dies, testate or intestate, if the total assets of the estate of the decedent do not exceed the sum of ten thousand dollars in value, the surviving spouse of the decedent, if entitled by will or by intestate succession to moneys on deposit in the account of the decedent in any bank, trust company, savings and loan association or credit union located in this state, shall be paid, without having been granted letters testamentary or letters of administration, the moneys on deposit, not in excess of one thousand dollars, upon furnishing the bank, trust company, savings and loan association or credit union with an affidavit showing the entitlement of the spouse to receive the moneys. Payment of the moneys to the spouse shall be deemed to be a payment to the legal representative of the decedent and the receipt of the spouse shall constitute a full discharge and release from any further claim for such payment to the same extent as if the payment had been made to an executor or administrator of the decedent's estate. The affidavit required to be furnished under the provisions of this section shall be in form and contents substantially as follows:

State of Kansas)
County of _____) ss.
_____ being duly sworn, says:

(1) On _____, 19 _____, (decedent) died _____ (testate or intestate) at _____ (location), leaving an estate not exceeding \$10,000 in value.

(2) The undersigned is the surviving spouse of _____ (decedent) and is entitled by _____ (decedent's will or by succession) to any money of _____ (decedent) deposited in _____ (specify bank, trust company, savings and loan association or credit union).

(3) There is on deposit with _____ (specify bank, trust company, savings and loan association or credit union and, if applicable, specify branch) the sum of \$ _____ in Account No. _____ in the name of _____ (decedent).

The undersigned requests that _____ (such sum or specify amount not exceeding \$1,000) be paid to the undersigned, without procurement of letters _____ (testamentary or of administration).

(4) The undersigned has not, nor has anyone on behalf of the undersigned, withdrawn or received any funds on deposit in this account, except the sum of \$ _____ (if applicable).

(Jurat)

(Signature)

History: L. 1980, ch. 166, § 7; July 1.

59-1508. Unclaimed money. If any part of the money on hand has not been paid over because the person entitled thereto cannot be found or refuses to accept the same, or for any other good and sufficient reason, the district court may order the executor or administrator to pay the same to the county treasurer for the same disposition as is provided by K.S.A. 20-2801 for moneys received from forfeitures, except that if the person to whom said sum is ordered to be paid refuses to accept the same when it is tendered such person by the executor or administrator, the court may, either before or after the sum has been deposited, order the same to be paid and distributed to those who would be entitled thereto had the refusing legatee or distributee not been entitled to it.

Upon application to the district court within ten (10) years after such deposit, and upon notice to the county attorney and the county treasurer, the court may order the county treasurer to pay the same to the person entitled thereto. No interest shall be allowed or paid thereon, and if the deposit is not claimed within such time no recovery thereof can be had.

History: L. 1939, ch. 180, § 119; L. 1973, ch. 106, § 14; L. 1976, ch. 242, § 18; Jan. 10, 1977.

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COMMENT

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stale check, the bank cannot be held liable for wrongful dishonor. Although certified checks are excluded from this section, it would seem that a bank could certify a stale check if it could pay it. The greatest exposure for a bank which pays a stale check is the "good faith" language appearing at the end of this section. Several judicial decisions virtually equate "good faith" (which should mean subjective "honesty in fact" under 84-1-201(19)) with ordinary care. In these cases, a bank may be liable to its customer if it pays a very stale check without making some inquiry. See, e.g., *Advanced Alloys, Inc. v. Sergeant Steel Corp.*, 12 U.C.C. Rep. 1173 (N.Y. Sup. Ct. 1973); *Charles Ragusa & Son v. Community State Bank*, 360 So.2d 231 (La. App. 1978). These cases seem to fly in the face of the subjective "good faith" test imposed by this section.

Statutory Reference:

Former K.S.A. 52-1703a.

Research and Practice Aids:

Banks and Banking—139 et seq.

C.J.S. Banks and Bankng § 342 et seq.

Vernon's Kansas U.C.C.—Howe & Navin, 84-4-404.

Duty of bank to honor checks generally. 10 Am. Jur. 2d, Banks § 267 et seq.

84-4-405. Death or incompetence of customer. (1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(2) Even with knowledge a bank may for ten days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.

History: L. 1965, ch. 564, § 231; Jan. 1, 1966.

OFFICIAL UCC COMMENT

Prior Uniform Statutory Provision:

None.

Purposes:

1. This section is new, although similar statutory provisions are in existence in seven states.

2. Subsection (1) follows existing decisions which hold that a drawee (payor) bank is not liable for the payment of a check before it has notice of the death or incompetence of the drawer. The justice and necessity of the rule are obvious. A check is an order to pay which the bank must obey under penalty of possible liability for dishonor. Further, with the tremendous volume of items handled any rule which required

banks to verify the continued life and competency of drawers would be completely unworkable.

One or both of these same reasons apply to other phases of the bank collection and payment process and the rule is made wide enough to apply to these other phases. It applies to all kinds of "items"; to "customers" who own items as well as "customers" who draw or make them; to the function of collecting items as well as the function of accepting or paying them; to the carrying out of instructions to account for proceeds even though these may involve transfers to third parties; to depository and intermediary banks as well as payor banks; and to incompetency existing at the time of the issuance of an item or the commencement of the collection or payment process as well as to incompetency occurring thereafter. Further, the requirement of actual knowledge makes inapplicable the rule of some cases that an adjudication of incompetency is constructive notice to all the world because obviously it is as impossible for banks to keep posted on such adjudications (in the absence of actual knowledge) as it is to keep posted as to death of immediate or remote customers.

3. Subsection (2) provides a limited period after death during which a bank may continue to pay checks (as distinguished from other items) even though it has notice. The purpose of the provision, as of the existing statutes, is to permit holders of checks drawn and issued shortly before death to cash them without the necessity of filing a claim in probate. The justification is that such checks normally are given in immediate payment of an obligation, that there is almost never any reason why they should not be paid, and that filing in probate is a useless formality, burdensome to the holder, the executor, the court and the bank.

This section does not prevent an executor or administrator from recovering the payment from the holder of the check. It is not intended to affect the validity of any gift causa mortis or other transfer in contemplation of death, but merely to relieve the bank of liability for the payment.

4. Any surviving relative, creditor or other person who claims an interest in the account may give a direction to the bank not to pay checks, or not to pay a particular check. Such notice has the same effect as a direction to stop payment. The bank has no responsibility to determine the validity of the claim or even whether it is "colorable." But obviously anyone who has an interest in the estate, including the person named as executor in a will, even if the will has not yet been admitted to probate, is entitled to claim an interest in the account.

Definitional Cross References:

"Accept." Section 3-410.

"Bank." Section 1-201.

"Certify." Section 3-411.

"Check." Section 3-104.

"Customer." Section 4-104.

"Depository bank." Section 4-105.

"Item." Section 4-104.

"Payor bank." Section 4-105.

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Subsection (1) provides an important variation of the rule in 84-4-401 that a bank may charge its customer's account for items which are "properly payable." Under this subsection, the drawee bank's authority to pay an item is not rendered ineffective until the bank has actual knowledge of "the fact of death or of an adjudi-

7-17

(2) If the bank establishes that the cus-

1. This section is new to Uniform Laws. It is to replace statutes in forty jurisdictions dealing with the general subject of a depositor's duty to discover and report forgeries and alterations. In these statutes there is substantial variation in rules prescribed as to the following matters: application of the statute to unauthorized signatures, raised checks or altered checks; inclusion of special provisions with respect to fictitious

4. The two effects comply with subs.

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MB-JNL

By LEO E. EICKHOFF, JR.

13

NONPROBATE TRANSFERS LAW

New law provides procedures for beneficiary deeds and TOD registration of securities and brokerage accounts. It also makes certain rules that are applicable to wills, such as antilapse and revocation by marriage dissolution, applicable to nonprobate transfers. It contains all the provisions of the newly recommended Uniform TOD Security Registration Act.

THE NONPROBATE TRANSFERS LAW was a part of the omnibus probate and trust law legislation passed by the General Assembly last year. It is sections 17 to 43 of House Bill No. 145, introduced by Representative Christopher Graham of Jefferson City, Missouri. It was originally introduced in the Senate by Senator Harold L. Caskey of Butler, Missouri as Senate Bill No. 28 and was added as an amendment to HB No. 145 during the session.¹

The Missouri Nonprobate Transfers Law was signed into law by Governor John Ashcroft on July 13, 1989, and became effective for new beneficiary designations made on and after August 28, 1989. The rules apply to all previously executed nonprobate transfer beneficiary designations within the scope of the law on January 1, 1990. It will form the basis for a new chapter 461 in the Revised Statutes as sections 461.003 to 461.081, RSMo Supp. 1989.

The legislature in 1983, as part of the trust law revision, enacted section 456.231, RSMo 1986, which confirmed the nontestamentary character of provisions in certain written instruments providing for the disposition of property after the death of the contracting party or property owner. This section was essentially Part 2 of Article VI of the 1969

Uniform Probate Code. It was confirmational in nature of court opinions like *Kansas City Life Ins. Co. v. Rainey*, 182 S.W.2d 624 (Mo 1944) which held that if the provision was part of an effectively executed contract, it did not have to satisfy the execution requirements of a will or be probated.

The problem with the Missouri statute and the Uniform Law provision was,



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that while the law made clear that a person could make a valid nonprobate transfer, it did not state how it was to be done or what rules would apply when various contingencies arose.

NEW LAW PROVIDES RULES FOR TRANSFER ON DEATH DIRECTIONS. The new law includes the general section 456.231, as section 461.017 and provides the formalities and rules for executing a good transfer on death direction in deeds, security certificates and certain other instruments and plans. It also provides rules that govern revocation, beneficiary survivorship, substitute takers, change of circumstances, rights of afterborn children, creditor rights, third party transferor protection and probate division jurisdiction to handle questions.

Article VI of the Uniform Probate Code also was revised this year by the NCCUSL and rearranged into three parts, entitled in its free standing form as the Uniform Nonprobate Transfers On Death Act.² The general provision, Part 2, becomes Part 1. The multiple party accounts law, Part 1 becomes Part 2, and gets a name change to the Uniform Multiple Persons Accounts Act. A new Part 3 is named the Uniform TOD Security Registration Act. The Uniform Law does not yet contain the general wills rules contained in the Missouri law. These are being considered as part of a revision of the entire Uniform Probate Code and it is envisioned that such rules will expressly state their applicability to both testamentary and nontestamentary transfers.

LAW DOES NOT APPLY TO LIFE INSURANCE OR BANK ACCOUNTS. The law does not apply to life or accidental death insurance. The will rules, such as dissolution of marriage, will not revoke beneficiary designations for life insurance. If children are named beneficiaries, the descendants of a deceased child will normally not take the share of their deceased par-

ent. Also, afterborn or after-adopted children normally will not receive a share of life insurance proceeds under standard beneficiary designation forms that are in general use.

Attorneys in divorce proceedings should encourage their clients to execute new life insurance beneficiary designations after dissolution of marriage, so that the decedent's intentions are confirmed and made clear. Group and term life insurance is often neglected in marriage dissolution proceedings because it does not constitute marital property. However, much unhappiness is suffered when an insured has remarried, maybe has children from the second marriage, and all the life insurance is paid to a spouse from whom the decedent was divorced many years before. Forms providing for antilapse substitute distribution to lineal descendants per stirpes and to provide for the contingency of an afterborn child are generally available from insurance companies on request.

The law also will not normally apply to checking and savings accounts in banks, savings and loan companies and credit unions. POD accounts may be established under section 362.471, RSMo, with banks and section 369.186, RSMo, for savings and loan companies. Credit unions have no POD statute but under section 461.072 of the new law they and other financial institutions may expressly adopt the NPTL as part of their deposit agreements.

Finally, the law does not apply to motor vehicle titles issued by the Department of Revenue. TOD registration of motor vehicle and watercraft ownership is provided in sections 301.681 and 306.461, RSMo, under a law passed in 1987.

While the law generally does not apply to life insurance, POD bank accounts or TOD motor vehicle titles, there are some provisions that do apply. Section 461.072, RSMo Supp. 1989, should be read very carefully to see what does and does not apply. For example,

section 461.051, respecting revocation by marriage dissolution, applies to POD financial accounts but not to life insurance or TOD automobile titles. Section 461.071, respecting creditors rights, applies to everything but life insurance, including distributions from inter vivos living trusts.

The breadth of this law is great. The exceptions may invoke a little discomfort, but they appear to try to make reasonable accommodation to a variety of property forms and to different industries that have developed different ways of doing business. As various institutions gain a better understanding of the law, it may be expected that some change will be made in the law's application.

There is very little literature in this new and developing area of the law. What exists is generally collected in a list in Volume II beginning on page 11-45 of the Guardian and Trust Law CLE Deskbook, published by The Missouri Bar in 1985. While there are a number of general articles, like John H. Langbein's "The Nonprobate Revolution," 97 *Harvard Law Review* 1108 (1984); Richard V. Wellman's "TOD Securities Registration: A New Title Form," 21 *Cal. L. Rev.* 789, 1987; and William F. McGovern, Jr.'s "The Payable on Death Account and Other Will Substitutes," 67 *Northwestern U.L. Rev.* 7 (1972), except for chapter 11, Nonprobate Transfer on Death Agreements, in The Missouri Bar CLE Deskbook, Guardianship and Trust Law, there are no "how to do it" articles or forms.

My original *Journal* article "Transfer On Death Directions," 40 *J. Mo. Bar* 93 (1984), was somewhat naive in assuming that with passage of the general confirmation statute, section 456.231, in 1983, everybody would know what to do as a matter of course and why. Moreover, the digest and legal encyclopedia publishers and periodical indexers don't seem to have a good idea as to how to classify this subject either. The collected articles are scattered over

banks and banking, executors and administrators, estate planning, joint tenancy, life insurance, probate, trusts and trustees, and wills. Hopefully a consensus will develop and the cases and articles dealing with nontestamentary transfers and will substitutes generally will find a suitable home in the near future. Even good attorneys need a starting point for research into the complexities of human action involving the passing of property on to future generations at death.

For the time being this article is all that will be available to you. A revision of chapter 11 of the Deskbook will be available early in 1990 and will include a revision in the forms offered and other suggestions I have received since the CLE seminar was presented this past summer.

PROBLEMS WITH JOINT TENANCY. We may have beat this subject to death. However, it seems necessary to review where we were to understand how we got here and why. The Missouri Bar has long cautioned against using joint tenancy to make gifts at death. The Missouri Bar is not recommending use of the will substitutes offered in the Nonprobate Transfers Law. A will or comprehensive trust, where all of the decedent's assets are marshaled together and distributed in an orderly manner, still seems to be the best procedure for making gifts at death. It is mind boggling to contemplate how any thoughtful estate plan could be kept on track with all the property being subject to separate beneficiary designations. Nevertheless, a TOD direction or beneficiary designation is much better than subjecting the property during the owner's lifetime to a joint tenancy with rights of survivorship.

The problems associated with joint tenancy are bound up in the fact that to make a gift at death, present property rights are transferred to the at death recipient. Property consists of a whole bundle of rights and also obligations. By

ing a nominal joint tenant a present property interest, we then need that tenant's consent to effect lifetime transactions. Except for bank accounts, where we can draw all the money out and start over with a new account, we can't change the joint tenant without the joint tenant's signature on deeds and stock certificates and we may need the signature of the spouse of the joint tenant to effect real estate conveyances.

If the nominal joint tenant has judgment creditors, the case of *Remax of Blue Springs v. Vajda & Co., Inc.*, 708 S.W.2d 804 (Mo. App. 1986) has taught us that the nominal joint tenant's creditors may execute on the joint tenant's interest in the property, break up and partition out the joint tenant's share of the property and cause a sale of the true owner's property. Moreover, by making our beneficiaries present property owners, we subject them to comply with city ordinances and other laws applicable to property owners. These laws subject the beneficiary to the risk of liability as a property owner for property supervision and management in situations in which the beneficiary has no practical means of controlling.

Tax consequences are also potentially undesirable. The transaction making the transfer may be a taxable gift or at least require a gift tax return. The beneficiary may lose a stepped up basis in part of the property at the owner's death and the real owner or owner's personal representative may lose the opportunity to take full advantage of the lifetime exemption of \$125,000 for the sale of a personal residence.

The investment community has shown us that this bundle of property rights that an owner acquires may be segregated and dealt with separately. They strip out the dividends and the appreciation in stock ownership from the underlying value of the stock. Interest payments are stripped out of treasury instruments and we suddenly have zero coupon bonds.

One of the rights a property owner

gets when property is acquired is the right to designate who will get possession and the right to use the property after the death of the current owner. The Nonprobate Transfers Law strips out this single right to give the property away at death, from all other rights of the owner, and deals only with that right. Consequently, during lifetime, the current owner retains all rights in the property and the beneficiary gets nothing. The consent, signature or other involvement of the beneficiary is never required. The owner may sell the property, mortgage it, convey an easement over it, revoke or change the beneficiary designations; and the beneficiary never has to be consulted.

The beneficiary's rights only begin at the owner's death and the beneficiary gets only what the owner has left at death. If the property has been sold or was destroyed, the beneficiary gets nothing. If it has been partially encumbered, the beneficiary gets the property subject to all liens and encumbrances to which the owner was subject during lifetime. The Nonprobate Transfers Law is therefore a true will substitute. It is always revocable and only becomes operative at the owner's death.

Recognizing that people of modest means were using the joint tenancy form of ownership for property management during periods of possible disability in old age and to make a gift at death, and that unnecessary problems were being caused by these arrangements, the Bar dealt with these situations in two ways. The Durable Power of Attorney Law and Adult Personal Custodian Law were written to replace the property management function of a joint tenancy arrangement. The Nonprobate Transfers Law was written to provide a way to make an at death gift of various forms of property other than by survivorship from a joint tenancy.

BENEFICIARY DEED. A gift of real property at death by deed was prevented by the requirement that a pres-

ent interest in property be conveyed during lifetime and that the deed be delivered, otherwise it was testamentary.³ An alternative of conveying to oneself a life estate reserving the power of sale and conveying the remainder to the beneficiaries has proved troublesome. Unless very carefully drawn, these deeds cannot be revoked and remade without a legitimate bona fide sale. Even with a sale, a court may hold that the proceeds are held on constructive trust for the remaindermen if not fully consumed by the life tenant before death. If the devisees under the decedent's will are different from the remaindermen in the conveyance, litigation ensues.

The new law simply eliminates the traditional rules that a deed, to be effective and not testamentary, must convey a present interest. A deed is now good that names grantee beneficiaries and the estates by which the beneficiaries will take their interest in the property and that states that the deed is not effective until the owner's death or the death of the last to die of two or more joint owners. Persons holding property as tenants in common should execute separate beneficiary deeds to convey their individual interest in the property to a person at death.

The law requires that a beneficiary deed must be signed and acknowledged by the grantors and be recorded before their death. It does not have to be delivered to the grantee beneficiaries or someone acting in their behalf. During the grantors' lifetimes, a beneficiary deed is fully revocable unless expressly made irrevocable. A beneficiary deed may be revoked by an instrument of revocation and is revoked in whole or in part by a conveyance of the property during the grantors' lifetime or by a subsequently executed beneficiary deed. The last deed on record controls. If the estates of the grantee beneficiaries are not stated, the beneficiaries will take their interest in the property as tenants in common.

The will rules in the law apply to beneficiary deeds, such as the requirement for survivorship by 120 hours, lineal descendant substitution, revocation by marriage dissolution, and protection for afterborn children. Affidavits concerning these facts may be necessary to clear title, similar to what must be done to render a good opinion on a real estate title where there has been no administration of a decedent's estate. The law does not specify the form of a beneficiary deed.⁴

The grantee beneficiary section may show the percentage shares they are to receive in the property and the estates which the grantee beneficiaries will take in the property. The nonprobate transfer rules in section 461.062, RSMo Supp. 1989, do not automatically apply to beneficiary deeds. If you want a gift over to other beneficiaries where the beneficiary does not survive and has no surviving lineal descendant substitutes, you will need to write into your conveyance language similar to section 461.062 (11)(c), RSMo Supp. 1989. Other rules in section 461.062 may be desirable. Also, it will be helpful to those reviewing an abstract on the property if, after the name of the grantee beneficiary, you will state how the grantee is related to the grantor, e.g., spouse, son, daughter, father, mother, brother, sister or friend, etc.

If you write your own conveyance, you will probably want to use the words "Grant and Assign, Convey and Confirm" for the granting clause.⁵ A grant, bargain and sell granting clause would imply that warranties are given. It should also probably be made clear that the conveyance is made as a gift and without consideration. No warranties are necessary as the grantee beneficiaries merely stand in as substitutes for the grantor and are subject to all the impediments of the grantor's title. They cannot be purchasers for value without knowledge.

If a regular printed deed form is used, the following sentence should be in-

aded: "This is a beneficiary deed executed pursuant to section 461.025, RSMo Supp. 1989, and is not to take effect until grantor's death or the last to die of two or more joint grantors." Until we can propose an amendment to section 59.330, RSMo, you will also have to provide the address of one of the grantee beneficiaries. A certificate of value under local law, as in St. Louis County, should not be necessary as there is no change in ownership when the beneficiary deed is filed.

For each type of will substitute in the nonprobate transfers law, certain execution requirements are set out that take the place of the formalities of executing a will. These are not just provisions designed to protect third party transferors but are the statute's requirements to be fulfilled to insure that the decision to make the gift is thoughtfully made and to impress on the donor that it is a final and binding decision unless revoked. An executed and acknowledged beneficiary deed that is found after death in a dresser drawer or a safety deposit box will not be given effect unless recorded before death.

TOD SECURITY REGISTRATION. Securities and brokerage accounts may be registered in beneficiary form. This is done by stating the owner's name followed by the words "transfer on death" or the abbreviation "TOD" and the name of the beneficiary or beneficiaries.⁶

For securities, the stock power on the back of the certificate is simply filled out and assigned as you want the registration to appear, i.e., "JOHN AND MARY JONES TEN ENT TOD JOHN JONES JR." The abbreviation "LDPS" may be added following the beneficiary's name John Jones, Jr. to make clear that lineal descendant substitution is required. If two beneficiaries are named, percentage interests may be indicated by placing a number in front of their names. The numbers ought to add up to 100% but it doesn't matter. The beneficiaries will share in the securities in

accordance with the ratio that the numbers bear to each other. "JOHN JONES TOD 60 JOHN JONES JR LDPS and 40 MARY JONES LDPS" is a registration providing for a 60/40 split. The numbers represent percentages and not shares of stock.

The stock power does not require witnesses but does require the normal signature guarantee procedure that is used in the securities industry and which transfer agents will expect to receive. Again, it must be emphasized that the formalities set out in the statute must be met and that the certificate representing the security be reissued by the transfer agent with the beneficial registration shown on its face. An owner just can't write TOD on the certificate and put it away in a safety deposit box.

For stock purchases over the telephone, a verbal request for the registration is good when the certificate is ultimately issued and shows a registration in beneficiary form. It is assumed that if this is not what the purchaser wants, the certificate will be returned for correction and reissue.

Beneficial registration is revoked by a sale or sending in the certificate with the stock power showing an assignment back into the owner's name without a TOD beneficiary designation.

At the owner's death the certificate is canceled and reissued in the beneficiary's sole name upon presentation of a death certificate to the transfer agent, the same as is done today when converting jointly owned stock into the surviving joint owner's sole name on death of a joint tenant. If there is more than one beneficiary the certificate would normally be broken down and separate certificates issued to each beneficiary for their proportional interests. Provision is made for the sale of fractional shares or as the beneficiaries may direct the handling of any odd shares. Securities, such as bonds, that can not be broken down into small separate parts may have to be reissued to the beneficiaries as tenants in common and remain that way

until they decide how to otherwise handle their common ownership interests.

Brokerage accounts are registered in beneficiary form following the same procedures described for securities, except that the registration would be written in the manner desired in the account agreement. Statements issued by the brokerage house will be issued showing the TOD registration as they follow the rules of the Securities Transfer Association for stock registration. Securities issued from the brokerage account will be issued in the name in which the account is carried and will include a registration in beneficiary form if that is the way the account is carried on the books of the brokerage firm.

The only problem with registration of securities and brokerage accounts in beneficiary form is the possible lack of knowledge by brokers, transfer agents and nominee trusts of the Missouri law and their failure to modify computer editing fields so that the registrations will not be rejected by their mechanized record keeping systems.

TOD beneficiaries of securities and brokerage accounts have no ownership interest in the securities until the shareholder's death and their signatures are not required on proxies or other transactions respecting those securities.

One hundred and twenty hour survival, lineal descendant substitution under the antilapse provisions of the statute and revocation by marriage dissolution apply to registrations in beneficiary form but the afterborn child rule does not.

While registration in beneficiary form mainly has application to securities and brokerage accounts, it also applies to any property whose ownership is evidenced by a certificate or instrument of title. Warehouse receipts and bills of lading could be issued in beneficiary form and also air frame titles issued by the federal government. Of course, automobile, truck, watercraft and outboard motor titles issued by the Missouri Department of Revenue are

covered by a similar but different statute. CDs issued by a financial institution could be registered in beneficiary form by reference to the statute, as well as book entries of the Federal Reserve System.

IRA ACCOUNTS. Individual retirement accounts, Keogh retirement accounts and employee benefit plans that provide for the manner in which the benefit proceeds are to be distributed on the participant's death come under the law.

The effect of a federal court decision involving an IRA account with E. F. Hutton has been reversed in the Missouri law. The case of *E. F. Hutton v. Joni Wallace*, No 87 CV 71516 DT, U.S. Dist. Ct., E.D. Mich., So. Div. (1987), held that self managed IRA accounts were held by the broker as a custodial agent. At the owner's death the broker's authority as an agent ceased and the broker had no authority to distribute the account proceeds to the designated beneficiaries. The beneficiary designation was ineffective and, therefore, the account belonged to the decedent's estate.

Section 461.009.2 of the new law expressly provides that the authority of a financial institution or broker who acts as a custodial agent on an IRA account shall not cease until the property has been distributed by the agent in accordance with the principal's beneficiary designation. A similar continuation of an agent's powers after the principal's death is contained in section 404.560, RSMo, respecting personal custodians distributing property pursuant to a custodial beneficiary's TOD direction.

The rules regarding survival, antilapse, change of circumstances and the afterborn child rule apply to distributions under these plans. Plan administrators should verify the appropriate facts that bear on these rules in making distribution at death in accordance with the employee's or plan participant's beneficiary designation. A universal

beneficiary designation form may be found beginning at page 11 Sup-8, Guardian and Trust Law Deskbook, The Missouri Bar, 1985, soon to be revised.⁷

OTHER WILL SUBSTITUTES. The law does not apply to life insurance, survivorship rights of joint tenants, tenants by the entirety or to a transfer to remaindermen after the death of a life tenant. It does apply to a variety of other will substitutes.

Any contract right that may be assigned may be made subject to an assignment effective on death. The only requirement provided is that the beneficial assignment be witnessed by one person, be in proper form for the contract involved and be delivered to the contract obligor prior to the assignor's death.

A promissory note may contain a provision that the obligation is extinguished on death of the promisee or promisor as the parties may provide. Of course, if the payment obligation is to continue after death, the note may include express provisions stating to whom the debt is to be paid after the holder's death. The simple way of handling promissory notes issued under private deeds of trust is simply to include a TOD direction in the payment order portion of the note, i.e., "Pay to the order of John Jones TOD John Jones, Jr. LDPS." If the TOD direction is made in an endorsement of the note, a copy would have to be served on the promisor. See §461.023, RSMo Supp. 1989.

Generally, beneficiary designations for other than deeds, and securities and brokerage accounts require a witness by one person not expressly named a beneficiary under the designation.

Throughout the law, reference is made to the "transferor." This has reference to the third party who will actually transfer the property at death and put the property involved in the possession and control of the beneficiaries. It does not refer to the owner who makes the beneficiary designation. A trans-

feror includes security transfer agents, promisors and drawers of negotiable instruments, contract obligors, government agencies issuing title certificates and the like. For a beneficiary deed there is no transferor or third party who intervenes to put the beneficiaries in possession and control of the real estate conveyed.

CREDITOR RIGHTS. Creditors are given extensive protection from the nonprobate transfers of a decedent. The provision comes from section 6-107 of Article VI of the UPC. It has existed in a number of states for twenty years and there are no reported decisions. Consequently, one may conclude that it has been effective to get creditors claims satisfied. Transferors are protected in making early transfers to beneficiaries of nonprobate transfers.

Only the personal representative may initiate the accounting proceeding authorized and only after the request of an unpaid creditor or a surviving spouse of an estate insufficient to pay statutory allowances. Recovery against beneficiaries of nonprobate transfers is limited to proportional contribution. Thus, the burden is on the personal representative to bring everybody into the proceeding and the personal representative may not selectively satisfy a claim from just one or two beneficiaries. Conceivably the personal representative may recover only 70% or some other percent of the amount needed to pay the decedent's creditors.

The statute of limitations on a personal representative initiating the accounting proceeding is two years from the decedent's death. If an estate cannot be opened because of the running of the one year statute in the Probate Code, no recovery may be obtained under the proceeding authorized.

Almost everyone who receives anything from a decedent is required to proportionally contribute to the payment of claims, including beneficiaries of TOD distributions from an adult per-

sonal custodianship, beneficiaries of revocable nontestamentary trusts to the extent that the trust assets could have been reached during the decedent's lifetime, surviving joint tenants to the extent of decedent's contribution to the value of the joint property and POD beneficiaries of accounts in financial institutions. Beneficiaries of life and accidental death insurance and tenants by the entirety are not subject to an action to account to pay creditors.

WILL RULES. Certain rules that are applicable to distributions under wills are made applicable to nonprobate distributions. Some prior references have been made to them, but they will be briefly summarized. This will be only a short explanation of the rules that apply to nonprobate transfers. I will not attempt to point out every contingency that the law attempts to cover, but only enough to indicate the general thrust of these sections.

Disclaimer of nonprobate transfers is authorized.

A nonprobate transfer, like a will, is revocable unless expressly made irrevocable. Until death the beneficiary's interest in any associated property is only an expectancy. No rights are acquired except, perhaps, against those who cause a change in the expectancy by fraud, duress or undue influence. Generally, a nonprobate transfer may not be revoked by a will or by an attorney in fact.

Survivorship by 120 hours is required unless the instrument provides for some other rule on survivorship.

An antilapse provision provides for lineal descendant per stirpes substitution if the beneficiary is a descendant of a grandparent of the decedent. Generally, grandchildren, nephews and nieces will take as substitutes. The section may be invoked for nonrelatives by the use of the abbreviation "LDPS" following the beneficiary's name. A nonprobate transfer will first go to the primary beneficiaries, then to their lineal descendant substitutes, contingent

beneficiaries, their lineal descendant substitutes, and if none, to the decedent's estate.

Marriage dissolution revokes a nonprobate transfer regardless of whether the beneficiary designation refers to marital status, unless the gift was made irrevocable or the gift is part of an agreement or court order respecting a property settlement on dissolution of the marriage. The revoked gift defaults to any surviving spouse and children and, if none, to the owner's estate. The surviving spouse receives only a child's share and this may differ from an intestate distribution of the decedent's estate.

A person named as a beneficiary by reason of fraud, duress or undue influence, or who causes or participates in causing the death of the decedent, is disqualified from receiving any benefit of a nonprobate transfer. The disqualified share is distributed to the surviving spouse and children in equal parts who are not subject to the disqualification. This goes beyond participation in an intentional killing and the comment to the section states that the outcome of any criminal proceeding is not determinative. The section does permit a civil jury to relieve any beneficiary from the effect of the disqualification. A son driving home from a hunting trip who causes the death of his parent by negligent driving or a spouse exercising a right of self defense could have their nonprobate inheritance restored. Agreement of all takers should also be sufficient to restore entitlement to the gift, and this might preserve a marital exemption for federal estate tax purposes.

Omitted spouses and omitted children do not have any rights in nonprobate distributions. Children born or adopted after the beneficiary designation is made have a right to participate in any distribution provided for the owner's other children. This section does not apply to TOD security registrations.

The statute has a set of procedural rules that govern the making, revoking

and implementation of nonprobate beneficiary designations and transfers. A benefit plan may use the rules provided or adopt its own set of rules. If a charity does not exist or a beneficiary cannot be found, the transfer is made to the known beneficiaries after a one year wait. A variety of other contingencies are also covered.

Transferors are given protection in making a nonprobate transfer in good faith and without actual knowledge that the distribution is in error. The protection is extensive and transferors are relieved from even the duty to check marital status. A transfer may be blocked by an adverse claim made under procedures similar to that provided for objecting to transfers under the Uniform Law on Simplification of Fiduciary Security Transfers, section 403.290, RSMo.

Regardless of what the transferor does, as between themselves, beneficiaries are free to dispute the entitlement to any nonprobate transfer. Anyone who improperly receives a nonprobate transfer has the obligation to deliver it to the rightful distributees.

PROBATE JURISDICTION. The probate division of the circuit court is given jurisdiction to make the determinations necessary to resolve questions about the nonprobate transfer. This would include determining the capacity of the owner at the time the beneficiary designation was purportedly made, interpreting the beneficiary designation, determining whether the gift was a result of fraud, duress or undue influence, whether the death was caused by the beneficiary, the lineal descendants of a nonsurviving beneficiary, accounting to pay creditors, restitution from improper distributees and any other proceeding necessary to effect the nonprobate transfer under the law.

CONCLUSION. Well, that's it! This brief explanation of the Nonprobate Transfers Law is probably longer than the law. But, there is much said and

unsaid in the law. The unsaid must be derived from our understanding of other applicable law. Posthumous children are included in the afterborn child rule but the statute does not say this. We know it because we are lawyers. Despite what might appear at first blush to be the elimination of the need for lawyers, there is a lot of lawyering required by this law.

With the passage of the Nonprobate Transfers Law, the Probate and Trust Committee concludes a decade long effort to revise and update Missouri's laws for the management of property of the disabled and the transfer of property at death. The Probate Code was revised in 1980. The Guardianship and Trust Law revision was passed in 1983. Thereafter followed the Transfers to Minors Law in 1985,⁸ the Adult Personal Custodian Law in 1986,⁹ the TOD automobile title law in 1987,¹⁰ and the new Durable Power of Attorney Law¹¹ and Nonprobate Transfers Law in 1989.¹²

When we wake up to what has transpired in Missouri, we will find that America's Heartland has the finest and most complete system of probate related laws in the country. We are the "Show'em State" not the "Show Me State." And, we don't have two systems, probate and nonprobate. Each of these laws returns to the probate court's traditional surrogate jurisdiction to solve problems within our traditional legal system.

We have one system, broad in scope and diversity. The lawyer has a vast array of alternatives available to handle a client's business. These laws forthrightly address the problems of an aging population where the possibility of inability and disability to cope with life's problems are becoming real for more and more of our people. Nothing is forced or mandated. Almost everything may be changed by the attorney to fit the situation of the client. To have so many choices available may require some ingenuity, but that is what lawyers are for.

The nonprobate revolution is over in Missouri, for all practical purposes. In the future we may have to directly address heirship rights of children born of surrogate parents, and other changes generated by biological advances in medical science; but, for now, I think we need to just get on with our normal business and learn to work with what we have. □

FOOTNOTES

¹ The Nonprobate Transfers Law was drafted by a subcommittee of the Probate and Trust Committee of The Missouri Bar. The subcommittee members were: Fred L. Hall, Springfield; Joseph P. Logan, Thompson and Mitchell, St. Louis; Raleigh W. Johnson, Monett; W. D. Raine, Boatmen's Union National Bank, Springfield; J. Scott King, Seigfried, Gray and King, Independence; Byron A. Stewart, Jr., Constance, Stewart & Cook, Independence; and Leo E. Eickhoff, Jr., Southwestern Bell Telephone Co., St. Louis.

The bill was reviewed and favorably reported by the Senate Judiciary Committee, Senator John D. Schneider, St. Louis, Missouri, Chairman; and by the House Judiciary Committee, Representative Mark A. Youngdahl of St. Joseph, Missouri, Chairman. The law, with detailed committee comments for each section was published in a MoBar CLE resource Handbook, titled "Missouri Probate and Trust Update — 1989," 342 pages, available for purchase from The Missouri Bar, P.O. Box 119, Jefferson City, Missouri 65102.

² Uniform probate related laws with

NCCUSL comments may be found in Volume 8A, Uniform Laws Annotated, West Publishing Company, and without comments in the law digest volume of Martin-dale-Hubbell Law Directory.

³ Guardian and Trust Law Deskbook, The Missouri Bar, 1985, pages 11-41 to 11-43.

⁴ A form for a beneficiary deed and to revoke a beneficiary deed will be included in the 1990 Supplement to Guardian and Trust Law Deskbook, The Missouri Bar, 1985.

⁵ An attorney at one of the CLE meetings said that he had never seen a deed that used the word "assign" in the granting clause, but since the habendum clause always used "and assigns," maybe it was a reasonable substitution for "bargain and sell."

⁶ See example of TOD certificate issued in beneficiary form by Southwestern Bell Corporation in Guardian and Trust Deskbook, The Missouri Bar 1985, page 11 Sup. 15. The 1990 supplement will show an example of a TOD motor vehicle title, as issued by the Department of Revenue.

⁷ See also sample Rules for Employee Beneficiary Designations, pages 11-53, Guardian and Trust Law CLE Deskbook, The Missouri Bar, 1985. These rules and the form shown in the Appendices will be revised in the 1990 supplement.

⁸ See, Eickhoff, *Transfers to Minors Law*, 41 J. Mo. Bar 441 (1985).

⁹ See, Eickhoff, *Adult Personal Custodian Law*, 42 J. Mo. Bar 303 (1986).

¹⁰ See, Eickhoff, *Nonprobate Transfers: TOD Motor Vehicle Titles*, 43 J. Mo. Bar 523 (1987).

¹¹ See, Eickhoff, *New Durable Power Law and Custodial Trust Act Amendments*, 45 J. Mo. Bar 329 (1989).

¹² See also, Eickhoff, *Transfer on Death Directions*, 40 J. Mo. Bar 93 (1984).

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25 NORTH WALNUT

December 9, 1992

Mr. Michael R. O'Neal
Gilliland & Hayes, P.A.
P. O. Box 2977
Hutchinson, KS 67504-2977

Re: Yankee Run (Kanopolis Lake);
Senate Bill 757

Dear Mike:

I had previously visited with you concerning problems with the Mobile Home Parks Residential Landlord and Tenant Act. In particular, I advised you that I represent Mr. Wayne Feist, who inherited property from Alta Robinson in the Yankee Run area of Kanopolis Lake. Since I think you are familiar with Yankee Run, the area of concern is the mobile home portion.

Even before Kanopolis Lake was developed, a number of hunters and fishermen leased campsite or cabin areas from Alta Robinson. When the lake developed, a number of the sites were eventually converted to mobile homes. At the present time, there are approximately 120 sites, which would include approximately 25 mobile homes, in addition to a few R.V.'s and, a few "cabins".

The arrangement with Mrs. Robinson, and now with Wayne Feist, has been to lease a space or lot, on an annual basis, or on some occasions, 5 year leases. The lease is for the space only, with no services provided. Space rent had previously been \$85.00 per year, but with the effect of reappraisal, space rent is now \$120.00 per year.

When a person initially rents a space, he or she is quite aware that the lessee is responsible for all utilities and services. On a personal basis, I would note that my wife recently sold our mobile home which was located in the Yankee Run area and, has acquired a different mobile home which has now been moved onto a space rented from Wayne Feist. As lessee the responsibilities are:

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Attachment 8

Mr. Michael R. O'Neal
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a. Electrical service. The area is served by Ark Valley Electric Cooperative, and, I will need to make arrangements for electrical service.

b. The space does not have a septic tank, and, it will be my responsibility for installing the septic tank.

c. A water connection will need to be made. Although Post Rock Water District now serves the area, the connection charges are fairly high. Therefore I have made arrangements with another lessee to connect to his well and will pay that person annually for the water well connection.

d. Trash and rubbish removal. Although a company out of Kanopolis will contract to provide a barrel and haul trash, we bag our trash, and haul it back to Hutchinson for disposal.

e. Propane. Several propane dealers service the area, and I will make arrangements with one of the dealers to get a tank, and to provide propane.

Obviously the requirements for providing services, and for maintaining those services, remain our responsibility as lessee, and with those companies contracting to provide the services.

Several mobile homes are sold each year. When the mobile homes are sold, matters affecting price, include whether the space has a Post Rock water connection, or its own well, septic tank, and such items as additional structures and landscaping.

I believe that Wayne Feist's situation is not unique, in that similar arrangements and facilities probably exist across the state, particularly where the mobile home park would have come into existence. It is not uncommon in this area for similar facilities to be located around sand pits, ponds, and lakes.

Before I visited with you, Wayne Feist reviewed the new bill, to determine if there were any substantial problems, other than the requirements of Section 13 requiring the landlord to provide and maintain services. In his review and mine, the only substantial problems appear to be with Section 13, and the rest of the provisions appear generally to be workable, mainly requiring drafting changes in the rental agreement.

I would suggest that a feasible solution to this situation

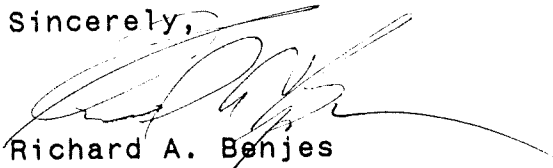
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would be to amend the legislation to provide that when a tenant leases a space, or, renews a lease, and, knowingly agrees that certain services are not being provided by the landlord, but, will be provided by the tenant, the provisions of Section 13 could be waived. Perhaps there might be a requirement that the tenant might be required to knowingly and affirmatively agree in writing that the tenant will provide and maintain such services before the provisions of Section 13 would be waived. I would further see no problem with a provision that if the landlord has been providing services, no waiver would be effective as to those services.

I have discussed change in the statute with the Kansas Manufactured Housing Association, and, find that the Association is supportive of the change, but did not wish for the Association to re-open the legislation. Therefore, the suggestion was made that I work through you, to see that legislation is introduced as promptly as possible. I will visit with you within the next several days on this concern.

Sincerely,



Richard A. Benjes

RAB:bsb

cc: Mr. Wayne Feist

KANSAS MANUFACTURED HOUSING ASSOCIATION

TESTIMONY BEFORE THE
SENATE SUBCOMMITTEE ON
CIVIL LAW

TO: Senator Mike Harris, Chairman and
Members of the Committee

FROM: Terry Humphrey, Executive Director

DATE: March 15, 1993

RE: HB 2132

Mr. Chairman and members of the Committee the Kansas Manufactured Housing Association supports HB 2132. HB 2132 fixes a problem that was discovered with the new Mobile Home Park Residential Landlord Tenant Act last summer.

Specifically the new Act that became effective January 1, 1993, requires that all manufactured home park owners provide services to their tenants such as: removal of garbage and outlets for electric, water and sewer services.

However, after the Act was passed by the Legislature I was notified by Richard Benjes of Hutchinson that he has a lake home in a mobile home park in the area of Kanopolis Lake and he and other tenants are required to provide and maintain their own services. Mr. Benjes stated that the tenants have provided these services from the beginning and this situation is acceptable. Consequently, these tenants and the property owner would like to see the language of HB 2132 written into law allowing their tenant-landlord arrangement regarding services to continue.

The Kansas Manufactured Housing Association supports HB 2132 and we believe that the Kanopolis Lake situation is not unique and that tenants probably provide these types of services at other recreation developments in the State. Thank you.

MEMORANDUM

TO: The Honorable Jerry Moran, Chairman
Senate Judiciary Committee

FROM: Jame G. Keller, Attorney
Kansas Department of Revenue

DATE: March 17, 1993

SUBJECT: House Bill No. 2355

I appreciate the opportunity to appear before you with regard to House Bill No. 2355.

This bill amends a number of statutes administered by the Division of Vehicles. The Department of Revenue supports this bill, but would suggest certain changes. Some of the changes simply clarify existing procedures in the statutory language, some are to clean up language as a result of other changes in this bill or in prior legislation, and others have been suggested by recent court decisions.

Attached hereto is an explanation of the changes suggested by the Department of Revenue along with a copy of the bill with the proposed changes.

SJ
3-22-93
Attachment 9

EXPLANATION OF PROPOSED AMENDMENT
TO HOUSE BILL NO. 2355

Section 1:

Page 3, Line 16: The words "at least" are proposed to be deleted because the suspension is for "one year."

Page 3, Line 29: The words "at least" are proposed to be deleted because the suspension is for "one year."

Page 3, Lines 36-37: The language "has the right to consult with an attorney" should be deleted. The original intention of that language was to advise that the Fifth Amendment right to counsel would still be available after the testing procedures were completed. However, recent court decisions have construed the phrase as granting a statutory right to counsel in addition to any constitutional right. There have also been arguments made that the language seems to restrict right to counsel only to those who have submitted to the test, but not those who refused. Removal of the language will simply eliminate these issues, but will have no effect upon any constitutional right to counsel which the person will still have.

Page 5, After Line 8: This language is the same as that contained in the Commercial Driver's License Act. Most prior court decisions have construed this law as a remedial law which should be liberally construed. However, some recent Kansas Court of Appeals decisions have overlooked prior precedents and stated that the act should be strictly construed. This proposed change will simply eliminate the issue and make it clear that the proper standard is that expressed in *State v. Adey*, 241 Kan. 825, 829 (1987).

Section 2:

Page 6, Lines 22-31: The proposed changes are necessary to eliminate technical issues that arise regarding who serves the copy of the certification and notice of suspension on the person and to accommodate certain police procedures regarding the handling of personal property of individuals in custody and in mailing documents.

Page 6, Lines 32-40: The proposed changes are to clarify that the person is to be suspended on the 20th calendar day after service of the notice of suspension--in other words, the 20 day period includes weekends and holidays. A recent court case ruled that the present language was unclear.

Page 7, Lines 7-17: The proposed changes are to carry out the purposes explained on the previous page and to make it clear that the direction to forward the law enforcement officer's certification and notice of suspension to the division of vehicles within five days is directory rather than mandatory. Some suspensions have been overturned because the certification was sent in after six days rather than five although there was no effect upon the proceeding.

Page 7, Lines 27-28: The proposed changes are to help make it clear that K.S.A. 60-206 does not apply to this time period. To help reduce the time period for setting administrative hearings to meet federal guidelines, the time requesting a hearing is made the same whether the certification was served by mail or in person.

Page 8, Lines 12-26: The section setting out the issues to be raised at an administrative hearing for a test failure are separated into breath test failure and blood test failure. A change in the language of the issues for a breath test failure recognizes that the Kansas department of health and environment is required to approve all breath-testing instruments in use in Kansas and has a program for periodic inspection of all such instruments and examination of all persons certified to operate such devices. The Kansas courts have repeatedly referred to the inspection and certification program of the KDHE when issues have been raised about "reliability" and "qualifications."

Page 8, After Line 30: This section sets out the issues for blood test failures.

Page 8, Lines 39-42: The proposed changes are necessary as a result of the changes proposed for paragraph (h)(2).

Page 9, Lines 13-21: The proposed language removes language that has been used as a basis for an argument that the suspension action should be dismissed if the matter is not set for hearing within 30 days, although the statute presently provides that

the only result is that the temporary license is extended until the date set for hearing. The change merely eliminates the reference to thirty days, but keeps the same procedure in effect. The additional language sets out a procedure for the service of administrative orders upon persons who have appeared at an administrative hearing.

Page 9, Line 30: The proposed language is necessary as a result of the additional language proposed in paragraph (k).

Page 9, After Line 35: Two additional paragraphs are proposed. Paragraph (n) was suggested by the result of a recent appellate decision which held that there were no procedural statutes for implied consent cases and ruled that the Act for Judicial Review should be used to supply administrative procedures. This proposed paragraph makes it clear that this section and some of the provisions in K.S.A. 8-255 constitute the administrative procedures to be used for the implied consent law. Paragraph (o) is to clarify that the time periods set out in this section are not governed by K.S.A. 60-206. A definition of the term "calendar day" as used in this section is included. This is in response to a recent court decision which held that the present statutory language is unclear without such references.

Section 8:

Page 17, Lines 27-28: New paragraph (e) in this bill eliminates the need for the language proposed to be deleted.

Page 17, Lines 35-43, Page 18, Lines 1-6: The Department of Revenue would recommend that new paragraph (d) be deleted. Since .04 to .08 BAC levels for persons under 21 years of age are included as "test failures" in K.S.A. 8-1013(h), such results would bring about suspensions under K.S.A. 8-1014(b). Also, most test failures result from breath tests rather than blood tests. The provision regarding the administrative fine is unclear.

Page 18, Line 31: The language proposed to be deleted should have been taken out when the sanction for a first occurrence refusal was changed from 180 days to one year. There is no reason for a reference to 150 days under present law.

Section 9: The restriction for using an ignition interlock device under new paragraph (4) would appear to be infinite in duration. The Department has no position on this, but merely wanted to call this to the attention of the committee.

HOUSE BILL No. 2355

By Representatives Crowell and O'Neal, Boston, Cornfield, Flower, Goossen, Graeber, Mason, Mayans, Mays, Myers, O'Connor, Samuelson, Shallenburger, Shore, M. Smith and Wagle

2-5

13 AN ACT concerning alcohol-related offenses involving the driving or
14 operating of vehicles or vessels; amending K.S.A. 8-1001, 8-1002,
15 8-1005, 8-1008, 8-1011, 8-1012, 8-1013, 8-1014, 8-1015, 8-1567,
16 as amended by section 1 of chapter 298 of the 1992 Session Laws
17 of Kansas, 8-2204, 12-4305, 12-4415, 22-2908, as amended by
18 section 257 of chapter 239 of the 1992 Session Laws of Kansas,
19 41-201 and 41-804 and K.S.A. 1992 Supp. 32-1131 and 32-1132
20 and repealing the existing sections; also repealing K.S.A. 41-2719
21 and 41-2720.

22
23 *Be it enacted by the Legislature of the State of Kansas:*

24 Section 1. K.S.A. 8-1001 is hereby amended to read as follows:
25 8-1001. (a) Any person who operates or attempts to operate a ~~motor~~
26 vehicle within this state is deemed to have given consent, subject
27 to the provisions of this act, to submit to one or more tests of the
28 person's blood, breath, urine or other bodily substance to determine
29 the presence of alcohol or drugs. The testing deemed consented to
30 herein shall include all quantitative and qualitative tests for alcohol
31 and drugs. A person who is dead or unconscious shall be deemed
32 not to have withdrawn the person's consent to such test or tests,
33 which shall be administered in the manner provided by this section.

34 (b) A law enforcement officer shall request a person to submit
35 to a test or tests deemed consented to under subsection (a) if the
36 officer has reasonable grounds to believe the person was operating
37 or attempting to operate a ~~motor~~ vehicle while under the influence
38 of alcohol or drugs, or both, or to believe that the person was driving
39 a commercial motor vehicle, as defined in K.S.A. 8-2,128, and
40 amendments thereto, while having alcohol or other drugs in such
41 person's system; and one of the following conditions exists: (1) The
42 person has been arrested or otherwise taken into custody for any
43 offense involving operation or attempted operation of a ~~motor~~ vehicle

1 while under the influence of alcohol or drugs, or both, or involving
 2 driving a commercial motor vehicle, as defined in K.S.A. 8-2,128,
 3 and amendments thereto, while having alcohol or other drugs in
 4 such person's system, in violation of a state statute or a city ordi-
 5 nance; or (2) the person has been involved in a motor vehicle ac-
 6 cident or collision resulting in property damage, personal injury or
 7 death. The law enforcement officer directing administration of the
 8 test or tests may act on personal knowledge or on the basis of the
 9 collective information available to law enforcement officers involved
 10 in the accident investigation or arrest.

11 (c) If a law enforcement officer requests a person to submit to
 12 a test of blood under this section, the withdrawal of blood at the
 13 direction of the officer may be performed only by: (1) A person
 14 licensed to practice medicine and surgery or a person acting under
 15 the supervision of any such licensed person; (2) a registered nurse
 16 or a licensed practical nurse; or (3) any qualified medical technician.
 17 When presented with a written statement by a law enforcement
 18 officer directing blood to be withdrawn from a person who has ten-
 19 tatively agreed to allow the withdrawal of blood under this section,
 20 the person authorized herein to withdraw blood and the medical
 21 care facility where blood is withdrawn may rely on such a statement
 22 as evidence that the person has consented to the medical procedure
 23 used and shall not require the person to sign any additional consent
 24 or waiver form. In such a case, the person authorized to withdraw
 25 blood and the medical care facility shall not be liable in any action
 26 alleging lack of consent or lack of informed consent. No person
 27 authorized by this subsection to withdraw blood, nor any person
 28 assisting in the performance of a blood test nor any medical care
 29 facility where blood is withdrawn or tested that has been directed
 30 by any law enforcement officer to withdraw or test blood, shall be
 31 liable in any civil or criminal action when the act is performed in
 32 a reasonable manner according to generally accepted medical prac-
 33 tices in the community where performed.

34 (d) If there are reasonable grounds to believe that there is im-
 35 pairment by a drug which is not subject to detection by the blood
 36 or breath test used, a urine test may be required. If a law enforce-
 37 ment officer requests a person to submit to a test of urine under
 38 this section, the collection of the urine sample shall be supervised
 39 by persons of the same sex as the person being tested and shall be
 40 conducted out of the view of any person other than the persons
 41 supervising the collection of the sample and the person being tested,
 42 unless the right to privacy is waived by the person being tested.
 43 The results of qualitative testing for drug presence shall be admissible

1 in evidence and questions of accuracy or reliability shall go to the
 2 weight rather than the admissibility of the evidence.

3 (e) No law enforcement officer who is acting in accordance with
 4 this section shall be liable in any civil or criminal proceeding in-
 5 volving the action.

6 (f) (1) Before a test or tests are administered under this section
 7 the person shall be given oral and written notice that: (A) Kansas
 8 law requires the person to submit to and complete one or more tests
 9 of breath, blood or urine to determine if the person is under the
 10 influence of alcohol or drugs, or both; (B) the opportunity to consent
 11 to or refuse a test is not a constitutional right; (C) there is no
 12 constitutional right to consult with an attorney regarding whether to
 13 submit to testing; (D) if the person refuses to submit to and complete
 14 any test of breath, blood or urine hereafter requested by a law
 15 enforcement officer, the person's driving privileges will be suspended
 16 for ~~at least~~ one year; (E) if the person [is 21 or more years of age
 17 at the time of the test,] submits to and completes the test or tests
 18 and the test results show an alcohol concentration of ≥ 0.08 or
 19 greater, the person's driving privileges will be suspended for at least
 20 30 days; (F) [if the person is less than 21 years of age at the time
 21 of the test, submits to and completes the test or tests, and the test
 22 results show an alcohol concentration of ≥ 0.04 or greater, the person's
 23 driving privileges will be suspended for at least 30 days; (G)] if
 24 person refuses a test or the test results show an alcohol concentrat-
 25 ion of ≥ 0.08 or greater and if, within the past five years, the person
 26 has been convicted or granted diversion on a charge of driving under
 27 the influence of alcohol or drugs, or both, or a related offense or
 28 has refused or failed a test, the person's driving privileges will be
 29 suspended for ~~at least~~ one year; (G) [(H)] refusal to submit to testing
 30 may be used against the person at any trial on a charge arising out
 31 of the operation or attempted operation of a motor vehicle while
 32 under the influence of alcohol or drugs, or both; (H) [(I)] the results
 33 of the testing may be used against the person at any trial on a charge
 34 arising out of the operation or attempted operation of a motor vehicle
 35 while under the influence of alcohol or drugs, or both; and (I) [(J)]
 36 after the completion of the testing, the person ~~has the right to consult~~
 37 ~~with an attorney~~ and may secure additional testing, which, if desired,
 38 should be done as soon as possible and is customarily available from
 39 medical care facilities and physicians. If a law enforcement officer
 40 has reasonable grounds to believe that the person has been driving
 41 a commercial motor vehicle, as defined in K.S.A. 8-2,128, at the
 42 time of the testing, while having alcohol or other drugs in such
 43 person's system, the person must also be provided the oral and

1 written notice pursuant to K.S.A. 8-2,145 and amendments thereto.
2 Any failure to give the notices required by K.S.A. 8-2,145 and
3 amendments thereto shall not invalidate any action taken as a result
4 of the requirements of this section. After giving the foregoing in-
5 formation, a law enforcement officer shall request the person to
6 submit to testing. The selection of the test or tests shall be made
7 by the officer. If the person refuses to submit to and complete a
8 test as requested pursuant to this section, additional testing shall
9 not be given unless the certifying officer has probable cause to
10 believe that the person, while under the influence of alcohol or
11 drugs, or both, has operated a motor vehicle in such a manner as
12 to have caused the death of or serious injury to another person. In
13 such event, such test or tests may be made pursuant to a search
14 warrant issued under the authority of K.S.A. 22-2502, and amend-
15 ments thereto, or without a search warrant under the authority of
16 K.S.A. 22-2501, and amendments thereto. If the test results show
17 a blood or breath alcohol concentration of ~~.10~~ [.04 or greater but
18 less than .08, if such person is less than 21 years of age, or] .08
19 or greater [of any person], the person's driving privileges shall be
20 subject to suspension, or suspension and restriction, as provided in
21 K.S.A. 8-1002, and amendments thereto, and ~~K.S.A. 8-1014,~~
22 and amendments thereto. The person's refusal shall be admissible
23 in evidence against the person at any trial on a charge arising out
24 of the alleged operation or attempted operation of a motor vehicle
25 while under the influence of alcohol or drugs, or both. If a law
26 enforcement officer had reasonable grounds to believe the person
27 had been driving a commercial motor vehicle, as defined in K.S.A.
28 8-2,128, and amendments thereto, and the test results show a blood
29 or breath alcohol concentration of .04 or greater, the person shall
30 be disqualified from driving a commercial motor vehicle, pursuant
31 to K.S.A. 8-2,142, and amendments thereto. If a law enforcement
32 officer had reasonable grounds to believe the person had been driving
33 a commercial motor vehicle, as defined in K.S.A. 8-2,128, and
34 amendments thereto, and the test results show a blood or breath
35 alcohol concentration of ~~.10~~ .08 or greater, or the person refuses a
36 test, the person's driving privileges shall be subject to suspension,
37 or suspension and restriction, pursuant to this section, in addition
38 to being disqualified from driving a commercial motor vehicle pur-
39 suant to K.S.A. 8-2,142, and amendments thereto.

40 (2) Failure of a person to provide an adequate breath sample or
41 samples as directed shall constitute a refusal unless the person shows
42 that the failure was due to physical inability caused by a medical
43 condition unrelated to any ingested alcohol or drugs.

1 (3) It shall not be a defense that the person did not understand
2 the written or oral notice required by this section.

3 (g) Nothing in this section shall be construed to limit the ad-
4 missibility at any trial of alcohol or drug concentration testing results
5 obtained pursuant to a search warrant.

6 (h) Upon the request of any person submitting to testing under
7 this section, a report of the results of the testing shall be made
8 available to such person.

9 Sec. 2. K.S.A. 8-1002 is hereby amended to read as follows: 8-
10 1002. (a) Whenever a test is requested pursuant to this act and
11 results in either a test failure or test refusal, a law enforcement
12 officer's certification shall be prepared. If the person had been driving
13 a commercial motor vehicle, as defined in K.S.A. 8-2,128, and
14 amendments thereto, a separate certification pursuant to K.S.A. 8-
15 2,145, and amendments thereto shall be prepared in addition to any
16 certification required by this section. The certification required by
17 this section shall be signed by one or more officers to certify:

18 (1) With regard to a test refusal, that: (A) There existed reason-
19 able grounds to believe the person was operating or attempting to
20 operate a motor vehicle while under the influence of alcohol or
21 drugs, or both, or to believe that the person had been driving a
22 commercial motor vehicle, as defined in K.S.A. 8-2,128, and amend-
23 ments thereto, while having alcohol or other drugs in such person's
24 system; (B) the person had been placed under arrest, was in custody
25 or had been involved in a motor vehicle accident or collision; (C)
26 a law enforcement officer had presented the person with the oral
27 and written notice required by K.S.A. 8-1001, and amendments
28 thereto; and (D) the person refused to submit to and complete a
29 test as requested by a law enforcement officer.

30 (2) With regard to a test failure, that: (A) There existed reasonable
31 grounds to believe the person was operating a motor vehicle while
32 under the influence of alcohol or drugs, or both, or to believe that
33 the person had been driving a commercial motor vehicle, as defined
34 in K.S.A. 8-2,128, and amendments thereto, while having alcohol
35 or other drugs in such person's system; (B) the person had been
36 placed under arrest, was in custody or had been involved in a motor
37 vehicle accident or collision; (C) a law enforcement officer had pre-
38 sented the person with the oral and written notice required by
39 K.S.A. 8-1001, and amendments thereto; and (D) the result of the
40 test showed that the person had an alcohol concentration of $\geq .10$ [.04
41 or greater but less than .08, if such person is less than 21 years
42 of age, in such person's blood or breath or] .08 or greater in such
43 [any] person's blood or breath.

(i) This act is remedial law and shall
be liberally construed to promote public
health, safety and welfare.

9-10

shall be served with a copy of the law enforcement officer's certification and

an _____

For purposes of this section, personal service shall include placing the copy of the law enforcement officer's certification and notice of suspension in safekeeping to be given to the person upon release from custody.

an _____

the copy of the law enforcement officer's certification and notice of

Mailing of the notice by another employee of the law enforcement agency at the direction of an officer shall constitute mailing by an officer.

In addition to the information required by subsection (a) of this section, the law enforcement officer's certification and

of suspension _____

a statement that _____

calendar _____

law enforcement officer's certification and _____

law enforcement officer's certification and _____

(3) With regard to failure of a breath test, in addition to those matters required to be certified under subsection (a)(2), that: (A) The testing equipment used was certified by the Kansas department of health and environment; (B) the testing procedures used were in accordance with the requirements set out by the Kansas department of health and environment; and (C) the person who operated the testing equipment was certified by the Kansas department of health and environment to operate such equipment.

(b) For purposes of this section, certification shall be complete upon signing, and no additional acts of oath, affirmation, acknowledgment or proof of execution shall be required. The signed certification or a copy or photostatic reproduction thereof shall be admissible in evidence in all proceedings brought pursuant to this act, and receipt of any such certification, copy or reproduction shall accord the department authority to proceed as set forth herein. Any person who signs a certification submitted to the division knowing it contains a false statement is guilty of a class B [nonperson] misdemeanor.

(c) When the officer directing administration of the testing determines that a person has refused a test and the criteria of subsection (a)(1) have been met or determines that a person has failed a test and the criteria of subsection (a)(2) have been met, the officer shall ~~serve upon the person~~ notice of suspension of driving privileges pursuant to K.S.A. 8-1014, and amendments thereto. If the determination is made while the person is still in custody, service shall be made in person by the officer on behalf of the division of vehicles. In cases where a test failure is established by a subsequent analysis of a breath, blood or urine sample, the officer shall serve notice of such suspension in person ~~or by another designated officer~~ or by mailing the notice to the person at the address provided at the time of the test.

(d) The notice shall contain the following information: (1) The person's name, driver's license number and current address; (2) the reason and statutory grounds for the suspension; (3) the date notice is being served and the effective date of the suspension, which shall be the 20th day after the date of service; (4) the right of the person to request an administrative hearing; and (5) the procedure the person must follow to request an administrative hearing. The notice of suspension shall also inform the person that all correspondence will be mailed to the person at the address contained in the notice of suspension unless the person notifies the division in writing of a different address or change of address. The address provided will be considered a change of address for purposes of K.S.A. 8-248, and

1 amendments thereto, if the address furnished is different from that
2 on file with the division.

3 (e) If a person refuses a test or if a person is still in custody
4 when it is determined that the person has failed a test, the officer
5 shall take any license in the possession of the person and, if the
6 license is not expired, suspended, revoked or canceled, shall issue
7 a temporary license effective until the ~~date of suspension stated in~~

20th calendar day after the date of service set
out in the law enforcement officer's
certification and notice of suspension

8 ~~the notice~~. If the test failure is established by a subsequent analysis
9 of a breath or blood sample, the temporary license shall be served
10 together with the notice of suspension. A temporary license issued

copy of the law enforcement officer's
certification and

11 pursuant to this subsection shall bear the same restrictions and lim-
12 itations as the license for which it was exchanged. ~~The officer shall~~

13 ~~also provide the person with a copy of the officer's certification as~~
14 ~~set forth in subsection (e).~~ Within five days after the date of certi-

service of a copy of the law enforcement
officer's certification and notice of suspension

15 ~~fication of the test refusal or test failure, the officer who effected~~

16 ~~service shall forward~~ the officer's certification and ~~a copy of the notice~~
17 of suspension, along with any licenses taken, ~~to the division.~~

shall be forwarded

18 (f) Upon receipt of the law enforcement officer's certification, the
19 division shall review the certification to determine that it meets the
20 requirements of subsection (a). Upon so determining, the division
21 shall proceed to suspend the person's driving privileges in accordance
22 with the notice of suspension previously served. If the requirements
23 of subsection (a) are not met, the division shall dismiss the admin-
24 istrative proceeding and return any license surrendered by the
25 person.

The failure to forward the law enforcement
officer's certification and notice of suspension
within five days after the date of service shall
not be cause for dismissal of the
administrative action on the person's driving
privileges unless the licensee can show
substantial prejudice resulting therefrom.

26 (g) If the person mails a written request which is postmarked
27 within ~~10~~ days after service of the notice, ~~if by personal service, or~~

28 ~~10 days after service, if by mail,~~ the division shall schedule a hearing

11 calendar

29 in the county where the alleged violation occurred, or in a county
30 adjacent thereto. The licensee may request that subpoenas be issued

31 in accordance with the notice provided pursuant to subsection (d).

32 Any request made by the licensee to subpoena witnesses must be

33 made in writing at the time the hearing is requested and must

34 include the name and current address of such witnesses and, except

35 for the law enforcement officer or officers certifying refusal or failure,

36 a statement of how the testimony of such witness is relevant. Upon

37 receiving a timely request for a hearing, the division shall mail to

38 the person notice of the time, date and place of hearing in accordance

39 with subsection (l) and extend the person's temporary driving priv-

40 ileges until the date set for the hearing by the division.

whether by personal service or by mail

41 (h) (1) If the officer certifies that the person refused the test,

42 the scope of the hearing shall be limited to whether: (A) A law

43 enforcement officer had reasonable grounds to believe the person

a breath

certified by the Kansas department of health and environment

certified by the Kansas department of health and environment

substantially complied with procedures approved by the Kansas department of health and environment

indicated

in such person's blood or breath

was less than 21 years of age at the time of testing, or

(3) If the officer certifies that the person failed a blood test, the scope of the hearing shall be limited to whether: (A) A law enforcement officer had reasonable grounds to believe the person was operating a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system; (B) the person was in custody or arrested for an alcohol or drug related offense or was involved in a vehicle accident or collision resulting in property damage, personal injury or death; (C) a law enforcement officer had presented the person with the oral and written notice required by K.S.A. 8-1001, and amendments thereto; (D) the testing procedures used were reliable; (E) the test result showed that the person had an alcohol concentration of .04 or greater but less than .08 in such person's blood or breath, if such person was less than 21 years of age at the time of the test, or .08 or greater in any person's blood or breath; and (F) the person was operating a vehicle.

certification

approved by the Kansas department of health and environment.

1 was operating or attempting to operate a motor vehicle while under
2 the influence of alcohol or drugs, or both, or to believe that the
3 person had been driving a commercial motor vehicle, as defined in
4 K.S.A. 8-2,128, and amendments thereto, while having alcohol or
5 other drugs in such person's system; (B) the person was in custody
6 or arrested for an alcohol or drug related offense or was involved
7 in a motor vehicle accident or collision resulting in property damage,
8 personal injury or death; (C) a law enforcement officer had presented
9 the person with the oral and written notice required by K.S.A. 8-
10 1001, and amendments thereto; and (D) the person refused to submit
11 to and complete a test as requested by a law enforcement officer.

12 (2) If the officer certifies that the person failed the test, the scope
13 of the hearing shall be limited to whether: (A) A law enforcement
14 officer had reasonable grounds to believe the person was operating
15 a motor vehicle while under the influence of alcohol or drugs, or
16 both, or to believe that the person had been driving a commercial
17 motor vehicle, as defined in K.S.A. 8-2,128, and amendments
18 thereto, while having alcohol or other drugs in such person's system;
19 (B) the person was in custody or arrested for an alcohol or drug
20 related offense or was involved in a motor vehicle accident or col-
21 lision resulting in property damage, personal injury or death; (C) a
22 law enforcement officer had presented the person with the oral and
23 written notice required by K.S.A. 8-1001, and amendments thereto;
24 (D) the testing equipment used was reliable; (E) the person who
25 operated the testing equipment was qualified; (F) the testing pro-
26 cedures used were reliable; (G) the test result determined that the
27 person had an alcohol concentration of ~~10~~ .04 or greater but less
28 than .08, if such person is less than 21 years of age, in such person's
29 blood or breath or] .08 or greater in such [any] person's blood or
30 breath; and (H) the person was operating a motor vehicle.

31 (i) At a hearing pursuant to this section, or upon court review
32 of an order entered at such a hearing, an affidavit of the custodian
33 of records at the Kansas department of health and environment
34 stating that the breath testing device was certified and the operator
35 of such device was certified on the date of the test shall be admissible
36 into evidence in the same manner and with the same force and effect
37 as if the certifying officer or employee of the Kansas department of
38 health and environment had testified in person. Such affidavit shall
39 be admitted to prove such ~~reliability~~ without further foundation re-
40 quirement. A certified operator of a breath testing device shall be
41 competent to testify regarding the ~~proper procedures to be used in~~
42 ~~conducting the test.~~

43 (j) At a hearing pursuant to this section, or upon court review

of an order entered at such hearing, in which the report of blood test results have been prepared by the Kansas bureau of investigation or other forensic laboratory of a state or local law enforcement agency are to be introduced as evidence, the report, or a copy of the report, of the findings of the forensic examiner shall be admissible into evidence in the same manner and with the same force and effect as if the forensic examiner who performed such examination, analysis, comparison or identification and prepared the report thereon had testified in person.

(k) If no timely request for hearing is made, the suspension period imposed pursuant to this section shall begin upon the expiration of the temporary license granted under subsection (e). If a timely request for hearing is made, ~~the hearing shall be held within 60 days of the date the request for hearing is received by the division.~~

At the hearing, the director or the representative of the director, shall either affirm the order of suspension or suspension and restriction or dismiss the administrative action. ~~If the division is unable to hold a hearing within 30 days of the date upon which the request for hearing is received, the division shall extend the person's temporary driving privileges until the date set for the hearing by the division.~~ No extension of temporary driving privileges shall be issued for continuances requested by or on behalf of the licensee. If the person whose privileges are suspended is a nonresident licensee, the license of the person shall be forwarded to the appropriate licensing authority in the person's state of residence if the result at the hearing is adverse to such person or if no timely request for a hearing is received.

(l) All notices affirming or canceling a suspension under this section, all notices of a hearing held under this section and all issuances of temporary driving privileges pursuant to subsection (k) shall be sent by first-class mail and a U.S. post office certificate of mailing shall be obtained therefor. All notices so mailed shall be deemed received three days after mailing.

(m) The division shall prepare and distribute forms for use by law enforcement officers in giving the notice required by this section.

Sec. 3. K.S.A. 8-1005 is hereby amended to read as follows: 8-1005. Except as provided by K.S.A. 8-1012 and amendments thereto, in any criminal prosecution for violation of the laws of this state relating to operating or attempting to operate a motor vehicle while under the influence of alcohol or drugs, or both, or the commission of vehicular homicide or manslaughter while under the influence of alcohol or drugs, or both, or in any prosecution for a violation of a city ordinance relating to the operation or attempted operation of a

division shall set the matter for

and extend the person's temporary driving privileges until the date set for the hearing by the division

The director or the representative of the director shall serve a copy of the administrative order affirming or dismissing the administrative action upon the person, or, if the person is represented at the hearing by an attorney, upon the person's attorney. If the director or the representative of the director takes the matter under advisement and does not decide the matter at the close of the hearing, notice of the decision shall be served upon the person or the person's attorney by mail and shall be considered effective on the third calendar day after the notice is mailed. If the person is represented at the hearing by an attorney, service of the administrative order upon the attorney shall be considered effective service on the person.

and notices of decisions of administrative hearings mailed

(n) This section and the applicable provisions contained in K.S.A. 8-255(d) and (c) constitute the administrative procedures to be used for all administrative hearings held under this act. To the extent that this section and any other provision of law conflicts, this section prevails.

(o) The provisions of K.S.A. 60-206, and amendments thereto, regarding the computation of time shall not be applicable in determining the effective date of suspension set out in subsection (d) or the time for requesting an administrative hearing set out in subsection (g). "Calendar day" when used in this section shall mean that every day shall be included in computations of time whether a week day, Saturday, Sunday or holiday.

motor vehicle while under the influence of alcohol or drugs, or both, evidence of the concentration of alcohol or drugs in the defendant's blood, urine, breath or other bodily substance may be admitted and shall give rise to the following:

(a) If the alcohol concentration is less than .10 .03, that fact may be considered with other competent evidence to determine if the defendant was under the influence of alcohol, or both alcohol and drugs.

(b) If the alcohol concentration is .10 .08 or more greater, it shall be prima facie evidence that the defendant was under the influence of alcohol to a degree that renders the person incapable of driving safely.

(c) If there was present in the defendant's bodily substance any narcotic, hypnotic, somnifacient, stimulating or other drug which has the capacity to render the defendant incapable of safely driving a vehicle, that fact may be considered to determine if the defendant was under the influence of drugs, or both alcohol and drugs, to a degree that renders the defendant incapable of driving safely.

Sec. 4. K.S.A. 8-1008 is hereby amended to read as follows: 8-1008. (a) Community-based alcohol and drug safety action programs certified in accordance with subsection (b) shall provide:

(1) Presentence alcohol and drug evaluations of any person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute;

(2) supervision and monitoring of all persons who are convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, and whose sentences or terms of probation require completion of an alcohol and drug safety action program, as provided in this section, or an alcohol and drug abuse treatment program, as provided in this section;

(3) alcohol and drug evaluations of persons whom the prosecutor considers for eligibility or finds eligible to enter a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute;

(4) supervision and monitoring of persons required, under a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, to complete an alcohol and drug safety

action program, as provided in this section, or an alcohol and drug abuse treatment program, as provided in this section; or

(5) any combination of (1), (2), (3) and (4).

(b) The presentence alcohol and drug evaluation shall be conducted by a community-based alcohol and drug safety action program certified in accordance with the provisions of this subsection to provide evaluation and supervision services as described in subsections (c) and (d). A community-based alcohol and drug safety action program shall be certified either by the administrative judge of the judicial district to be served by the program or by the secretary of social and rehabilitation services for judicial districts in which the administrative judge declines to certify a program. In establishing the qualifications for programs, the administrative judge or the secretary shall give preference to those programs which have had practical experience prior to July 1, 1982, in diagnosis and referral in alcohol and drug abuse. Certification of a program by the administrative judge shall be done with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district. If within 60 days after the effective date of this act the administrative judge declines to certify any program for the judicial district, the judge shall notify the secretary of social and rehabilitation services, and the secretary of social and rehabilitation services shall certify a community-based alcohol and drug safety action program for that judicial district. The certification shall be for a four-year period. Recertification of a program or certification of a different program shall be by the administrative judge, with consultation and approval of a majority of the judges of the district court of the district and municipal judges of cities lying in whole or in part within the district. If upon expiration of certification of a program there will be no certified program for the district and the administrative judge declines to recertify or certify any program in the district, the judge shall notify the secretary of social and rehabilitation services, at least six months prior to the expiration of certification, that the judge declines to recertify or certify a program under this subsection. Upon receipt of the notice and prior to the expiration of certification, the secretary shall recertify or certify a community-based alcohol and drug safety action program for the judicial district for the next four-year period. To be eligible for certification under this subsection, the administrative judge or the secretary of social and rehabilitation services shall determine that a community-based alcohol and drug safety action program is capable of providing, within the judicial district: (1) The evaluations, supervision and monitoring required

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under subsection (a); (2) the alcohol and drug evaluation report required under subsection (c) or (d); (3) the follow-up duties specified under subsection (c) or (d) for persons who prepare the alcohol and drug evaluation report; and (4) any other functions and duties specified by law. Community-based alcohol and drug safety action programs performing services in any judicial district under this section prior to the effective date of this act may continue to perform those services until a community-based alcohol and drug safety action program is certified for that judicial district.

(c) A presentence alcohol and drug evaluation shall be conducted on any person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute. The presentence alcohol and drug evaluation report shall be made available to and shall be considered by the court prior to sentencing. The presentence alcohol and drug evaluation report shall contain a history of the defendant's prior traffic record, characteristics and alcohol or drug problems, or both, and a recommendation concerning the amenability of the defendant to education and rehabilitation. The presentence alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the defendant. The presentence alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis of alcohol and drug abuse. The duties of persons who prepare the presentence alcohol and drug evaluation report may also include appearing at sentencing and probation hearings in accordance with the orders of the court, monitoring defendants in the treatment programs, notifying the probation department and the court of any defendant failing to meet the conditions of probation or referrals to treatment, appearing at revocation hearings as may be required and providing assistance and data reporting and program evaluation. The cost of any alcohol and drug education, rehabilitation and treatment programs for any person shall be paid by such person, and such costs shall include, but not be limited to, the assessments required by subsection (e). If financial obligations are not met or cannot be met, the sentencing court shall be notified for the purpose of collection or review and further action on the defendant's sentence.

(d) An alcohol and drug evaluation shall be conducted on any person whom the prosecutor considers for eligibility or finds eligible to enter a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the

acts prohibited by that statute. The alcohol and drug evaluation report shall be made available to the prosecuting attorney and shall be considered by the prosecuting attorney. The alcohol and drug evaluation report shall contain a history of the person's prior traffic record, characteristics and alcohol or drug problems, or both, and a recommendation concerning the amenability of the person to education and rehabilitation. The alcohol and drug evaluation report shall include a recommendation concerning the alcohol and drug driving safety education and treatment for the person. The alcohol and drug evaluation report shall be prepared by a program which has demonstrated practical experience in the diagnosis of alcohol and drug abuse. The duties of persons who prepare the alcohol and drug evaluation report may also include monitoring persons in the treatment programs, notifying the prosecutor and the court of any person failing to meet the conditions of diversion or referrals to treatment, and providing assistance and data reporting and program evaluation. The cost of any alcohol and drug education, rehabilitation and treatment programs for any person shall be paid by such person, and such costs shall include, but not be limited to, the assessments required by subsection (e).

(e) In addition to any fines, fees, penalties or costs levied against a person who is convicted of a violation of K.S.A. 8-1567 and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, or who enters a diversion agreement in lieu of further criminal proceedings on a complaint alleging a violation of that statute or such an ordinance, \$110 shall be assessed against the person by the sentencing court or under the diversion agreement. The \$110 assessment may be waived by the court or, in the case of diversion of criminal proceedings, by the prosecuting attorney, if the court or prosecuting attorney finds that the defendant is an indigent person *or that the defendant has completed an alcohol and drug treatment program subsequent to being charged with a violation of K.S.A. 8-1567 and amendments thereto*. Except as otherwise provided in this subsection, the clerk of the court shall deposit all assessments received under this section in the alcohol and drug safety action fund of the court, which fund shall be subject to the administration of the judge having administrative authority over that court. If the secretary of social and rehabilitation services certifies the community-based alcohol and drug safety action program for the judicial district in which the court is located, the clerk of the court shall remit, during the four-year period for which the program is certified, 15% of all assessments received under this section to the secretary of social and rehabilitation serv-

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ices. Moneys credited to the alcohol and drug safety action fund shall be expended by the court, pursuant to vouchers signed by the judge having administrative authority over that court, only for costs of the services specified by subsection (a) or otherwise required or authorized by law and provided by community-based alcohol and drug safety action programs, except that not more than 10% of the money credited to the fund may be expended to cover the expenses of the court involved in administering the provisions of this section. In the provision of these services the court shall contract as may be necessary to carry out the provisions of this section. The district or municipal judge having administrative authority over that court shall compile a report and send such report to the office of the state judicial administrator on or before January 20 of each year, beginning January 20, 1991. Such report shall include, but not be limited to:

(1) The balance of the alcohol and drug safety action fund of the court on December 31 of each year;

(2) the assessments deposited into the fund during the 12-month period ending the preceding December 31; and

(3) the dollar amounts expended from the fund during the 12-month period ending the preceding December 31.

The office of the state judicial administrator shall compile such reports into a statewide report and submit such statewide report to the legislature on or before March 1 of each year, beginning March 1, 1991.

(f) The secretary of social and rehabilitation services shall remit all moneys received by the secretary under this section to the state treasurer at least monthly. Upon receipt of the remittance, the state treasurer shall deposit the entire amount in the state treasury and credit it to the certification of community-based alcohol and drug safety action programs fee fund, which is hereby created. All expenditures from such fund shall be made in accordance with appropriation acts upon warrants issued pursuant to vouchers approved by the secretary of social and rehabilitation services or a person designated by the secretary.

Sec. 5. K.S.A. 8-1011 is hereby amended to read as follows: 8-1011. A law enforcement officer, and the state or any political subdivision of the state that employs a law enforcement officer, arresting or taking custody of a person for any offense involving the operation of or attempt to operate a motor vehicle while under the influence of alcohol or drugs, or both, shall have immunity from any civil or criminal liability for the care and custody of the motor vehicle that was being operated by or was in the physical control of the person arrested or in custody if the law enforcement officer acts in good

faith and exercises due care.

Sec. 6. K.S.A. 8-1012 is hereby amended to read as follows: 8-1012. A law enforcement officer may request a person who is operating or attempting to operate a motor vehicle within this state to submit to a preliminary screening test of the person's breath to determine the alcohol concentration of the person's breath if the officer has reasonable grounds to believe that the person: (a) Has alcohol in the person's body; (b) has committed a traffic infraction; or (c) has been involved in a motor vehicle accident or collision. At the time the test is requested, the person shall be given oral notice that: (1) There is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to submit to testing is a traffic infraction; and (3) further testing may be required after the preliminary screening test. Failure to provide the notice shall not be an issue or defense in any action. The law enforcement officer then shall request the person to submit to the test. Refusal to take and complete the test as requested is a traffic infraction. If the person submits to the test, the results shall be used for the purpose of assisting law enforcement officers in determining whether an arrest should be made and whether to request the tests authorized by K.S.A. 8-1001 and amendments thereto. A law enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test. Such results shall not be admissible in any civil or criminal action except to aid the court or hearing officer in determining a challenge to the validity of the arrest or the validity of the request to submit to a test pursuant to K.S.A. 8-1001 and amendments thereto. Following the preliminary screening test, additional tests may be requested pursuant to K.S.A. 8-1001 and amendments thereto.

Sec. 7. K.S.A. 8-1013 is hereby amended to read as follows: 8-1013. As used in K.S.A. 8-1001 through 8-1010, 8-1011, 8-1012, 8-1014, 8-1015, 8-1016, 8-1017 and 8-1018, and amendments thereto, and this section:

(a) "Alcohol concentration" means the number of grams of alcohol per 100 milliliters of blood or per 210 liters of breath.

(b) (1) "Alcohol or drug-related conviction" means any of the following: (A) Conviction of vehicular battery or aggravated vehicular homicide, if the crime is committed while committing a violation of K.S.A. 8-1567 and amendments thereto or the ordinance of a city or resolution of a county in this state which prohibits any acts prohibited by that statute, or conviction of a violation of K.S.A. 8-1567 and amendments thereto; (B) conviction of a violation of a law of another state which would constitute a crime described in subsection

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(b)(1)(A) if committed in this state; or (C) conviction of a violation of an ordinance of a city in this state or a resolution of a county in this state which would constitute a crime described in subsection (b)(1)(A), whether or not such conviction is in a court of record; or (D) conviction of an act which was committed on a military reservation and which would constitute a violation of K.S.A. 8-1567, and amendments thereto, or would constitute a crime described in subsection (b)(1)(A) if committed off a military reservation in this state.

(2) For the purpose of determining whether an occurrence is a first, second or subsequent occurrence: (A) "Alcohol or drug-related conviction" also includes entering into a diversion agreement in lieu of further criminal proceedings on a complaint alleging commission of a crime described in subsection (b)(1) which agreement was entered into during the immediately preceding five years, including prior to the effective date of this act; and (B) it is irrelevant whether an offense occurred before or after conviction or diversion for a previous offense.

(c) "Division" means the division of motor vehicles of the department of revenue.

(d) "Ignition interlock device" means a device which uses a breath analysis mechanism to prevent a person from operating a motor vehicle if such person has consumed an alcoholic beverage.

(e) "Occurrence" means a test refusal, test failure or alcohol or drug-related conviction, or any combination thereof arising from one arrest, occurring in the immediately preceding five years, including prior to the effective day of this act.

(f) "Other competent evidence" includes: (1) Alcohol concentration tests obtained from samples taken two hours or more after the operation or attempted operation of a vehicle; and (2) readings obtained from a partial alcohol concentration test on a breath testing machine.

(g) "Samples" includes breath supplied directly for testing, which breath is not preserved.

(h) "Test failure" or "fails a test" refers to a person's having results of a test administered pursuant to this act, other than a preliminary screening test, which show an alcohol concentration of $\geq .10$ [.04 or greater but less than .08, if such person is less than 21 years of age, in such person's blood or breath or] .08 or greater in the [any] person's blood or breath, and includes failure of any such test on a military reservation.

(i) "Test refusal" or "refuses a test" refers to a person's failure to submit to or complete any test, other than a preliminary screening

test, in accordance with this act, and includes refusal of any such test on a military reservation.

(j) "Law enforcement officer" has the meaning provided by K.S.A. 21-3110, and amendments thereto, and includes any person authorized by law to make an arrest on a military reservation for an act which would constitute a violation of K.S.A. 8-1567, and amendments thereto, if committed off a military reservation in this state.

Sec. 8. K.S.A. 8-1014 is hereby amended to read as follows: 8-1014. (a) Except as provided by subsection (d) ~~(e)~~ [(f)] and K.S.A. 8-2,142, and amendments thereto, if a person refuses a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall suspend the person's driving privileges for one year.

(b) Except as provided by subsection (d) ~~(e)~~ [(f)] and K.S.A. 8-2,142, and amendments thereto, if a person fails a test, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

(1) On the person's first occurrence, suspend the person's driving privileges for 30 days, then restrict the person's driving privileges as provided by K.S.A. 8-1015, and amendments thereto, for an additional 60 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year.

(c) Except as provided by subsection (d) ~~(e)~~ [(f)] and K.S.A. 8-2,142, and amendments thereto, if a person has an alcohol or drug-related conviction in this state, the division shall:

(1) On the person's first occurrence, suspend the person's driving privileges for 30 days ~~or until the person has completed educational and treatment programs required by the court, whichever is longer~~, then restrict the person's driving privileges as provided by K.S.A. 8-1015, and amendments thereto, for an additional 330 days; and

(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for one year ~~or until the person has completed the treatment program required by the court, whichever is longer~~.

[(d) Except as provided by subsection (f), if a person less than 21 years of age shows an alcohol concentration of .04 or greater but less than .08 in such person's blood or breath, the division, pursuant to K.S.A. 8-1002, and amendments thereto, shall:

[(1) On the person's first occurrence, suspend the person's driving privileges for 30 days;

[(2) on the person's second or a subsequent occurrence, suspend the person's driving privileges for six months; and

[(3) assess an administrative fine of \$25 to the person to cover

1 the Kansas bureau of investigation laboratory costs. The division
2 shall remit all fines received under this section to the state treasurer
3 at least monthly. Upon receipt of such remittance, the state treasurer
4 shall deposit the entire amount thereof in the state treasury
5 to the credit of the forensic laboratory and materials fee fund of
6 the Kansas bureau of investigation.]

7 ~~(d)~~ [(e)] *Whenever the division is notified by an alcohol and drug*
8 *safety action program that a person has failed to complete any*
9 *alcohol and drug safety action education or treatment program ordered*
10 *by a court for a conviction of a violation of K.S.A. 8-1567,*
11 *and amendments thereto, the division shall suspend the person's*
12 *driving privileges until the division receives notice of the person's*
13 *completion of such program.*

14 ~~(d)~~ ~~(e)~~ [(f)] Except as provided in K.S.A. 8-2,142, and amendments
15 thereto, if a person's driving privileges are subject to suspension
16 pursuant to this section for a test refusal, test failure or alcohol or
17 drug-related conviction arising from the same arrest, the
18 period of such suspension shall not exceed the longest applicable
19 period authorized by subsection (a), (b) or [(c)] (c) [(or (d))], and such
20 suspension periods shall not be added together or otherwise imposed
21 consecutively. In addition, in determining the period of such suspension
22 as authorized by subsection (a), (b) or [(c)] (c) [(or (d))], such
23 person shall receive credit for any period of time for which such
24 person's driving privileges were suspended while awaiting any hearing
25 or final order authorized by this act.

26 If a person's driving privileges are subject to restriction pursuant
27 to this section for a test failure or alcohol or drug-related conviction
28 arising from the same arrest, the restriction periods shall not be
29 added together or otherwise imposed consecutively. In addition, in
30 determining the period of restriction, the person shall receive credit
31 for ~~150 days of~~ any period of suspension imposed for a test refusal
32 arising from the same arrest.

33 ~~(e)~~ ~~(f)~~ [(g)] If the division has taken action under subsection (a)
34 or (b) and such action is stayed pursuant to K.S.A. 8-259, and amendments
35 thereto, or if temporary driving privileges are issued pursuant
36 to subsection (k) of K.S.A. 8-1002, and amendments thereto, the
37 stay or temporary driving privileges shall not prevent the division
38 from taking the action required by subsection (c).

39 ~~(f)~~ ~~(g)~~ [(h)] Upon restricting a person's driving privileges pursuant
40 to this section, the division shall issue without charge a driver's
41 license which shall indicate on the face of the license that restrictions
42 have been imposed on the person's driving privileges and that a
43 copy of the order imposing the restrictions is required to be carried

1 by the person for whom the license was issued any time the person
2 is operating a motor vehicle on the highways of this state. If the
3 person is a nonresident, the division shall forward a copy of the
4 order to the motor vehicle administrator of the person's state of
5 residence.

6 Sec. 9. K.S.A. 8-1015 is hereby amended to read as follows: 8-
7 1015. (a) A driver whose violations were committed in a commercial
8 motor vehicle is exempt from utilizing the below-stated restrictions.
9 When subsection (b)(1) of K.S.A. 8-1014, and amendments thereto,
10 requires the division to place restrictions on a person's driving privileges,
11 the division shall restrict the person's driving privileges to
12 driving only under the following circumstances: In going to and
13 returning from the person's place of employment and in going to
14 and returning from a mandated alcohol education or treatment
15 program.

16 (b) (1) When subsection (c)(1) of K.S.A. 8-1014, and amendments
17 thereto, requires the division to place restrictions on a person's
18 driving privileges, the division shall restrict the person's driving
19 privileges to driving only under the following circumstances for a
20 period of 60 days: In going to and returning from the person's place
21 of employment and in going to and returning from a mandated
22 alcohol education or treatment program.

23 (2) Upon expiration of the 60-day period provided by subsection
24 (b)(1), the division shall restrict the person's driving privileges as
25 provided by K.S.A. 8-292, and amendments thereto, for an additional
26 270 days, unless the convicting court, in lieu of such restrictions,
27 has ordered the restrictions set out in subsection (b)(3).

28 (3) Upon convicting a person of an alcohol or drug related offense,
29 the convicting court, in lieu of the restrictions set out in subsection
30 (b)(2), may restrict the person's driving privileges to driving only a
31 motor vehicle equipped with an ignition interlock device, approved
32 by the division and obtained, installed and maintained at the person's
33 expense. Any fine imposed by the court for the conviction shall be
34 reduced by the court in an amount equal to the expense incurred
35 by the person for obtaining, installing and maintaining the ignition
36 interlock device.

37 (4) Upon a person's second or subsequent conviction for an alcohol
38 related offense and the person had an alcohol concentration
39 of .15 or more in the person's blood or breath, the convicting court
40 shall restrict the person's driving privileges to driving only a motor
41 vehicle equipped with an ignition interlock device, approved by the
42 division and obtained, installed and maintained at the person's expense.
43 Any fine imposed by the court for the conviction ~~shall~~ [may]

1 *be reduced by the court in an amount equal to the expense incurred*
 2 *by the person for obtaining, installing and maintaining the ignition*
 3 *interlock device.*

4 (c) Upon expiration of the period of time for which restrictions
 5 are imposed pursuant to this section, the licensee may apply to the
 6 division for the return of any license previously surrendered by the
 7 licensee. If the license has expired, the person may apply to the
 8 division for a new license, which shall be issued by the division
 9 upon payment of the proper fee and satisfaction of the other con-
 10 ditions established by law, unless the person's driving privileges have
 11 been suspended or revoked prior to expiration.

12 (d) Violation of restrictions imposed under this section is a mis-
 13 demeanor subject to punishment and suspension of driving privileges
 14 as provided by K.S.A. 8-291, and amendments thereto.

15 Sec. 10. K.S.A. 8-1567, as amended by section 1 of chapter 298
 16 of the 1992 Session Laws of Kansas, is hereby amended to read as
 17 follows: 8-1567. (a) No person shall operate or attempt to operate
 18 any vehicle within this state while:

19 (1) The alcohol concentration in the person's blood or breath as
 20 shown by any competent evidence, including other competent ev-
 21 idence, as defined in paragraph (1) of subsection (f) of K.S.A. 8-
 22 1013, and amendments thereto, is ~~10~~ .08 or more;

23 (2) the alcohol concentration in the person's blood or breath, as
 24 measured within two hours of the time of operating or attempting
 25 to operate a vehicle, is ~~10~~ .08 or more;

26 (3) under the influence of alcohol to a degree that renders the
 27 person incapable of safely driving a vehicle;

28 (4) under the influence of any drug or combination of drugs to
 29 a degree that renders the person incapable of safely driving a vehicle;
 30 or

31 (5) under the influence of a combination of alcohol and any drug
 32 or drugs to a degree that renders the person incapable of safely
 33 driving a vehicle.

34 (b) No person shall operate or attempt to operate any vehicle
 35 within this state if the person is a habitual user of any narcotic,
 36 hypnotic, somnifacient or stimulating drug.

37 (c) If a person is charged with a violation of this section involving
 38 drugs, the fact that the person is or has been entitled to use the
 39 drug under the laws of this state shall not constitute a defense against
 40 the charge.

41 (d) ~~Violation of this section is a misdemeanor.~~ Upon a first
 42 conviction of a violation of this section, a person shall be guilty of
 43 a class B, nonperson misdemeanor and sentenced to not less than

1 48 consecutive hours nor more than six months' imprisonment, or
 2 in the court's discretion 100 hours of public service, and fined not
 3 less than \$200 nor more than \$500. The person convicted must serve
 4 at least 48 consecutive hours' imprisonment or 100 hours of public
 5 service either before or as a condition of any grant of probation or
 6 suspension, reduction of sentence or parole. In addition, the court
 7 shall enter an order which requires that the person enroll in and
 8 successfully complete an alcohol and drug safety action education
 9 program or treatment program as provided in K.S.A. 8-1008, and
 10 amendments thereto, or both the education and treatment programs.

11 (e) On a second conviction of a violation of this section, a person
 12 shall be guilty of a class A, nonperson misdemeanor and sentenced
 13 to not less than 90 days nor more than one year's imprisonment and
 14 fined not less than \$500 nor more than \$1,000. The five days' im-
 15 prisonment mandated by this subsection may be served in a work
 16 release program only after such person has served 48 consecutive
 17 hours' imprisonment, provided such work release program requires
 18 such person to return to confinement at the end of each day in the
 19 work release program. Except as provided in subsection (g), the
 20 person convicted must serve at least five consecutive days' impris-
 21 onment before the person is granted probation, suspension or re-
 22 duction of sentence or parole or is otherwise released. As a condition
 23 of any grant of probation, suspension of sentence or parole or of any
 24 other release, the person shall be required to enter into and complete
 25 a treatment program for alcohol and drug abuse as provided in K.S.A.
 26 8-1008, and amendments thereto.

27 (f) On the third or a subsequent conviction of a violation of this
 28 section, a person shall be guilty of a severity level 9, nonperson
 29 felony and sentenced to not less than 90 days nor more than one
 30 year's imprisonment and fined not less than \$1,000 nor more than
 31 \$2,500. Except as provided in subsection (g), the person convicted
 32 shall not be eligible for release on probation, suspension or reduction
 33 of sentence or parole until the person has served at least 90 days'
 34 imprisonment. The court may also require as a condition of parole
 35 that such person enter into and complete a treatment program for
 36 alcohol and drug abuse as provided by K.S.A. 8-1008, and amend-
 37 ments thereto. The 90 days' imprisonment mandated by this sub-
 38 section may be served in a work release program only after such
 39 person has served 48 consecutive hours' imprisonment, provided
 40 such work release program requires such person to return to con-
 41 finement at the end of each day in the work release program.

42 (g) On a second or subsequent conviction of a violation of this
 43 section, the court may place the person convicted under a house

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and 14 to 22, inclusive, through 22 of chapter 8 of Kansas Statutes Annotated and; K.S.A. 8-1,129, 8-1,130a, 8-1428a, 8-1742a and, 8-2118 and K.S.A. 41-804, and amendments to these sections thereto.

Sec. 12. K.S.A. 12-4305 is hereby amended to read as follows: 12-4305. (a) The municipal judge shall establish a schedule of fines which shall be imposed for municipal ordinance violations that are classified as ordinance traffic infractions. Also, the municipal judge may establish a schedule of fines which shall be imposed for the violation of certain other ordinances. Any fine so established shall be within the minimum and maximum allowable fines established by ordinance for such offenses by the governing body. The following traffic violations are specifically excluded from any schedule of fines:

- (1) Reckless driving;
- (2) driving while under the influence of alcohol or drugs, or both, or driving with a blood or breath alcohol concentration of .10 .08 or more;
- (3) driving without a valid license issued or on a canceled, suspended or revoked license;
- (4) fleeing or attempting to elude a police officer; or
- (5) offense comparable to those prescribed by K.S.A. 8-1602, 8-1603 and 8-1604 and amendments thereto.

(b) A person charged with the violation of an ordinance contained in a schedule of fines established under subsection (a) shall, except as provided in subsection (c), appear at the place and time specified in the notice to appear. If the person enters an appearance, waives right to trial, pleads guilty or no contest, the fine shall be no greater than that specified in the schedule.

(c) Prior to the time specified in the notice to appear, a person charged with the violation of an ordinance contained in a schedule of fines established under subsection (a) may enter an appearance, waive right to trial, plead guilty or no contest and pay the fine for the violation as specified in the schedule. At the election of the person charged, such appearance, waiver, plea and payment may be made by mail or in person and payment may be by personal check. The complaint shall not have been complied with if a check is not honored for any reason, or the fine is not paid in full prior to the time specified in the notice to appear. When a person charged with an ordinance traffic infraction or other ordinance violation on a schedule of fines makes payment without executing a written waiver of right to trial and plea of guilty or no contest, the payment shall be deemed such an appearance, waiver of right to trial and plea of no contest.

The municipal judge may authorize the clerk of the municipal

1 court or some other person to accept by mail or in person such
2 voluntary appearance, plea of guilty or no contest and payment of
3 the fine imposed by the schedule.

4 The schedule of fines and persons authorized to accept such pleas
5 shall be conspicuously displayed in the office where such voluntary
6 appearance, plea of guilty and payment of fine occurs.

7 Sec. 13. K.S.A. 12-4415 is hereby amended to read as follows:
8 12-4415. (a) In determining whether diversion of a defendant is in
9 the interests of justice and of benefit to the defendant and the
10 community, the city attorney shall consider at least the following
11 factors among all factors considered:

- 12 (1) The nature of the crime charged and the circumstances sur-
13 rounding it;
- 14 (2) any special characteristics or circumstances of the defendant;
- 15 (3) whether the defendant is a first-time offender of an alcohol
16 related offense and if the defendant has previously participated in
17 diversion, according to the certification of the division of vehicles of
18 the state department of revenue;
- 19 (4) whether there is a probability that the defendant will coop-
20 erate with and benefit from diversion;
- 21 (5) whether the available diversion program is appropriate to the
22 needs of the defendant;
- 23 (6) the impact of the diversion of the defendant upon the
24 community;
- 25 (7) recommendations, if any, of the involved law enforcement
26 agency;
- 27 (8) recommendations, if any, of the victim;
- 28 (9) provisions for restitution; and
- 29 (10) any mitigating circumstances.

30 (b) A city attorney shall not enter into a diversion agreement in
31 lieu of further criminal proceedings on a complaint alleging an alcohol
32 related offense if the defendant:

- 33 (1) Has previously participated in diversion of an alcohol related
34 offense;
- 35 (2) has previously been convicted of or pleaded *nolo contendere*
36 to an alcohol related offense in this state or has previously been
37 convicted of or pleaded *nolo contendere* to a violation of K.S.A. 8-
38 1567, and amendments thereto, or of a law of another state, or of
39 a political subdivision thereof, which prohibits the acts prohibited
40 by that statute; or

41 (3) at the time of the alleged alcohol related offense had an
42 alcohol concentration of .15 or more in the defendant's blood or
43 breath; or

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1 (3) (4) during the time of the alleged alcohol related offense was
2 involved in a motor vehicle accident or collision resulting in personal
3 injury or death.

4 Sec. 14. K.S.A. 22-2908, as amended by section 257 of chapter
5 239 of the 1992 Session Laws of Kansas, is hereby amended to read
6 as follows: 22-2908. (a) In determining whether diversion of a de-
7 fendant is in the interests of justice and of benefit to the defendant
8 and the community, the county or district attorney shall consider at
9 least the following factors among all factors considered:

10 (1) The nature of the crime charged and the circumstances sur-
11 rounding it;

12 (2) any special characteristics or circumstances of the defendant;

13 (3) whether the defendant is a first-time offender and if the de-
14 fendant has previously participated in diversion, according to the
15 certification of the Kansas bureau of investigation or the division of
16 vehicles of the department of revenue;

17 (4) whether there is a probability that the defendant will coop-
18 erate with and benefit from diversion;

19 (5) whether the available diversion program is appropriate to the
20 needs of the defendant;

21 (6) the impact of the diversion of the defendant upon the
22 community;

23 (7) recommendations, if any, of the involved law enforcement
24 agency;

25 (8) recommendations, if any, of the victim;

26 (9) provisions for restitution; and

27 (10) any mitigating circumstances.

28 (b) A county or district attorney shall not enter into a diversion
29 agreement in lieu of further criminal proceedings on a complaint if:

30 (1) The complaint alleges a violation of K.S.A. 8-1567, and
31 amendments thereto, and the defendant: (A) Has previously partic-
32 ipated in diversion upon a complaint alleging a violation of that
33 statute or an ordinance of a city in this state which prohibits the
34 acts prohibited by that statute; (B) has previously been convicted of
35 or pleaded *nolo contendere* to a violation of that statute or a violation
36 of a law of another state or of a political subdivision of this or any
37 other state, which law prohibits the acts prohibited by that statute;
38 (C) at the time of the alleged alcohol related offense had an alcohol
39 concentration of .15 or more in the defendant's blood or breath; or
40 (G) (D) during the time of the alleged violation was involved in a
41 motor vehicle accident or collision resulting in personal injury or
42 death; or

43 (2) the complaint alleges that the defendant committed a class A

1 or B felony or for crimes committed on or after July 1, 1993, a
2 severity level 1, 2 or 3 felony for nondrug crimes or drug severity
3 level 1 or 2 felony for drug crimes.

4 Sec. 15. K.S.A. 1992 Supp. 32-1131 is hereby amended to read
5 as follows: 32-1131. (a) No person shall operate or attempt to operate
6 any vessel within this state while:

7 (1) The alcohol concentration in the person's blood or breath, at
8 the time or within two hours after the person operated or attempted
9 to operate the vessel, is ~~10~~ .08 or more;

10 (2) under the influence of alcohol;

11 (3) under the influence of any drug or combination of drugs to
12 a degree that renders the person incapable of safely operating a
13 vessel; or

14 (4) under the influence of a combination of alcohol and any drug
15 or drugs to a degree that renders the person incapable of safely
16 operating a vessel.

17 (b) No person shall operate or attempt to operate any vessel
18 within this state if the person is a habitual user of any narcotic,
19 hypnotic, somnifacient or stimulating drug.

20 (c) If a person is charged with a violation of this section involving
21 drugs, the fact that the person is or has been entitled to use the
22 drug under the laws of this state shall not constitute a defense against
23 the charge.

24 (d) *No person shall operate or attempt to operate any vessel*
25 *within this state for three months after the date of refusal of sub-*
26 *mitting to a test if such person refuses to submit to a test pursuant*
27 *to K.S.A. 32-1132, and amendments thereto.*

28 (d) (e) Violation of this section is a misdemeanor punishable:

29 (1) On the first conviction, by imprisonment of not more than
30 one year or a fine of not less than \$100 nor more than \$500, or
31 both; and

32 (2) on the second or a subsequent conviction, by imprisonment
33 for not less than 90 days nor more than one year and, in the court's
34 discretion, a fine not exceeding \$500.

35 (f) *In addition to any other penalties prescribed by law or rule*
36 *and regulation, any person convicted of a violation of this section*
37 *shall be required to satisfactorily complete a boater education course*
38 *of instruction approved by the secretary before such person sub-*
39 *sequently operates or attempts to operate any vessel.*

40 Sec. 16. K.S.A. 1992 Supp. 32-1132 is hereby amended to read
41 as follows: 32-1132. (a) Any person who operates or attempts to
42 operate a vessel within this state is deemed to have given consent,
43 subject to the provisions of this act, to submit to one or more tests

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of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. The testing deemed consented to herein shall include all quantitative and qualitative tests for alcohol and drugs. A person who is dead or unconscious shall be deemed not to have withdrawn the person's consent to such test or tests, which shall be administered in the manner provided by this section.

(b) A law enforcement officer shall request a person to submit to a test or tests deemed consented to under subsection (a) if the officer has reasonable grounds to believe the person was operating or attempting to operate a vessel while under the influence of alcohol or drugs, or both, and one of the following conditions exists: (1) The person has been arrested or otherwise taken into custody for any offense involving operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both, in violation of a state statute or a city ordinance; or (2) the person has been involved in a vessel accident or collision resulting in property damage, personal injury or death. The law enforcement officer directing administration of the test or tests may act on personal knowledge or on the basis of the collective information available to law enforcement officers involved in the accident investigation or arrest.

(c) If a law enforcement officer requests a person to submit to a test of blood under this section, the withdrawal of blood at the direction of the officer may be performed only by: (1) A person licensed to practice medicine and surgery or a person acting under the supervision of any such licensed person; (2) a registered nurse or a licensed practical nurse; or (3) any qualified medical technician. When presented with a written statement by a law enforcement officer directing blood to be withdrawn from a person who has tentatively agreed to allow the withdrawal of blood under this section, the person authorized herein to withdraw blood and the medical care facility where blood is withdrawn may rely on such a statement as evidence that the person has consented to the medical procedure used and shall not require the person to sign any additional consent or waiver form. In such a case, the person authorized to withdraw blood and the medical care facility shall not be liable in any action alleging lack of consent or lack of informed consent. No person authorized by this subsection to withdraw blood, nor any person assisting in the performance of a blood test nor any medical care facility where blood is withdrawn or tested that has been directed by any law enforcement officer to withdraw or test blood, shall be liable in any civil or criminal action when the act is performed in a reasonable manner according to generally accepted medical prac-

tices in the community where performed.

(d) If there are reasonable grounds to believe that there is impairment by a drug which is not subject to detection by the blood or breath test used, a urine test may be required. If a law enforcement officer requests a person to submit to a test of urine under this section, the collection of the urine sample shall be supervised by persons of the same sex as the person being tested and shall be conducted out of the view of any person other than the persons supervising the collection of the sample and the person being tested, unless the right to privacy is waived by the person being tested. The results of qualitative testing for drug presence shall be admissible in evidence and questions of accuracy or reliability shall go to the weight rather than the admissibility of the evidence.

(e) No law enforcement officer who is acting in accordance with this section shall be liable in any civil or criminal proceeding involving the action.

(f) (1) Before a test or tests are administered under this section, the person shall be given oral and written notice that: (A) There is no right to consult with an attorney regarding whether to submit to testing; (B) refusal to submit to testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both; (C) the results of the testing may be used against the person at any trial on a charge arising out of the operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both; and (D) after the completion of the testing, the person has the right to consult with an attorney and may secure additional testing, which, if desired, should be done as soon as possible and is customarily available from medical care facilities and physicians. After giving the foregoing information, a law enforcement officer shall request the person to submit to testing. The selection of the test or tests shall be made by the officer. If the person refuses to submit to and complete a test as requested pursuant to this section, additional testing shall not be given. The person's refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a vessel while under the influence of alcohol or drugs, or both.

(2) Failure of a person to provide an adequate breath sample or samples as directed shall constitute a refusal unless the person shows that the failure was due to physical inability caused by a medical condition unrelated to any ingested alcohol or drugs.

(3) It shall not be a defense that the person did not understand the written or oral notice required by this section.

(g) Nothing in this section shall be construed to limit the admissibility at any trial of alcohol or drug concentration testing results obtained pursuant to a search warrant.

(h) Upon the request of any person submitting to testing under this section, a report of the results of the testing shall be made available to such person.

(i) In addition to any other penalties prescribed by law or rule and regulation, any person refusing to take a test or tests when requested to do so by a law enforcement officer pursuant to this section shall be required to satisfactorily complete a boater education course of instruction approved by the secretary before such person subsequently operates or attempts to operate any vessel.

Sec. 17. K.S.A. 41-201 is hereby amended to read as follows: 41-201. (a) The director of alcoholic beverage control and agents and employees of the director designated by the director, with the approval of the secretary of revenue, are hereby vested with the power and authority of peace and police officers, in the execution of the duties imposed upon the director of alcoholic beverage control by this act and in enforcing the provisions of this act and the provisions of K.S.A. 41-804, and amendments thereto.

(b) The director and each agent and employee designated by the director under subsection (a), with the approval of the secretary of revenue, shall have the authority to make arrests, conduct searches and seizures and carry firearms while investigating violations of this act or violations of K.S.A. 41-804, and amendments thereto, and during the routine conduct of their duties as determined by the director or designee. In addition to the above, the director and such agents and employees shall have the authority to make arrests, conduct searches and seizures and generally to enforce all the criminal laws of the state as violations of those laws are encountered by such employees or agents during the routine performance of their duties. In addition to or in lieu of the above, the director and the director's agents and employees shall have the authority to issue notices to appear pursuant to K.S.A. 22-2408 and amendments thereto. No agent or employee of the director shall be certified to carry firearms under the provisions of this section without having first successfully completed the firearm training course or courses prescribed for law enforcement officers under subsection (a) of K.S.A. 74-5604a and amendments thereto. The director may adopt rules and regulations prescribing other training required for such agents or employees.

(c) The attorney general shall appoint, with the approval of the secretary of revenue, an assistant attorney general who shall be the attorney for the director of alcoholic beverage control and the division

of alcoholic beverage control, and who shall receive an annual salary fixed by the attorney general with the approval of the director of alcoholic beverage control and the state finance council.

Sec. 18. K.S.A. 41-804 is hereby amended to read as follows: 41-804. (a) As used in this section, "alcoholic beverage" means any alcoholic liquor, as defined by K.S.A. 41-102 and amendments thereto, or any cereal malt beverage, as defined by K.S.A. 41-2701 and amendments thereto.

(b) No person shall transport in any vehicle upon a highway or street any alcoholic liquor beverage unless such liquor is:

(1) In the original unopened package or container, the seal of which has not been broken and from which the original cap, cork or other means of closure has not been removed;

(2) in the locked rear trunk or rear compartment, or any locked outside compartment which is not accessible to any person in the vehicle while it is in motion; or

(3) in the exclusive possession of a passenger in a vehicle which is a recreational vehicle, as defined by K.S.A. 75-1212 and amendments thereto, or a bus, as defined by K.S.A. 8-1406 and amendments thereto, who is not in the driving compartment of such vehicle or who is in a portion of such vehicle from which the driver is not directly accessible.

(b) (c) Violation of this section is a misdemeanor punishable by a fine of not more than \$200 or by imprisonment for not more than six months, or both.

(e) Except as provided in subsection (f) upon conviction or adjudication of a violation of this section, the judge, in addition to any other penalty or disposition ordered pursuant to law, shall suspend the person's driver's license or privilege to operate a motor vehicle on the streets and highways of this state. Upon conviction or adjudication of the first violation by such person, the suspension shall be for three months. Upon adjudication of a second or subsequent violation, the suspension shall be for one year.

(d) Upon suspension of a license pursuant to this section, the court shall require the person to surrender the license to the court, which shall transmit the license to the division of motor vehicles of the department of revenue, to be retained until the period of suspension expires. At that time, the licensee may apply to the division for return of the license. If the license has expired, the person may apply for a new license, which shall be issued promptly upon payment of the proper fee and satisfaction of other conditions established by law for obtaining

a license unless another suspension or revocation of the person's privilege to operate a motor vehicle is in effect.

(e) As used in this section, "highway" and "street" have the meanings provided by K.S.A. 8-1424 and 8-1473, and amendments thereto.

(f) In lieu of suspending the driver's license or privilege to operate a motor vehicle on the highways of this state of any person convicted of violating this section, as provided in subsection (e), the judge of the court in which such person was convicted may enter an order which places conditions on such person's privilege of operating a motor vehicle on the highways of this state, a certified copy of which such person shall be required to carry any time such person is operating a motor vehicle on the highways of this state. Any such order shall prescribe the duration of the conditions imposed, which in no event shall be for a period of less than three months for a first violation nor more than one year for a second violation.

Upon entering an order restricting a person's license hereunder, the judge shall require such person to surrender such person's driver's license to the judge who shall cause it to be transmitted to the division of vehicles, together with a copy of the order. Upon receipt thereof, the division of vehicles shall issue without charge a driver's license which shall indicate on its face that conditions have been imposed on such person's privilege of operating a motor vehicle and that a certified copy of the order imposing such conditions is required to be carried by the person for whom the license was issued any time such person is operating a motor vehicle on the highways of this state. If the person convicted is a nonresident, the judge shall cause a copy of the order to be transmitted to the division and the division shall forward a copy of it to the motor vehicle administrator, of such person's state of residence. Such judge shall furnish to any person whose driver's license has had conditions imposed on it under this section a copy of the order, which shall be recognized as a valid Kansas driver's license until such time as the division shall issue the restricted license provided for in this section.

Upon expiration of the period of time for which conditions are imposed pursuant to this subsection, the licensee may apply to the division for the return of the license previously surrendered by such licensee. In the event such license has expired, such person may apply to the division for a new license, which shall be issued immediately by the division upon payment of

the proper fee and satisfaction of the other conditions established by law, unless such person's privilege to operate a motor vehicle on the highways of this state has been suspended or revoked prior thereto. If any person shall violate any of the conditions imposed under this subsection, such person's driver's license or privilege to operate a motor vehicle on the highways of this state shall be revoked for a period of not less than 60 days nor more than one year by the judge of the court in which such person is convicted of violating such conditions.

(d) The court shall report to the division every conviction of a violation of this section or of a city ordinance or county resolution that prohibits the acts prohibited by this section. Prior to sentencing under the provisions of this section, the court shall request and shall receive from the division a record of all prior convictions obtained against such person for any violations of any of the motor vehicle laws of this state.

(e) Subject to the provisions of subsection (f), the division, upon receiving a report under subsection (d), shall suspend the driving privileges of the convicted person pursuant to K.S.A. 8-255 and amendments thereto as follows: (1) Upon the first reported conviction of such person, a suspension for three months; and (2) upon the second or a subsequent reported conviction of such person, a suspension for one year.

(f) In lieu of suspension of a person's driving privileges as provided by subsection (e), the court may place restrictions on the person's driving privileges as provided by K.S.A. 8-292 and amendments thereto for a period of: (1) Not less than three months upon the first reported conviction of such person; and (2) not less than one year upon the second or a subsequent reported conviction.

(g) It shall be an affirmative defense to any prosecution under this section that an occupant of the vehicle other than the defendant was in exclusive possession of the alcoholic beverage.

(h) The court shall require any person who is under the age of 21 who violates this section to enter into and complete an alcohol and drug safety action program as provided by K.S.A. 8-1008, and amendments thereto.

(i) For the purpose of determining whether a conviction is a first, second or subsequent conviction in sentencing under this section:

(1) "Conviction" includes being convicted of a violation of an ordinance of any city, or resolution of any county, which prohibits the acts that this section prohibits;

(2) only convictions occurring in the immediately preceding five

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1 years, including prior to the effective date of this act, shall be taken
2 into account, but the court may consider other prior convictions in
3 determining the sentence to be imposed within the limits provided
4 for a first, second or subsequent offender, whichever is applicable;
5 and

6 (3) it is irrelevant whether an offense occurred before or after
7 conviction for a previous offense.

8 (j) This section shall not be construed as preventing any city
9 from enacting ordinances, or any county from adopting resolutions,
10 declaring acts prohibited by this section as unlawful or prohibited
11 in such city or county and prescribing penalties for violation thereof,
12 but such ordinance or resolution shall provide for suspension or
13 restriction of driving privileges as provided by this section and the
14 convicting court shall be required to report convictions for violations
15 of such ordinance or resolution as provided by subsection (d).

16 (k) This section shall be part of and supplemental to the uniform
17 act regulating traffic on highways.

18 Sec. 19. K.S.A. 8-1001, 8-1002, 8-1005, 8-1008, 8-1011, 8-1012,
19 8-1013, 8-1014, 8-1015, 8-1567, as amended by section 1 of chapter
20 298 of the 1992 Session Laws of Kansas, 8-2204, 12-4305, 12-4415,
21 22-2908, as amended by section 257 of chapter 239 of the 1992
22 Session Laws of Kansas, 41-201, 41-804, 41-2719 and 41-2720 and
23 K.S.A. 1992 Supp. 32-1131 and 32-1132 are hereby repealed.

24 Sec. 20. This act shall take effect and be in force from and after
25 its publication in the statute book.