Approved: May 23, 1994
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael O'Neal at 3:30 p.m. on February 24, 1994 in Room 313-S of the Capitol.

All members were present.

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Others attending: See attached list

Chairman O'Neal stated that the Committee would consider sub-committee reports.

HB 2914 - Uniform interstate family support act, (see attachments 1-5).

Representative Carmody explained that this was a uniform act that revised the child support collection between the states. The sub-committee changed the effective date from July 1, 1994 to January 1, 1995 to allow time for the courts to learn the changes in the law.

Representative Carmody made a motion to adopt the sub-committee report. Representative Adkins seconded the motion. The motion carried.

Representative Carmody made a motion to report **HB 2914** favorably for passage as amended. Representative Heinemann seconded the motion. The motion carried.

HB 2852 - Foreign adoption; birth certificates, (see attachment 6).

Representative Carmody explained that this bill would allow Kansas courts to issue a new birth certificate when there are foreign adoption.

Representative Carmody made a motion to adopt the sub-committee report. Representative Scott seconded the motion. The motion carried.

Representative Carmody made a motion to report **HB 2852** favorably for passage. Representative Wagnon seconded the motion. The motion carried. Representative Mayans requested to be recorded as voting no.

HB 2992 - Reduced period of redemption for real estate under foreclosure, (see attachments 7-12).

Representative Carmody stated that this bill would reduce the redemption period for mortgages.

Representative Carmody made a motion to adopt the sub-committee report. Representative Smith seconded the motion. The motion carried.

Representative Carmody made a motion to report **HB 2992** favorably for passage. Representative Macy seconded the motion. The motion carried.

HB 2993 - Qualified domestic relations orders apply to KPERS pension plans, (see attachment 13).

Representative Carmody commented that this would allow the courts to use KPERS for child support and property division.

Representative Carmody made a motion to adopt the sub-committee report. Representative Wagnon seconded the motion. The motion carried.

Representative Carmody made a motion to report **HB 2993** favorably for passage. Representative Wagnon seconded the motion. The motion carried.

HB 3037 - Hearing for probate; uncontested consent, (see attachment 14).

Representative Carmody stated that the sub-committee recommended that this bill be tabled and sent to the Judicial Council for further study.

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Representative Carmody made a motion to adopt the sub-committee report. Representative Adkins seconded the motion. The motion carried.

Representative Carmody made a motion that **HB 3037** be tabled. Representative Macy seconded the motion. The motion carried.

HB 2990 - Repealing statute requiring service of process upon the secretary of state.

Representative Carmody made a motion to adopt the sub-committee report to pass the bill out favorably. Representative Adkins seconded the motion. The motion carried.

Representative Carmody made a motion to report **HB 2990** favorably for passage. Representative Adkins seconded the motion. The motion carried.

Representative Carmody stated that the sub-committee recommended no action be taken at this time on the following bills: **HB 2868** - Public office responsible for enforcement of support allowed to obtain information from public utilities for enforcement purposes, **HB 2869** Public office responsible for enforcement of support allowed to obtain information from public utilities for enforcement powers, **HB 2871** - Garnishment proceedings against insurance companies; public offices not required to pay fee, (see attachments 15-22).

HB 2813 - Qualifications of judges pro tem.

Representative Carmody explained that the sub-committee recommended that this bill be not passed and be addressed by supreme court rule.

Representative Carmody made a motion to adopt the sub-committee report. Representative Macy seconded the motion. The motion carried.

Representative Heinemann made a motion to have the Chairman request that this issue be addressed by a supreme court rule. Representative Carmody seconded the motion. The motion carried.

Representative Carmody made a motion to report **HB 2813** adversely. Representative Adkins seconded the motion. The motion carried.

HB 2884 - Adoption; consent; best interest of the child.

Representative Carmody explained that the sub-committee recommended striking section 1 and the bill be passed as amended.

Representative Carmody made a motion to adopt the sub-committee report. Representative Heinemann seconded the motion. The motion carried.

Representative Carmody made a motion to report **HB 2884** favorably for passage as amended. Representative Heinemann seconded the motion.

Representative Carmody stated that there were two policy considerations in the bill. New section 1 states that once a final decree of adoption has been entered that the only test the courts could use would be if it was in the best interest of the child. The court would not focus on whether every technical step was followed. The second change is in section 2(b) which would require that the birth mother have advise of independent legal counsel. The third change would make consent to an adoption given prior to twelve hours presumed not to be freely and voluntary given and voidable up to the final decree of adoption.

Representative Garner questioned if consent was given before the birth would another consent need to be signed after the birth. Representative Carmody stated that he would suggest that another consent be signed. Current statute states that consent should be given up to 12 hours after the birth, however, consent is being given before the 12 hours is up and this would make it clear that consent would need to be given 12 hours after the birth or the birth parent could void the adoption.

Representative Everhart stated that this bill clarifies that consent could still be taken before or after the birth but if they haven't waited the 12 hours after the birth then everything is going to shakey until the final adoption decree is signed.

Representative Goodwin questioned if an attorney of the birth mother has to be present when consent is given. Could the judge be there instead? Representative Carmody replied that the intent is that an attorney or judge be present, but the bill states that an attorney must be present.

Representative Rock made a substitute motion to table **HB 2884.** Representative Goodwin seconded the motion. The motion failed.

Representative Garner made a substitute motion to clarify section 2(b) so that there is an exception for adoption pursuant to K.S.A. 59-2914, so that if a judge is there and has provided all the required advise there doesn't need to be an independent attorney present. Representative Carmody seconded the motion.

The Chairman questioned if this would apply to subsection (a) which has the identical language. Judges might want some protections.

Representative Garner with permission of the second modified his original motion to include subsection (a) into the motion. The motion carried.

Representative Carmody made a motion to report **HB 2884** favorably as amended. Representative Robinette seconded the motion. Representative Carmody commented that the sub-committee requested that the issue of adoption be studied by an interim committee. The motion carried.

HB 2903 - License plates for DUI violators; (see attachments 23, 24 & 25).

Chairman O'Neal explained that the sub-committee felt that this bill needed more work and recommended that the issue be deferred until next legislative session.

HB 2893 - Allowing assistant district attorneys and assistant county attorney to conduct inquisitions.

Chairman O'Neal explained that the bill as drafted was not in the form that the proponents wanted it to be. Staff had made a balloon draft which represented the recommendations of the sub-committee, (see attachment 26). He explained that the balloon takes section 1 back to its original form and changes in section 2 the powers to be effected to allow the designation of the county or district attorney to authorize subpoenas.

Representative Carmody made a motion to adopt the sub-committee report. Representative Garner seconded the motion. The motion carried.

Chairman O'Neal made a motion to report **HB 2893** favorably for passage as amended. Representative Garner seconded the motion. The motion carried.

HB 2870 - Lifetime prohibition against possessing weapons for certain felons; (see attachments 27 & 28).

Chairman O'Neal explained that with the balloon amendment the right to possess a firearm after a conviction of anyone who committed a felony and during that commission actually possessed a firearm then there would be a lifetime prohibition on that person from possessing a firearm. If the person committed a felony but did not possess a firearm then the prohibition would be for five years. Crimes such as murders and rapes, person felonies and drug crimes the prohibition would be ten years, (see attachment 29).

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Garner seconded the motion. The motion carried.

Representative Garner made a motion to amend **HB 2916** - Destroying seized firearms, into **HB 2870.** Representative Macy seconded the motion. The motion carried.

Chairman O'Neal made a motion to report **HB 2870** favorably for passage as amended. Representative Macy seconded the motion. The motion carried.

HB 2946 - Increased penalty for person who possesses firearm while selling controlled substance; (see attachments 30-32).

Chairman O'Neal explained that the sub-committee recommended no action be taken at this time.

HB 2858 - Increased penalties for manufacturing controlled substances; (see attachments 33-35).

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY, Room 313-S Statehouse, at 3:30 p.m. on February 24, 1994.

The Chairman explained that the proposed bill bumps up the severity level from 3 to 2 for those who are convicted of manufacturing controlled substances. The bill as originally introduced, would include the enhancement of manufacturing within a 1,000 feet of a school zone. The sub-committee determined that sub-section (b) be deleted, (see attachment 36).

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Garner seconded the motion. The motion carried.

Representative Pauls made a motion to amend the bill back to its original form. Representative Everhart seconded the motion. The motion carried.

Chairman O'Neal made a motion to report **HB 2858** favorably for passage. Representative Pauls seconded the motion. The motion carried.

HB 3038 - Court costs include the cost of examination and evidence collection kit of sexual assault victims, (see attachment 37).

Chairman O'Neal explained that this would make the rape kits uniform throughout the State and the cost would be assessed to the county. The sub-committee recommended that the bill be passed.

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Garner seconded the motion. The motion carried.

Chairman O'Neal made a motion to report **HB 3038** favorably for passage. Representative Pauls seconded the motion. The motion carried.

HB 2849 - Civil commitment of persons who commit sexually violent offenses, (see attachments 38-42).

Chairman O'Neal stated that the sub-committee recommended that action on this bill be deferred until a similar bill comes over from the Senate.

HB 2912 - Mandatory jail time for assault, battery and battery against a law enforcement officer; mandatory anger management counseling; (see attachments 43-45).

Chairman O'Neal stated that the sub-committee recommended that this bill remain in committee because as a State we are trying to get away from mandatory sentences.

SB 522 - Violations of parole, probation or conditional release for persons who committed murder in the first degree and treason prior to July 1, 1993 shall not result in conversion to determinate sentence, (see attachments 46&47).

Chairman O'Neal explained that the Sentencing Commission discovered a problem with the release procedures, (see attachment 48).

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Garner seconded the motion. The motion carried.

The Chairman explained that **SB 551** is a criminal code conflict reconciliation bill that could be amended into **SB 522**.

Chairman O'Neal made a motion to amend **SB 551** into **SB 522**. Representative Robinette seconded the motion. The motion carried.

Chairman O'Neal made a motion to report **SB 522** favorably for passage as amended. Representative Wells seconded the motion. The motion carried.

HB 3040 - If fatality occurs, officer has probable cause to believe person driving under the influence; (see attachments 49 & 50).

Chairman O'Neal explained that this bill would allow, in the event of a fatality accident or an accident resulting in serious injury, the officer to have probable cause to believe that the vehicle had been operated under the influence of alcohol, and the officer could get a search warrant to draw blood. The sub-committee recommended that this be passed as amended, (see attachment 51).

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Goodwin seconded the motion. The motion carried.

Representative Goodwin made a motion to report **HB 3040** favorably for passage as amended. Representative Ruff seconded the motion. The motion carried.

HB 2690 - Statute of limitations on criminal prosecution of childhood sexual abuse.

The Chairman explained that the sub-committee recommended tying the statute of limitations to the age of majority plus five years, (see attachment 52).

Chairman O'Neal made a motion to adopt the sub-committee report. Representative Wagnon seconded the motion. The motion carried.

Representative Wagnon made a motion to report **HB 2690** favorably for passage as amended. Representative Carmody seconded the motion. Representative Plummer commented that the study of the human mind is not an exact science. He believes that an opened ended statute would not be justice, and this is a compromise. The motion carried. Representative Scott requested that he be recorded as voting no.

HB 2771 - Mortuary arts, penalties.

Chairman O'Neal stated that he had a late request from the Attorney General's office and the Board of Mortuary Arts to consider **HB 2771**, (see attachment 53). The need to increase the penalty became apparent during the course of a Shawnee County case where $104,780 became unaccountable for prepaid funeral funds of thirty families. This bill would increase the penalty to a severity level 7.

Representative Garner made a motion to treat this like a theft and tie the penalty to the value of the loss. If the value amount was above $25,000 it would be a severity level 7 and if the value amount was between $500 - $25,000 it would be a severity level 9. Representative Robinette seconded the motion. The motion carried.

Representative Mays made the motion to report **HB 2771** favorably for passage as amended. Representative Carmody seconded the motion. The motion carried.

Chairman O'Neal suggested considering amending **HB 2893, HB 2870, HB 3038, HB 3040** into **SB 551**. Representative Pauls stated that she was against putting these bills into one bill. She would rather the bills be voted on individually on their own merit. The Chairman stated that these bills were not controversial bills.

Representative Carmody made a motion to amend the contents of **HB 2893, HB 2870, HB 3038, HB 3040** into **SB 551.** Representative Wells seconded the motion. The motion carried.

HB 2980 - Identification of informer, includes crime stopper chapter.

Chairman O'Neal stated that this bill would allow the disclosure of crime stopper informants.

Representative Carmody made a motion to report **HB 2980** favorably for passage. Representative Mays seconded the motion.

Representative Mays made a substitute motion to adopt the balloon amendment (see attachment 54). Representative Carmody seconded the motion. The motion carried.

Representative Carmody made a motion to report **HB 2980** favorably for passage as amendment. Representative Plummer seconded the motion. The motion carried.

The Committee meeting adjourned at 6:00 p.m. The next meeting is scheduled for February 25, 1994.

GUEST LIST

HOUSE JUDICIARY COMMITTEE

DATE February 24, 1994

NAME	ADDRESS	ORGANIZATION
Paul Shelby	Topeka	OJA
Ron Smith	"	KBA
Jamie Corkhill	"	SRS/ISE
JAMES CLARK	"	KCDAA
Ruth Driver	"	Self
Marlene Nadeau	"	Rep. for Self + Daughter
Danielle Noe	Topeka	State Farm
Greg Rosa	"	KPOA
Matt Truell	"	AP
KAREN FRANCE	"	KAJC
Ben Coates	"	KPA
Neal Whitaker	Topeka	KBWA
TUCK DUNCAN	Topeka	KWSA

STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE CHAIRMAN: FINANCIAL INSTITUTIONS & INSURANCE
MEMBER: APPROPRIATIONS
RULES & JOURNAL

February 22, 1994

Mr. Chairman, Members of the Committee:

In 1993, eight state legislatures enacted the Uniform Interstate Family Support Act (UIFSA), a major overhaul of interstate child support enforcement rules. UIFSA has been introduced in an additional 12 state legislatures. It replaces the earlier Uniform Reciprocal Enforcement of Support Act (URESA), which has been the primary connection between states for enforcing child support orders since the 1950's. URESA is the law in every state in the U.S., except in those eight that replaced it with UIFSA.

The new UIFSA will ultimately mean more money for those children deprived of support. Interstate child support enforcement cases - about 30% of cases nationally - are complex, difficult to resolve, and consistently have the poorest collection record. When two or more states are involved in a child support enforcement case, delay tactics are often implemented by the parties involved, and children do not receive their support.

URESA has been used universally across the U.S. when a child support award made in one state must be enforced in another. URESA depends upon the principle of reciprocity, that is, each state agrees to enforce the decrees of other states that agree to enforce decrees of the first state. **The greatest weakness of reciprocity is its inability to prevent multiple modifications of child support awards.** Thus, if a second state takes modification jurisdiction and amends an award, the effect is to create two competing awards, each enforceable within the boundaries of each initiating state, and each equally enforceable in yet other states. **URESA has never been sufficient to cope with the multi-state award problem that results from exercise of modification jurisdiction by more than one state.**

UIFSA solves this problem by requiring all courts involved to respect the jurisdiction of one court. That court handles the enforcement action and considers any petition to modify the existing support award. **UIFSA does this by combining principles of "long-arm" jurisdiction with principles of continuing jurisdiction and "home-state" of the child.** This combination has the effect of helping the forum, initially, take personal jurisdiction over the

party absent from the jurisdiction. Then, by the set of rules that the states agree to apply, UIFSA locates modification jurisdiction in one and only one state at a time, thereafter. **This coordinated scheme of jurisdictional principles solves the multi-state problem.**

LONG ARM -- In the usual case, a child support proceeding is initiated in a state in which the child is found. It is obtaining jurisdiction over either parent in another state that is the problem. **If the child is in a state and the out-of-state parent has had some relationship to that child within the comtemplated forum state, there will be jurisdiction to adjudicate the child support award and to bind the out-of-state parent.**

CONTINUING EXCLUSIVE JURISDICTION AND HOME STATE OF THE CHILD -- Once there is a child support award by a court in a state that has taken jurisdiction, the problem is to limit modification jurisdiction to just one jurisdiction at a time. **UIFSA provides that a state that has taken jurisdiction has continuing, exclusive jurisdiction so long as one of the parties remains a resident of that state.**

The concept of continuing, exclusive jurisdiction will prevent other states with the ability to exercise jurisdiction from exercising it. They will defer to the state with continuing, exclusive jurisdiction. **This means one state will retain the power to modify the award.**

SIMULTANEOUS PROCEEDINGS -- If two states with the ability to obtain jurisdiction are simultaneously competing for it, UIFSA says the "home state" of the child is the preferred state, the one to which other states should defer. If there is no home state, the first state to proceed past the time when jurisdiction may be challenged, gains priority. All other states then defer to it.

TO SUMMARIZE -- Once a state has appropriate jurisdiction and issues an award, other states defer to the state that has continuing exclusive jurisdiction. If there are simultaneous proceedings to establish an award, the state with jurisdiction that is the home state of the child gets preference in adjudicating the child support award.

UIFSA is not just confined to child support awards. It can be used, also, to enforce spousal support awards. The overall effect of UIFSA is greater

interstate cooperation in the whole spectrum of child support establishment and enforcement.

The ultimate beneficiaries of UIFSA are the children involved. Uniformity in child support enforcement is crucial. **Until UIFSA is adopted in every state, multiple litigation across state lines will continue to plague child support enforcement, and children will not get needed money.** The NCSL has encouraged states to consider UIFSA and to give it high priority. UIFSA is a model act completed by the Uniform Law Conference in 1992. **It has been endorsed by the 1992 U.S. Commission on Interstate Child Support and by the American Bar Association.**

A Few Facts About
THE UNIFORM INTERSTATE FAMILY SUPPORT ACT

PURPOSE: Limiting child and family support orders to a single state, eliminating interstate jurisdictional disputes.

ORIGIN: Completed by the Uniform Law Commissioners in 1992.

ENDORSED BY: American Bar Association
U.S. Commission on Interstate Child Support

STATE ADOPTIONS:

Arizona
Arkansas
Colorado
Montana
Nebraska
Oregon
Texas
Washington

1994 INTRODUCTIONS:

California
District of Columbia
Hawaii
Illinois
Maryland
Massachusetts
Minnesota
New Mexico
Oklahoma
South Dakota
Wisconsin

For any further information regarding the Uniform Interstate Family Support Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(2/15/94)

WEDNESDAY, AUGUST 5, 1992 B1

THE WALL STREET JOURNAL

LAW

Child-Support Reform Sought By U.S. Panel

By AMY STEVENS
Staff Reporter of THE WALL STREET JOURNAL

A federal commission proposed a major overhaul of child-support laws to put more pressure on divorced parents who try to evade support payments, and to simplify the muddle of conflicting laws that develop when divorced parents live in different states.

The proposal called for making it a federal crime to intentionally fail to pay child support, and urged Congress to require employers to withhold such payments from employees' paychecks. The commission also said the Internal Revenue Service should play a greater role in the enforcement of support orders.

"There is a bewildering maze of different state laws, policies, and procedures," the U.S. Commission on Interstate Child Support said in a 200-page document released yesterday in Washington, the product of a two-year study by the 15-member commission. "This report represents a comprehensive national blueprint for reform."

Acting shortly after the commission's report was released, the House passed a bill providing for federal penalties for crossing state lines in order to avoid paying child support. The report stopped short of calling for the establishment of a single federal child-support system, as has been proposed recently by Rep. Henry Hyde, (R., Ill.) and Rep. Thomas Downey (D., N.Y.), and instead recommended improvements to the current state-based system.

The commission said its proposal would

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Commission Seeks An Overhaul of Laws On Child Support

Continued From Page B1

remedy problems created by current family law rules, last revised almost a quarter of a century ago, which allow parents to obtain child-support orders from judges in more than one state. Discrepancies between the awards are sometimes so great that mothers and fathers feud for years in multiple courts while their children get no support at all.

Indeed, divorce lawyers claim that crossing state lines is one of the most common gambits used by people trying to evade support obligations. In 1989, about 30% of the 5.7 million support orders issued involved parents who live in different states. Yet only $1 of every $10 collected for support is from an interstate case, according to the commission's report.

"It's a huge problem," said Harry Tindall, a Houston matrimonial attorney and a member of the commission. Mr. Tindall said a "significant proportion" of the almost $1 billion a year in unpaid child support results from parents' taking advantage of confusion between courts.

In a key part of its proposal, the commission urged Congress to require states to enact a law modeled on a draft by the National Conference of Commissioners on Uniform State Laws, a quasi-governmental body that recommends ways for states to reconcile their laws on issues ranging from marriage to commercial trade. The uniform law group is expected to approve a final draft this afternoon at its annual meeting in San Francisco.

The proposed law, known as the Uniform Interstate Family Support Act, would require states to recognize only one support order at any given time. Typically, courts of the state where the child lived at the time of the divorce would retain control over both parents — even if one moved elsewhere. If both parents moved, the original court's order would remain in place for a time, but eventually the court in the state where the child lived would assume jurisdiction.

For example, if a couple divorced in Illinois, the noncustodial parent wouldn't be able to relocate to Colorado and seek a reduction of the support order there. Rather, the noncustodial parent would be required to contest the original order in Illinois.

The proposal encourages communications and cooperation between courts of different states, such as the use of standardized forms that would enable out-of-state parents to file papers in court without having to travel.

Harrowing tales abound about the current system. In testimony before the federal commission last year, Jayne Allen of St. Paul, Minn., said that after her 12-year marriage ended in 1986, she had to petition courts in both Florida and Minnesota as her ex-husband moved from state to state. In the confusion, thousands of dollars in back support that accumulated under different states' orders went unpaid. "This deplorable ineffectiveness on the parts of the different states and very lengthy delays in getting support to my children has had serious repercussions," she told the commission.

If the new law is adopted as the commission recommends, it would replace the 40-year-old Uniform Reciprocal Enforcement of Support Act, which permitted multiple orders. "Back then, it was thought that a state court couldn't have jurisdiction over someone who wasn't in the state," said John McCabe, the staff lawyer for the uniform law group. But a series of U.S. Supreme Court decisions has broadened the reach of state courts, allowing them to retain control over disputes that began within their borders, even if all parties have since moved, he said.

The increasing reach of the state courts prompted the uniform law group in the 1970s to propose similar legislation with respect to child-custody disputes. Their model rule is now in force in every state, so that children are no longer subject to endless litigation in different courts over which parent should be their caregiver.

Other matrimonial lawyers praised the proposed law. "This is an enforcement tool that will be highly beneficial," said Sorrell Trope, a Los Angeles family lawyer. "Anything that has to do with the support of a child should have a certain amount of consistency so that the parents can have a feeling of reliance," he said.

In addition to recommending the new law, the federal commission proposed that Congress broaden the amount of information required on federal W-4 forms for new hires. New employees would be required to state on the form if they owed child support, and if so, where and how much. Self-employed people, such as lawyers and doctors, could lose their licenses for failure to make support payments.

Each state also would be required to create computer registries of support orders, to which other states' officials could gain access.

One member of the commission, Geraldine Jensen of Toledo, Ohio, dissented from the report, urging the establishment of a new agency, akin to the IRS, to enforce support orders. But the commission concluded that it found "no evidence that such a massive change" would improve collections.

* * *

WHY STATES SHOULD ADOPT THE UNIFORM INTERSTATE FAMILY SUPPORT ACT

Currently, one in four children in the U.S. – more than 10 million children – grows up in a single–parent household, and millions of these children fail to receive the financial support that they are owed. This support is crucial to sustaining family life, and often to averting outright poverty. Children whose parents live in different states suffer the most, since a conflict between jurisdictions can often stand as a serious impediment to the enforcement of a support order.

In recent years, Congress has made substantial changes to federal child support enforcement laws. Perhaps most significantly, it has mandated that the states adopt child support guidelines and establish enforcement devises such as tax intercepts and credit reporting.

To eliminate interstate jurisdictional disputes and enable the new federal legislation to be effective, the Uniform Law Commissioners (ULC) have drafted the Uniform Interstate Family Support Act (UIFSA), which provides for one–state control of a case and for a clear, efficient method of interstate case processing. This new act simplifies the muddle of conflicting child and spousal support laws that develop when parents live in different states. It represents a major overhaul of national child support rules and should be adopted in every state.

UIFSA UPDATES AND IMPROVES URESA

The Uniform Reciprocal Enforcement of Support Act (URESA), drafted by the ULC in 1950, amended in 1958 and 1968, and adopted in every state, has been one of the ULC's most successful acts. Yet URESA recognizes the coexistence of multiple support orders from different states, often making it difficult to enforce an order for collection of child and spousal support.

It is the overriding principle of UIFSA that, to the maximum extent possible, only one valid support order will be in existence at any one time. This act makes the child's "home state" dominant in establishing priority of competing courts.

UIFSA also provides for a "long arm" provision which allows one court to retain exclusive jurisdiction over both parties in the support dispute, even though one – or both – may be living outside the boundaries of the court's jurisdiction.

A number of other improvements are made to URESA to streamline interstate proceedings: support proceedings may be initiated by or referred to administrative agencies rather than to courts in states that use those agencies to establish support orders; vital information and documents may be transmitted through electronics and other modern means of communication for quicker facilitation; courts are required to cooperate in the discovery process for use in a court in another state; a registered support order is immediately enforceable, unless the respondent files a written objection within twenty days and sustains that objection.

UIFSA MAKES SUPPORT ORDER ENFORCEMENT EASIER

If a court finds that support is owed, it issues a support order requiring that support or reimbursement be paid. To enforce its support orders, a court may: order the person owing support to make payments; order that income be withheld; enforce orders by claiming civil or criminal contempt; set aside property for payment of support; or order the person owing support to seek appropriate employment.

Except under narrowly defined circumstances, the only court or tribunal that can modify a support order is the one having continuing, exclusive jurisdiction over the order. If two or more states claim jurisdiction to establish or modify an order, UIFSA has a priority scheme that favors the child's home state.

Also, UIFSA provides two direct enforcement procedures that do not require assistance from a court. First, the support order may be mailed directly to an obligor's employer in another state, which triggers wage withholding by that employer without the necessity of a hearing, unless the employee objects. Second, the act provides for direct administrative enforcement by the support enforcement agency of the obligor's state.

UNIFORMITY

The problems this act addresses have long cried out for uniformity, and it may well be the answer to long–standing interstate jurisdictional conflicts that have often been a refuge for those hoping to avoid paying child support.

If adopted everywhere, the bottom line effect of this act would be to eliminate multiple litigation across state lines and also to counter inefficiencies within the URESA bureaucracy, both of which form major barriers to child support enforcement.

The UIFSA holds the promise of exerting a positive effect on the lives of untold numbers of American children, one quarter of whom now live in single parent households. The ULC envisions that the new law's influence will be extremely broad, and some form of it should be adopted in every state.

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE NO. 2 **FEBRUARY 22, 1994**

HB 2914: UNIFORM INTERSTATE FAMILY SUPPORT ACT

TESTIMONY OF ANNE MCDONALD, COURT TRUSTEE, 29TH JUDICIAL DISTRICT

The Uniform Interstate Family Support Act is the result of lengthy and painstaking work over the past several years by two national groups: the United States Commission on Interstate Child Support and the National Conference of Commissioners on Uniform State Laws. The final draft is believed to be a synthesis of the best of both groups, addressing the main problems with interstate cases that arose again and again in the public hearings.

They are the same problems you hear about from your own constituents: delays, difficulty in obtaining service of process, lower order amounts, two or three different order amounts and arrears calculations, dependence on officials in the responding state to work the case, and so on. This Act will not solve all our interstate child support enforcement problems - we ought to consider a massive public education campaign to raise public awareness and encourage voluntary compliance to address those - but it will make significant strides in addressing many of the major difficulties.

I will give you two examples: 1. The new Act (referred to now as "UIFSA") allows direct service of an Income Withholding Order on an employer in another state. This cuts down on the time

House Judiciary
Attachment 2
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and work needed to register the order in the responding state and have those officials then serve the Income Withholding Order. It is true that there is no jurisdiction over the employer unless the employer has a registered agent or does business in Kansas and thus compliance with the Income Withholding Order is voluntary. However, we have found that many employers have become familiar with Income Withholding since it was introduced nationwide in 1985 and will honor the Order.

2. UIFSA addresses the multiple orders problem by setting out clear jurisdictional parameters and priorities, with the underlying premise that there is to be **one** order in **one** place. The preference is the original jurisdiction; if both parties have left that jurisdiction, they can consent to jurisdiction in another state. The law of the forum state applies. The predicaments that have arisen from calculating arrears based on two or more concurrent orders in different states are many, and quite time-consuming to staff. Although it will take time to train and implement this new method, in the long run it is believed that it will reduce considerably the time spent tracing the intricacies of multiple orders.

A quick look at the statute book shows 1970 as the year in which Kansas enacted "RURESA" : the Revised Uniform Reciprocal Enforcement of Support Act. It has been modified a couple times since then, the most notable change being the addition of Income

Withholding provisions in 1985 and subsequent years. But the basic structure hasn't changed since 1970. That was before VCRs, car phones, even personal computers. Hemlines, gas prices and the DOW have gone up and down several times in the past twenty-four years since we first enacted RURESA.

UIFSA is where Interstate Child Support Enforcement is going in the 1990's. I urge you to recommend its enactment in Kansas.

Respectfully submitted,

Anne McDonald, Court Trustee
Wyandotte County Courthouse
710 No. 7th St.
Kansas City, Kansas 66101
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HB 2914
House Judiciary Subcommittee
February 22, 1994

Testimony of Gary Jarchow
Court Trustee, 18th Judicial District of Kansas

Representative Carmody and members of the subcommittee:

Thank you for the opportunity to appear before you to discuss enactment of the Uniform Interstate Family Support Act (UIFSA).

I have been involved in interstate child support enforcement work for over 23 years, first as an assistant district attorney in Sedgwick County and since July of 1985 as the Court Trustee there.

The Uniform Reciprocal Enforcement of Support Act (URESA) has governed interstate support proceedings in Kansas since it went into effect here in July of 1970. **UIFSA**, also a product of the Commissioners on Uniform State Laws, is intended to replace **URESA** and cure many of the problems experienced under the present law.

One order at a time. The chief criticism of **URESA** has always been that it allows for the existence of two valid support orders in a case, usually one in the initiating jurisdiction and the other in the responding jurisdiction, at the same time.

In the most common situation, the obligor leaves the initiating state and is placed under a new order, **lower** in amount, in the responding jurisdiction. While this is done with good intent, to give the obligor a fresh start, the intent is often frustrated by a section of URESA called the "anti-supersession" clause. This clause states that the order in the first state is not nullified by the order in the second state and that support paid under the second order is only credited against amounts due under the first. The obligor, who may not even be aware of this clause, is lulled into a false sense of security, thinking that compliance with the new order will relieve him or her of the additional responsibility under the old. Yet arrearage keeps accumulating under the old order and the obligor's tax refunds, unemployment compensation or other assets may be taken as long as he does not follow the old order.

The existence of two valid support orders in a case at the same time also causes confusion among child support enforcement workers in both states over which order to enforce or how to calculate the amount of the arrearage.

UIFSA seeks to cure this problem by allowing only one state the right to change the order, the state with **continuing, exclusive jurisdiction.** Any change in the order may only be made in the state that issues it as long as one of the parties or a child resides there, or unless the parties agree in writing that another state may become the court of continuing, exclusive jurisdiction. Therefore there is only **one valid order in effect at a time.**

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UIFSA also focuses more on the needs of the custodial parent and child(ren). It really isn't unfair to expect the obligor in a second state to go back to the first state to seek a change in the support order. After all, in the usual situation, it is the obligor who has left the first state and the obligee or custodial parent who has remained there with the child(ren). The state with the most at stake, where the obligee and child reside, **should** retain the power to change support orders. The needs of the obligee and children are better determined there and child support guidelines will give the obligor equivalent treatment there.

Under **URESA**, it is often the custodial parent and children who are at a disadvantage. The custodial parent usually can't be present at proceedings to set support in the second state, and it is hard for the court to get a full picture of their needs from written documentation or statements from it by the prosecuting attorney. The obligor, who is present, often gets adjustments to his support obligation that are not warranted because the custodial parent is not present to help present the full picture.

Direct income withholding. Another advantage of **UIFSA** is that it permits an income withholding order for support to be mailed directly to the obligor's employer in another state, provided that state has enacted **UIFSA.** Under present law, since the state issuing the order has no jurisdiction over out-of-state employers, the order must first go to the central registry of another state, then often to the local child support enforcement agency in the other state, before income withholding begins.

Registration for Enforcement. UIFSA also makes it easier to enforce a support order in a responding state by allowing the support order to be registered for enforcement only. A **de novo** hearing would not be required before enforcement. After registration and notice to the obligor, the support order could be enforced just as a any other support order of this state.

UIFSA eases evidentiary rules. It allows for such improvements as facsimile materials to be placed in evidence and testimony and depositions to be taken by telephone conference. It is user-friendly in that it allows cases to be filed directly to the responding state without prior certification by the inititiating tribunal. It also authorizes representation by private attorneys.

The U.S. Commission on Intersate Child Support recommended enactment of **UIFSA** in 1992. On February 9, 1993, **UIFSA** received the endorsement of the House of Delegates of the American Bar Association, which recommended that **UIFSA** be enacted verbatim.

Eight states have already enacted **UIFSA.** Most of the interstate cases handled my jurisdiction involve those states: Arizona, Arkansas, Colorado, Montana, Nebraska, Oregon, Texas and Washington. Most states have deferred implemenation of **UIFSA** for a year or two after passage. I would recommend, to allow time for private attorneys and child support enforcement personnel to receive formal training, an implementation date of July 1, 1995.

HOUSE BILL 2914

House Judiciary Committee
Judiciary Subcommittee #2
February 22, 1994

Testimony of Kay Farley
Coordinator of Children and Family Programs
Office of Judicial Administration

Representative Carmody and members of the subcommittee:

Thank you for the opportunity to appear in support of House Bill No. 2914.

In my testimony, I would like to focus on the history leading up to this legislative proposal and the public policy issue.

One of the problems that practitioners have experienced in trying to work interstate cases through URESA is that there is not much uniformity. URESA has been the main mechanism for handling interstate cases since its promulgation in 1950. URESA was amended in 1952, 1958, and 1968. Since that time URESA has been adopted in various forms in all 54 child support jurisdictions. Only about two-thirds of the states have adopted the 1968 version of URESA (often called RURESA, Revised Uniform Reciprocal Enforcement of Support Act).

To respond to the increasing federal mandates regarding child support enforcement and to the implementation problems of the Uniform Reciprocal Enforcement of Support Act (URESA), the National Conference of Commissioners on Uniform State Laws established the URESA Drafting Committee in February 1988. Working in concert with the U.S. Commission on Interstate Child Support Enforcement, the URESA Drafting Committee developed the draft Uniform Interstate Family Support Act (UIFSA) which was presented to the Conference in August of 1992. The Conference unanimously approved UIFSA with some modifications on August 5, 1992.

The Act is based on eight key principles;

One state should control the support order terms, collection, and modification,

A comprehensive uniform state law should provide both consistent long-arm jurisdiction and traditional two-state jurisdiction processes for interstate cases,

Direct income withholding provides an efficient method of collecting support across state lines,

Two-state enforcement requires an efficient and speedy registration system that protects the due process rights of the parties without risking modification of the order,

Modifications should only be ordered by the state with authority to do so,

Forms of evidence obtained in one state should be easily admissible at another state's hearing,

The forum state's choice of law governs which laws apply in the establishment or modification of a support order, and

The Act should be user friendly.

In the U.S. Commission on Interstate Child Support's report to Congress in 1992, the Commission endorsed UIFSA and recommended to Congress the following;

> "Subject to the risk of losing federal funding, states shall adopt verbatim the URESA drafting committee's final version of UIFSA..."

Congress has not addressed this recommendation, as all child support legislation appears to be on hold awaiting the Clinton Administration's welfare reform proposals.

Despite this, eight states have already adopted UIFSA. A listing of those states are attached to my testimony as Attachment I. A number of other states are considering legislative proposals in 1994.

I would encourage your consideration and support in enactment of UIFSA for Kansas. There are multiple benefits for Kansas. 1) Children will be more speedily served and obligors who seek to elude their financial responsibilities will be more rapidly made to support their children. 2) It will be easier to file outgoing interstate requests as certificates signed by judges will not be necessary. 3) The number of judicial hearings for incoming interstate requests will be reduced. Orders will be registered for enforcement only and enforcement can begin after the obligor is given notice of the registration. 4) The problems of multiple support orders will be eliminated. I would, however, support a delay in the implementation date for this legislation until July 1995 to allow time for training and implementation planning.

Thank you for your consideration.

UNIFORM INTERSTATE FAMILY SUPPORT ACT (UIFSA) STATES

State	Effective Date	Exceptions
Arkansas	07-01-93	
Texas	09-01-93	
Montana	10-01-93	NO direct IWO provisions
Nebraska	01-01-94	
Oregon	07-01-94	NO self-incrimination provision
Washington	07-01-94	
Colorado	01-01-95	
Arizona	07-01-95	

Department of Social and Rehabilitation Services
Child Support Enforcement Program

Before the House Judiciary Committee
February 22, 1994

House Bill 2914
Related to enactment of UIFSA
(Uniform Interstate Family Support Act)

==========

The SRS Mission Statement

The Kansas Department of Social and Rehabilitation Services empowers individuals and families to achieve and sustain independence and to participate in the rights, responsibilities, and benefits of full citizenship by creating conditions and opportunities for change; by advocating for human dignity and worth; and by providing care, safety, and support in collaboration with others.

==========

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify on behalf of Secretary Whiteman today concerning HB 2914.

The primary responsibility of the SRS Child Support Enforcement Program is to help children by establishing regular and adequate support payments and by enforcing past due support obligations. From that perspective, SRS supports the concepts of the Uniform Interstate Family Support Act (UIFSA) but recommends that this measure be studied over the interim to insure the smoothest possible transition.

UIFSA fundamentally changes the terminology, procedures, and substantive law for interstate cases. It affects all cases, both incoming and outgoing, at all stages -- establishment, enforcement, and modification. Clearly, UIFSA's enactment will require extensive policy revisions and retraining of IV-D attorneys and program staff. The same is true for public offices which will be handling non-IV-D cases, presumably County and District Attorneys and District Court Trustees.

Although UIFSA has been much discussed at the federal level, its adoption is not yet a IV-D mandate. So far, eight states have adopted UIFSA, but only in three states has the act actually taken effect. Texas and Arkansas each have less than one year of experience and Nebraska has less than three months. Already these states are discovering areas where consensus needs to be developed, particularly in transactions between UIFSA states and those still operating under URESA (Uniform Reciprocal Enforcement of Support Act). Though the Uniform Laws Commissioners tried to provide as much guidance as possible, they simply could not foresee all the situations the real world would present. This is one area of law where we believe that Kansas will not benefit from being on the cutting edge.

Initially we expect enactment of UIFSA to cost SRS roughly $64,000 ($24,000 for the State's share). About half that cost will be for basic training, an investment that will be needed whenever UIFSA is enacted. SB 2914 presently

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would require SRS to create and maintain a "putative father registry" (Section 3), at a projected cost of $30,000 per year. This registry in one of UIFSA's features which warrants further study -- last summer's paternity mandates under OBRA (Omnibus Budget Reconciliation Act of 1993) may have made this putative father registry obsolete.

Nationwide enactment of UIFSA is expected to increase interstate support collections over the long term, but support collections received by the Kansas IV-D program will not materially increase until a significant number of other states also adopt UIFSA. Key states for Kansas are Florida, California, Missouri, and Illinois.

There are many aspects of the Interstate Family Support Act which we are certain will be beneficial to Kansas children and to the Kansas IV-D program over time. But the greatest benefits will result from a smooth, well-considered transition from the old law to the new. For this reason, we suggest the UIFSA be examined by an interim committee of the Legislature or by the Judicial Council before it is enacted.

Respectfully submitted,

Jamie L. Corkhill
Policy Counsel
Child Support Enforcement
296-3237

State of Kansas
Joan Finney, *Governor*

Department of Health and Environment

Robert C. Harder, *Secretary*

Testimony presented to

House Judiciary Subcommittee #2

by

The Kansas Department of Health and Environment

House Bill 2852

The Office of Vital Statistics has had several cases over the past couple of years where the parents of a child adopted in a foreign country wanted a U.S. (Kansas) birth certificate. Currently there is no provision in Kansas statute allowing a subsequent adoption of a child in Kansas if an adoption has already been granted in a foreign country. Even without a specific provision, some judges have granted a second adoption in Kansas. Others refuse to. Passage of H.B. 2852 would allow the parents to petition a Kansas court for a subsequent adoption which would then allow OVS to prepare a Kansas birth certificate. We would view the second adoption as more of a formality than a legal procedure since a first adoption has already taken place, is legal and is recognized in another country.

Kansas currently has a provision whereby the Office of Vital Statistics can produce a birth certificate for a child born in a foreign country and adopted in Kansas. However, this birth certificate is not a standard birth certificate, since standard birth certificates are filed only in the place of birth. The birth certificate actually states on the form "Birth Certificate for Foreign-Born Child Adoption in Kansas". It also states that "This Certificate is Not Evidence of United States Citizenship." OVS would use this same form.

We see no particular problem with the passage of H.B. 2852 and agree that it may save the parents a lot of frustration and trouble; therefore, we would support such a provision.

Testimony presented by:

Charlene M. Satzler
Director & Assistant State Registrar
Office of Vital Statistics
Center for Health and Environmental Statistics
February 22, 1994

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Kansas-Nebraska League of Savings Institutions

Jeffrey D. Sonnich, Vice-President

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

February 21, 1994

TO: House Judiciary Subcommittee

FROM: Jeffrey Sonnich, KS-NE League of Savings Institutions

RE: H.B. 2992; Redemption of Real Property

The Kansas-Nebraska League of Savings Institutions appreciates the opportunity to appear before the House Committee on Judiciary in support of H.B. 2992 which would amend K.S.A. 60-2414 to allow for a reduced period of redemption of real estate under foreclosure.

The bill would reduce from six months to three months the redemption period for individuals who have defaulted in the conditions of their mortgage before one-third of the original debt has been paid. Owners would have the ability to petition the court to extend the three month redemption to six months should they lose employment during the redemption period. The bill would retain the twelve month redemption period for owners that have substantial equity in their homes.

This summer the Governors' Commission on Housing and Homelessness recommended to the Governor a number of legislative changes that "would allow Kansas to improve affordable housing for low to moderate income families". One of those recommendations was to reduce the redemption period on loan foreclosures. We agree with the Commission's assertion that one of the deterrents lenders face when making a marginal housing loan is the long period of redemption. A reduced period would in some cases make the difference between loan approval and loan disapproval.

In some ways financial institutions are held hostage by the underwriting requirements of the secondary market. Most low income and some moderate income individuals do not fall within the income and credit limits set by Fannie Mae and Freddie Mac. Lenders who are willing to make these loans expose themselves to increased risks because they are carried to maturity as an asset and not sold on the secondary market. At the same time federal regulators scrutinize any loan that falls outside of the parameters of an institutions lending policies. While little can be done about an individual's credit risk a change in the law to reduce the costs associated with those risks would be beneficial.

Notwithstanding the Governor's Commission recommendations, new federal Community Reinvestment Act (CRA) regulations have been proposed by the regulatory agencies that would significantly change the way financial institutions are evaluated in lending to low and moderate income individuals. As under current regulations, the CRA regulatory goal is to grade each federally insured lender's record in meeting its community credit needs. Where current compliance procedures focus on Board of Director involvement and extensive documentation of community involvement these new regulations are performance based. Under these standards large institutions would be subject to three tests: a lending test, a service test and investment test. For retail lending institutions the lending test is the key factor in determining a CRA rating.

Kansas-Nebraska League of Savings Institutions

The lending test would directly evaluate an institution's percentage of low and moderate income lending in their lending area. A rating of "substantial noncompliance" in this area could subject the institution to cease and desist orders, civil money penalties, removal and prohibition orders, and loss of federal insurance. The bottom line is that institutions will have "increased incentive" to make more loans in low and moderate income areas.

Finally a shortened redemption period would help deter the practice of equity skimming by shortening the time period an equiteer has control of the property. This is evidenced by the lack of equity skimming in states that have ninety-day redemption periods. Missouri, Nebraska and Colorado, which are all deed of trust states with not more than ninety days redemption, do not have the equiteering problem that Kansas has. The Legislature passed a law two years ago that prohibited equity skimming. Unfortunately, the law has been ineffective in stopping the practice.

Real estate lenders face substantial problems when recovering property that has been rented by an equiteer. Many times the property is in such poor condition that substantial improvements must be made before trying to resell it. This occurs, we feel, because many equiteers have no real vested interest in seeing that the property is maintained once it is rented. We also would like to point out that during the redemption period the equiteer pays no property taxes. Lenders are essentially forced into paying the property taxes in order to avoid a state imposed tax lien on the property. A reduced period of redemption would go a long way towards curtailing this practice.

In closing, we would add that we recognize the right of a homeowner to redeem his/her property has been a fundamental part of Kansas Law for over 100 years. We do not support taking away that right even though very few individuals (less than 2%) ever redeem their homes. However, we do support a reduction in the redemption period with the appropriate safeguards contained in H.B. 2992. Accordingly we respectfully request the Judiciary Subcommittee recommend favorable passage of H.B. 2992.

Jeffrey Sonnich
Vice President

The Kansas Association of Financial Services
George Barbee, Executive Director
Jayhawk Tower, 700 SW Jackson, Suite 702
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913/233-0555 Fax: 913/357-6629

Statement to
House Judiciary Committee
House Bill 2992

Mr. Chairman and members of the committee my name is George Barbee appearing today on behalf of the Kansas Association of Financial Services in support of House Bill 2992. The Association of Financial Services members are finance companies familiar to most of you such as Household Finance, Beneficial Finance, Associates, Norwest, etc.

This bill addresses a serious problem that arises in only a small percent of loans on real estate. It happens after the creditor has exhausted every effort to collect the delinquent amounts owed by the debtor. It happens after attempts to restructure the loan have failed. It happens after the creditor finally has to foreclose. None of the lending institutions desire to be in the real estate business, but foreclosures do happen, and when they do the creditor still cannot gain possession of the property. They must wait a minimum of six months because the debtor is granted a six month redemption right in the Kansas statutes. During that time the debtor still has possession of the property, unless the debtor sells the redemption rights to someone else. This someone else is usually an "equiteer" who pays a small amount for the redemption rights and then rents the property out for as long as possible.

All to often the property is in diminished value when the creditor finally regains possession. Either inadvertently or intentionally, unoccupied property may have suffered from damage. This damage can include frozen and broken pipes and plumbing fixtures or unattended water leaks destroying ceilings and floors. Too often hot water heaters and other valuable plumbing and lighting fixtures are stolen.

Finance companies are sensitive to each individual client's circumstances in an effort to prevent damage to property that will be in foreclosure. For example, if a couple has fallen on hard times because of the loss of employment and is delinquent on payments, the company will discuss the situation with the consumer. If they are attempting to find a new job, or have become reemployed,

the company will certainly try to restructure the loan. If the borrower is trying to make payments, the finance company will certainly try to keep the loan.

But, let's look at a different scenario. A young couple has a record of being delinquent in payments. Their marriage of one year is on the rocks and they split. The property is abandoned. They both move out of the area to return to family or friends. It takes several weeks to discover all the facts and bring foreclosure action. Even after foreclosure, we must wait six months while the right of redemption runs. The property becomes a target for vandals, thieves, and weather damage. We do not have this problem with those debtors who have built equity of one third or more of the remaining balance of the mortgage. The statutes would continue to grant a twelve month redemption right to those borrowers. It is with those that have little or no equity that cause problems.

This reduced limit would make the lender more comfortable with making loans to the low to moderate income borrower. We believe the Commission on Housing and Homelessness was right on traget with its recommendation which is:

> Shorten redemption period on loan foreclosures - Lenders are reluctant to make marginal housing loans due to the long redemption period in Kansas. A shorter redemption period that still adequately preserves the borrowers rights would enhance the availability of low and moderate income housing needs.

Three months redemption would certainly help defer some losses, but not all. It is a partial solution.

This bill would ease the availability of loans to low and moderate income borrowers.

This bill has merit for both consumers and lenders.

On behalf of the Kansas Association of Financial Services I thank you for the opportunity to appear and urge you to act favorably on House Bill 2992.

The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 21, 1994

TO: House Subcommittee on Judiciary

FROM: Kathleen A. Taylor, Associate General Counsel
Kansas Bankers Association

RE: HB 2992: Redemption Period

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear in support of **HB 2992** which amends KSA 60-2414(m).

That section of law determines the redemption period for those real estate loans that go into default before one-third of the original debt secured by the mortgage has been paid. This bill would reduce from 6 months, to 3 months that period of redemption.

In addition, the bill would allow a court to award an additional 3 months of redemption time if the debtor has involuntarily lost employment after the date of the foreclosure sale and prior to the expiration of the 3 month redemption period.

The KBA fully supports these efforts to amend the statute so as to partially relieve the risk involved in real estate lending - and especially as that affects borrowers in the marginal credit risk category.

Real estate loans are generally thought to be fairly low-risk loans because of the stability of the collateral backing the debt. In other words, compared to a loan where the collateral is crops or livestock, which have values that fluctuate more frequently, loans backed by real estate are categorized as less risky. But in fact, the risk involved in real estate loans is not due to the type of collateral, but because the collateral is not easily liquidated when the loan goes into default. From the time of the default, until the property can clearly be sold to a willing purchaser, the lender is at risk . There is the risk that the property's value may deteriorate due to misuse of the defendant owner or another who purchases the redemption rights. The value of that property to the lender is also subject to property taxes that must be kept current; insurance, and other costs of maintaining the property. These things will soon eat up the equity that has been accumulated in the property.

While this bill would help the lender by allowing the property to be sold to a willing buyer three months sooner than is allowed today in most cases, this does not mean that the defendant owner will be ousted from his property three months after the first default on the loan. There are many months spent prior to the sheriff's sale (after which the redemption period begins to run) which the lender attempts to put in motion the procedures used to collect the funds it has loaned.

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For example, I asked several of our KBA Real Estate Committee members to give me an idea, on a time line, of the process a loan takes in reaching the point of the sheriff's sale. Their response was as follows:

1. The default is called. Typically this does not occur until the loan is already three months in arrears (that is three months that the borrower has not paid as agreed).

2. The bank will send a demand letter in which a time period is given in which to cure the default. Typically this time period is no less than 30 days (another month).

3. If the cure is not made, the bank must contact their attorney to start proceedings. This usually means the attorney will first make a title search and do some other background work before actually filing the petition with the court (usually another 30 days).

4. The Court then has to serve the summons which in some areas takes one to two weeks. The borrower has 20 days to answer, but most request a 30 day extension, which is almost always granted (at least another month to a month and a half).

5. Then a trial date is set. Depending on the court's docket, this is usually at least 30 more days. After trial, judgment is rendered. If the bank's motion is granted, it can start thinking about the sheriff's sale.

6. Once the date of the sheriff's sale is set, the lender must publish the particulars about the sale in the newspaper for three consecutive weeks. After this time, the sheriff's sale occurs, and **now** the redemption period starts.

From the date of the first default until the date of the sheriff's sale, the borrower has been able to stay on the property for approximately eight months, in most cases. It is at that time that the redemption period starts to run. In those cases where less than one third of the original indebtedness had been paid in, it would appear that the borrower is able to live out almost a year's worth of equity, taking into account the time taken in the loan collection procedure plus the redemption period. All this time, the borrower has not made a payment and has had no reason to maintain the property.

We believe that this bill contains sufficient protection to the borrowers who have not accumulated much equity, while allowing the lender to liquidate that property a little faster so the bank can recoup its investment, and so the property does not stand idle longer than is fair for all parties involved.

We would respectively ask for your favorable consideration of **HB 2992**. Thank you.

REALTOR®

KANSAS ASSOCIATION OF REALTORS®

Executive Offices:
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TO: THE HOUSE JUDICIARY SUBCOMMITTEE #2

FROM: KAREN FRANCE, DIRECTOR, GOVERNMENTAL AFFAIRS

DATE: FEBRUARY 21, 1994

SUBJECT: HB 2992, REDUCTION OF MORTGAGE REDEMPTION PERIOD

Thank you for this opportunity to testify. On behalf of the Kansas Association of REALTORS® I appear today support for the measure before you.

Our association has always been protective of the right of redemption. We have viewed it as one of the private property rights which Kansans enjoy. However, we also know what can happen to a property during a redemption period and what happens to the value of the properties which surround a property which is in redemption when a homeowner has less than one-third equity in the property. More often than not, properties which are in redemption deteriorate in condition and become an eyesore to the neighborhood. The benefits of having a longer redemption period do not outweigh the degradation of property values and the surrounding community.

We believe this bill proposes a relatively limited adjustment to the redemption rights in Kansas. We see it as a method for addressing the problems we see in the market today without severely damaging the redemption rights which Kansans have come to expect. We urge your support for the bill.

The Governor's Commission
on
Housing and Homelessness

Joan Finney, Governor

Karen Herrman, Chairperson
Noelle St. Clair, Vice-Chairperson

H.B 2992
Monday 21, 1994
Wm. F. Caton

Thank you for the opportunity to appear before you today as Chairman of the Legislative Sub-Committee for the Governor's Commission on Housing and Homelessness. I also have an interest in this bill as Consumer Credit Commissioner, as this bill will have an impact on consumer transactions that are secured by a second mortgage on real estate.

The Governor's Commission on Housing and Homelessness ("the Commission") has identified a need to shorten the redemption period on mortgage foreclosures. This subject was brought up many times at a statewide conference held on September 12 - 14, 1993 by housing advocates, not bankers and lenders. The redemption rights on foreclosed properties have been abused in the past by "equity skimmers" by purchasing equity rights from the borrower, who have already vacated the property, and rented or leased the property under false pretenses to a third party; meanwhile, the mortgage holder suffers economically. This situation still exists even though a bill was passed into law two years ago to curtail this problem.

When the Commission recommended this concept to be part of the Governor's legislative package for housing, she was concerned that shortening this period would unfairly harm consumers when economic conditions have caused employment layoffs. I was able to relay this concern to the financial industry who was working on a bill draft and through our combined efforts, were able to provide a bill draft that shortens redemption periods, from six to three months, on only those properties that have less than 1/3 of the original indebtedness paid. This has been identified by lenders as the area where most of the losses occur since problems on properties with larger amounts of equity usually are resolved by private sale or restructuring the debt. The redemption period for properties that have more than 1/3 equity will remain at twelve months, and a provision was included to allow a court to extend the three month redemption period an additional three months in the event of the owners loss of employment. The Governor's staff was pleased with this bill draft and indicated she would sign legislation if presented in this format.

As Consumer Credit Commissioner of the State of Kansas, I am charged by statute to provide fairness between borrowers and creditors and insure that credit is available to Kansas consumers. I believe the current redemption right period inhibits lenders in making loans to low and moderate income borrowers, due to the extensive losses caused by abuses of the redemptions rights. This bill maintains a balance of fairness, and continues to allow a twelve month redemption period to those borrowers who have accumulated significant equity in their property, which commences after the lengthy time it takes to obtain a judgement. I interpret this bill to be favorable to consumers, and it will promote additional housing availability to low and moderate income households.

I support this bill as the Consumer Credit Commissioner and as a representative for the Governor's Commission on Housing and Homelessness.

I will be glad to answer any questions or provide any additional information you might request.

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Karen Herrman
111 West 11th Street
Hays, Kansas 67601

H. B. 2992
February 21, 1994

I appreciate the opportunity to appear before you as the Chairman of the Governor's Commission on Housing and Homelessness and as a representative of the housing concerns of the rural areas and small towns throughout Kansas.

The Commission, which is charged with finding solutions for housing all citizens of Kansas, recommended legislation to shorten the redemption period on mortgage foreclosures.

The support for the shorter redemption period grew as housing focus groups met throughout the state the past two years, and culminated with conclusive support from those attending the Governor's statewide housing conference in September, 1993.

Any apprehension has been dispelled by housing advocates clearly recognizing that one can almost never come up with the amount of money necessary to redeem the property. Most foreclosures are filed when the homeowner has virtually no way of meeting the payments. The costly foreclosure process may be simplified with a deed in lieu of foreclosure, in many instances. A prolonged process does not seem to do the borrower a favor.

This issue came to light when we examined the problems some homebuyers experience in qualifying for a home loan. Minor issues on creditworthiness had enormous impacts in the rejection of some loans. We constantly look at successful policies and programs in other states. We eventually discovered the barrier we have in Kansas. Lenders must be exceptionally conservative to prevent as many lengthy foreclosures as possible.

The present foreclosure/redemption laws do not seem to be helping people save their homes. They do, however, seem to be preventing many low-to-moderate-income people from obtaining home loans.

As an advocate of affordable housing for Kansas, I ask that you support this bill.

I will be happy to answer any questions.

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February 21, 1994

TO: House Judiciary Subcommittee #2

FOR: Written Testimony on HB 2993

FROM: Stephen J. Blaylock

The purpose of this bill is to provide a mechanism for dividing and/or attaching public employees' pension benefits for purposes of child support, spousal maintenance (alimony) and property division incidental to a divorce or decree of separate maintenance.

Prior to HB 2993, the various statutes relating to public employees' pension benefits allowed attachment for purposes of child support and spousal maintenance. The Kansas Court of Appeals in an Opinion filed March 13, 1992, held that public employees' pension benefits were marital property and may be divided in a divorce. In Re Marriage of Sedbrook, 16 Kan.App.2d 668, 827 P.2d 1223 (1992), (rev. den.) 1992. A portion of that Opinion is marked as "Attachment 1" to this testimony. Therefore, the ultimate change requested in HB 2993 is to add language and a method of dividing public employees' pension benefits as property division. See also "Attachment 2" which is Attorney General Opinion No. 92-141.

The mechanism requested is the use of a "Qualified Domestic Relations Order" (QDRO). A QDRO is defined by Section 414(p) of the Federal Internal Revenue Code of 1985, as amended. A QDRO is a court order issued by a state domestic relations court that divides retirement benefits in the form of child support, maintenance payments or property rights to a spouse, former spouse or child. The person who is to receive benefits under a QDRO is called an "alternate payee."

The QDRO document itself must meet certain requirements which are set out in Sec. 414(p), and basically places the alternate payee in the same shoes as the plan participant, with the same restrictions regarding benefits. QDROs have been used in the past to attach public employees' pensions for purposes of child support

House Judiciary
Attachment 13
2-24-94

and spousal support. (Attorney General Opinion - Cite Omitted.) Although each QDRO must be drawn individually to show whether the benefits are for property, child support or maintenance, a sample QDRO for property purposes when the plan participant is in pay status is attached hereto as "Attachment 3".

K.S.A 60-2308(c), effective July 1, 1986, specifically allows the attachment or division of certain retirement plans in a divorce proceeding if made pursuant to a QDRO. While those types of plans do not include public employees' pensions except for child support and maintenance under the Attorney General's opinion, Sedbrook, supra, makes it a logical conclusion.

The bill itself applies the QDRO language to K.S.A. 12-111a (policeman and firemen under charter ordinance), K.S.A. 12-5005 (KP&F system), K.S.A. 13-14a10 (Employees' Retirement Systems), and K.S.A. 74-4923 (KPERS).

This bill is necessary because, although Kansas courts recognize that the above pension benefits can be divided as property pursuant to a divorce proceeding, most of the pension trustees do not recognize a QDRO for property division purposes. Therefore the choices for a court are to either join the trust itself (which means additional legal expense) or to have an "if and when" order. An "if and when" order means that if and when a public employee retires, he or she pays part of his or her pension to their ex-spouse in the form of child support, maintenance or property division. However, this latter method is unsatisfactory because:

1. Death of employee-participant - means loss of pension benefits awarded or they go to new spouse;

2. Collection is difficult or impossible;

3. Bankruptcy; and

4. Tax consequences can be adverse to employee-participant.

With an approved QDRO, all of the above problems are resolved in that the trustee of the pension plan recognizes the alternate payee as a beneficiary and payment is guaranteed, as it is with non-public employee pension plans. In most cases, this will mean that women and children (sometimes men) will actually receive what the domestic court declares they are entitled to. Presently, there are hundred of domestic cases pending with the problem of how to divide public employees' pension plans incidental to a divorce. The Kansas legislature can cure this problem for this asset which, for many domestic cases, constitutes the major marital asset.

The bill has the support of the Kansas Bar Association (KBA) Board of Governors, the KBA's legislative committee, and the KBA's family law section. Failure to pass this bill will create certain additional economic hardships to families already struggling with the high stress level caused by the divorce process.

Sincerely submitted,

WOODARD, BLAYLOCK, HERNANDEZ,
PILGREEN & ROTH

Stephen J. Blaylock
(biography - Attachment 4)

Note: References in the bill to Internal Revenue Code of 1954 should be changed to Internal Revenue Code of 1985 as amended.

(827 P.2d 1222)

No. 66,410

In the Matter of the Marriage of LUANNE SEDBROOK, *Appellant*, and DELBERT SEDBROOK, *Appellee*.

Petition for review denied April 21, 1992.

SYLLABUS BY THE COURT

1. DIVORCE—*Fault—Admissibility of Evidence of Fault—Consideration in Determining Financial Aspects of Dissolution—Exception.* The fault of either party to a marriage is not to be considered in determining the financial aspects of the dissolution of the marriage unless the conduct is so gross and extreme that the failure to penalize therefor would, itself, be inequitable. *In re Marriage of Sommers*, 246 Kan. 652, 658-59, 792 P.2d 1005 (1990).

2. SAME—*Maintenance—Basis for Determination.* The determination of the allowance of maintenance must be based on a realistic evaluation of the parties' circumstances, future income, and needs.

3. SAME—*Maintenance—Cohabitation Not Automatic Reason to Deny Maintenance.* A finding of cohabitation may not be equated with the conclusion the relationship has become that of wife and husband and is not, by itself, sufficient to justify denial of spousal maintenance.

4. SAME—*Maintenance—Consideration of Financial Contributions of Unrelated Party.* It is not improper for the trial court to consider the nature and extent of the financial contribution of an unrelated party, or that which he or she may be capable of assuming, in order to maintain a relationship with a spouse seeking continued maintenance from a former spouse.

5. SAME—*Property Division—Consideration of Maintenance Allowance in Determining Property Division.* The determination of maintenance and the division of property should be made at the same time, but, if separately determined, the allowance of maintenance or the lack thereof should be considered before making a division of property. K.S.A. 1991 Supp. 60-1610(b).

6. SAME—*Property Division—Retirement Benefits Earned during Marriage.* To the extent earned during the marriage, retirement benefits represent compensation for marital effort and are substitutes for current earnings which would have increased the marital standard of living or would have been converted into other assets divisible at dissolution of the marriage.

7. SAME—*Property Division—Effect of Exemption and Anti-alienation Provisions on Division of Retirement Benefits.* Exemption and anti-alienation provisions restricting garnishment, attachment, execution, and prohibition of assignment are designed to protect benefits from creditors and do not apply to the claims of a spouse at the time of the dissolution of a marriage.

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8. SAME—*Property Division—Municipal Pensions Considered Marital Property.* Municipal pensions are considered as marital property under K.S.A. 23-201(b) for the purpose of making the division of property upon the dissolution of a marriage as provided under K.S.A. 1991 Supp. 60-1610(b).

9. SAME—*Maintenance—Effect of Cohabitation—Property Division—Municipal Pension Subject to Division.* Under the facts and circumstances of this case, the trial court erred in denying spousal maintenance solely on the grounds of cohabitation with an unrelated member of the opposite sex. The trial court further erred in ruling, as a matter of law, that a municipal firefighter's pension benefits were not marital property subject to equitable division upon the dissolution of a marriage.

Appeal from Sedgwick District Court; JAMES G. BEASLEY, judge. Opinion filed March 13, 1992. Reversed and remanded with instructions.

Stephen J. Blaylock and *Cindy Cleous-Stang*, of Woodard, Blaylock, Hernandez, Pilgreen & Roth, of Wichita, for appellant.

David J. Lund, of Dewey & Lund, of Wichita, for appellee.

Before LARSON, P.J., ELLIOTT, J., and NELSON E. TOBUREN, District Judge, assigned.

LARSON, J.: This is a divorce action in which Luanne Sedbrook appeals the trial court's ruling that she is ineligible to receive maintenance from Delbert Sedbrook because she was cohabiting with an unrelated male. Luanne also claims the trial court erred by ruling Delbert's City of Wichita firefighter's pension is not a marital asset subject to division and may only be considered as a source of funds for the payment of child support or maintenance.

The parties married in August of 1964. After 25 years, the parties separated and Luanne filed for divorce in November of 1989.

Delbert commenced his firefighting employment in May of 1963. Wichita established by charter ordinance its police and fire retirement system on January 1, 1965, which after numerous amendments became Charter Ordinance No. 131. Delbert became a member of the system and continued his uninterrupted employment until he retired in April of 1985 with a monthly pension for life of $1,022.94. Cost of living adjustments increased his monthly pension to $1,084.29 by the time of trial.

Luanne's contention that Delbert's pension was marital property subject to division was resolved adversely to her as a matter of law by the trial court in January 1991.

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or any part thereof shall be void, except as may be provided herein. Any such annuity or benefit shall not answer for debts contracted by the person receiving the same, and it is the intention of this ordinance that they shall not be subject to execution, attachment, garnishment, or affected by any judicial proceedings."

Similar anti-assignment or anti-alienation provisions relative to state and local government retirement benefits are found at K.S.A. 12-111a, K.S.A. 12-5005(e), K.S.A. 13-14a10 and K.S.A. 1991 Supp. 74-4923(b). K.S.A. 12-5005(e) (Kansas Police and Firemen's Retirement System) and K.S.A. 1991 Supp. 74-4923 (Kansas Public Employees Retirement System [KPERS]) both specifically provide that benefits thereunder are not subject to execution, garnishment, attachment or any other process or claim whatsoever, except such annuity, pension, or benefit or any accumulated contributions due and owing from the system to such person(s) or special member *"are subject to decrees for child support or maintenance, or both, as provided in K.S.A. 60-1610 and amendments thereto."* (Emphasis added.)

The Kansas Supreme Court in *Mahone v. Mahone*, 213 Kan. 346, 348, 352, 517 P.2d 131 (1973), held the anti-alienation provisions in K.S.A. 74-4923 (Weeks), which then provided that KPERS funds "shall not be subject to execution, garnishment, or attachment, or any other process or claim whatsoever, [including decrees for support or maintenance,] and shall be unassignable," was inapplicable to a claim for past-due child support.

Justice Prager looked to the purposes of KPERS as enabling public employees to accumulate reserves for themselves and their dependents in stating:

"In arriving at this conclusion we have applied the principle that a statute is not to be given an arbitrary construction, according to the strict letter, but one that will advance the sense and meaning fairly deducible from the context. 'It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.' [Citation omitted.] The whole purpose and policy of our exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges. [Citation omitted.] In construing statutory exemptions this court has consistently taken into consideration this purpose and policy. We have by judicial construction exempted from the application of certain statutory exemptions, persons and situations not falling within that purpose." *Mahone*, 213 Kan. at 350.

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Last year our court in *In re Marriage of Knipp*, 15 Kan. App. 2d 494, 809 P.2d 562, *rev. denied* 248 Kan. 995 (1991), held that federal law (42 U.S.C. § 407[a] [1988]) precluded a Kansas court from dividing a lump sum social security disability award, but did not prohibit considering the value of the award in dividing marital property. The exemption section there involved provided:

" '(a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and *none of the moneys paid or payable* or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.' (Emphasis added.)" 15 Kan. App. 2d at 495.

Interestingly, the party prevailing in our court petitioned for review, claiming our decision permitted, and indeed encouraged, the trial court to do indirectly what it could not do directly. The petition for review was not granted.

An earlier Supreme Court decision on a companion issue, *Mariche v. Mariche*, 243 Kan. 547, 758 P.2d 745 (1988), citing *Mahone* as authority, held social security disability benefits payable to a parent are subject to garnishment to satisfy past-due child support payments, and that such garnishment is not precluded by what is now K.S.A. 1991 Supp. 60-2308(a). The true purpose of the exemption statute, to protect the funds necessary to support a pensioner and his family, precluded strict application of the exemption statute. 243 Kan. at 551-52.

We find no decisions directly relating to the construction of the Wichita ordinance and thus look to decisions from other states.

Community property states have held not only is each spouse the owner of the other's pension (a position we might reach by a literal reading of the language of K.S.A. 23-201(b) that "[e]ach spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60-1610 and amendments thereto"), but also the anti-alienation provisions were designed to protect benefits from creditors and not from spouses and family members. See *Koelsch v. Koelsch*, 148 Ariz. 176, 180, 713 P.2d 1234 (1986); *Collida v. Collida*, 546 S.W.2d 708, 710 (Tex. Civ. App. 1977).

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Illinois held in *In re Marriage of Hackett*, 113 Ill. 2d at 292-93, that enactment of anti-alienation provisions was to protect retired firefighters and their beneficiaries from creditors and that benefits could be divided between divorcing parties. See *Rice v. Rice*, 762 P.2d at 927 (anti-alienation provision is a "spendthrift" provision to protect a pensioner's income from the claims of creditors; as spouse in divorce proceedings is not a creditor, benefits accumulated during marriage are subject to division as jointly acquired property).

There have been earlier cases which hold to the contrary, but the recent trend is in accordance with the cases above cited.

In *Graham v. Graham*, 396 Pa. Super. 166, 578 A.2d 459 (1990), a state employee's pension was deemed subject to attachment through a qualified domestic relations order in a divorce action notwithstanding a statute exempting benefits from any process whatsoever. *Young v. Young*, 507 Pa. 40, 488 A.2d 264 (1985), was quoted by the *Graham* court in setting forth two reasons why state or municipal pensions were not excluded from equitable distribution with the court, stating:

"[First], '[r]etirement funds . . . are created for the protection of not only the employee, but for the protection of his family as well. Hence, the provisions exempting assignments and attachments contained therein are to relieve the person exempted from the pressure of claims that are hostile to his *and to his dependents' essential needs', citing Fowler v. Fowler*, 116 N.H. 446, 362 A.2d 204, 205, 93 A.L.R.3d 705 (1976).

"[Second], we note that a family loses its ability to spend a portion of its income when that income is deferred and placed in a pension. It would be terribly unfair to read an exemption statute, which was created to protect a pension for the benefit of a retired employee's family, in such a way that the exemption would bar children *or a former spouse* from receiving support from the very fund created for their benefit, and would once again deny them the benefits of the income they sacrificed to a pension years before. *Id.*, 507 Pa. at 47-50, 488 A.2d at 267-69 (emphasis added)." 396 Pa. Super. at 170-71.

Wichita Charter Ordinance No. 131 sets forth in § 2 that the system provides "retirement annuities, survivors' annuities, death benefits and other benefits for police and fire officers of the City of Wichita *and their dependents.*" (Emphasis added.) We believe a spouse must be considered as a dependent to be granted protection under the plan and not treated as a creditor. A spouse

is a member of the family unit the retirement plan is designed to protect. We hold the anti-alienation provisions, in particular those relating to exemption from garnishment, attachment, and prohibition of assignment, do not apply to the claims of a spouse at the time of the marital dissolution.

An excellent collection of cases from the increasing number of states that by statute and decision have conferred on divorce courts authority to make an equitable distribution of joint and separate property and have recognized spousal claims to an interest in retirement and pension benefits is set forth in Baxter, Marital Property § 11.2 (1991 Supp.).

While there is ample authority for our decision here in the prior Kansas decisions we have cited, especially *Sadecki*, 250 Kan. 5; *Sommers*, 246 Kan. 652; and *Harrison*, 13 Kan. App. 2d 313, the logic of those opinions and ours herein is bolstered by some of Professor Baxter's observations:

"The most timely issue regarding the economics of divorce is the question of spousal claims to an interest in retirement or pension benefits of the other spouse. . . .

. . . .

"More important, in our typical case, the wife has a just claim to a share of the benefit derived from joint contributions, albeit her contributions were of a different order. She already has earned her right to a share and paid for it with her past services. Thus she has a present accrued interest, not a contingent claim such as is involved in alimony.

. . . .

". . . The spread of no-fault grounds requires that the economics of divorce be fair and equitable, otherwise the homemaker wife may be victimized and impoverished.

". . . Not only has alimony been de-sexed, it also has come to be regarded as an interim stipend which is available for a relatively short time while a former spouse in need prepares for the labor market. . . . In short, the current law of divorce in most states has upset the former equilibrium and requires new approaches to the concepts of marital property and the future financial security of broken families." Baxter, Marital Property § 11.2, pp. 26-28.

We hold that none of the three reasons given by the trial court justifies the refusal to consider Delbert's firefighter's retirement benefits as marital property because:

(1) *Sommers* and *Sadecki* support our finding that K.S.A. 23-201(b) includes a municipal pension as marital property;

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(2) the anti-alienation provisions of the Wichita ordinance must not be applied to disadvantage spouses and family members; and (3) *Harrison* and *Sadecki* provide ample authority that the retirement benefit has a determinable value.

Luanne claims the trial court has authority to make her an alternate payee under Delbert's pension plan pursuant to K.S.A. 1991 Supp. 60-2308(b) and (c). We will not reach or decide this issue for two reasons. This was not an issue before the trial court and will not be considered for the first time on appeal. *Kansas Dept. of Revenue v. Coca Cola Co.*, 240 Kan 548, 552, 731 P.2d 273 (1987). There is also an insufficient record to determine if the statutory requirements are met. See *Dickinson, Inc. v. Balcor Income Properties Ltd.*, 12 Kan. App. 2d 395, 399, 745 P.2d 1120 (1987), *rev. denied* 242 Kan. 902 (1988).

We also decline to remand, as Luanne requests, with instructions that the retirement benefits be divided equally, in kind. The trial court may divide property as set forth in K.S.A. 1991 Supp. 60-1610(b)(1). We will not make an order limiting or confining the trial court's options.

We recognize the large burden which trial courts bear in following the provisions of K.S.A. 1991 Supp. 60-1610(b), but they must be free to reach decisions that are fair, just, and equitable under all of the circumstances in accordance with the evidence which may be presented and the contentions and arguments which are made.

Reversed and remanded for determination of the property division and allowance of maintenance, if any, in accordance with the directions of this opinion.

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ATTACHMENT 2

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

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November 6, 1992

ATTORNEY GENERAL OPINION NO. 92-141

Meredith Williams
Executive Secretary
Kansas Public Employees Retirement System
Capitol Tower, Suite 200
400 S.W. 8th Avenue
Topeka, Kansas 66603-3925

Re: State Boards, Commissions and Authorities--Public Employees Retirement Systems; Kansas Public Employees Retirement System--Benefits and Rights Nonassignable and Exempt From Taxes and Legal Process, Exception for Decrees for Support and Maintenance; Effect of Decree for the Division of Property Following Dissolution of Marriage

Synopsis: The whole purpose and policy of Kansas' exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges. The spouse of a member of the Kansas public employees retirement system is not to be regarded as one of the parties subject to the anti-alienation provisions set forth in K.S.A. 1991 Supp. 74-4923, as amended by L. 1992, ch. 321, § 10. Therefore, any annuity or benefit earned pursuant to K.S.A. 74-4901 et seq. may be subject to a decree for the division of property following dissolution of marriage. Cited herein: K.S.A. 74-4901; K.S.A. 1991 Supp. 74-4902; 74-4923, as amended by L. 1992, ch. 321, § 10; L. 1961, ch. 427, § 23; L. 1974, ch. 338, § 1; L. 1982, ch. 152, § 24; L. 1990, ch. 282, § 11; L. 1991, ch. 238, § 3.

* * *

Dear Mr. Williams:

As executive secretary for the Kansas public employees retirement system (KPERS), you request our opinion regarding whether any annuity or benefit earned under K.S.A. 74-4901 et seq. is subject to a decree for the division of property following dissolution of marriage. You raise this issue because of the decision of the Kansas Court of Appeals in In re Marriage of Sedbrook, 16 Kan.App.2d 668 (1992).

In Mahone v. Mahone, 213 Kan. 346 (1973), the Kansas Supreme Court "concluded that the statutory exemption contained in K.S.A. 74-4923 is not applicable when in conflict with the enforcement of a decree or claim for child support." Id. at 350.

> "In arriving at this conclusion we have applied the principle that a statute is not to be given an arbitrary construction, according to the strict letter, but one that will advance the sense and meaning fairly deducible from the context. 'It is not the words of the law but the internal sense of it that makes the law; the letter of the law is the body; the sense and reason of the law is the soul.' [Citation omitted.] The whole purpose and policy of our exemption laws has been to secure to an unfortunate debtor the means to support himself and his family, to keep them from being reduced to absolute destitution and thereby public charges. [Citation omitted.] In construing statutory exemptions this court has consistently taken into consideration this purpose and policy. We have by judicial construction excepted from the application of certain statutory exemptions, persons and situations not falling within that purpose." Id. (emphasis added).
>
> "In construing the exemption provision under 74-4923 we should consider the other sections of the statute which created and maintain [KPERS]. The purpose of the act is set forth in K.S.A. 74-4901. One of its purposes is to enable public employees to accumulate reserves for themselves and

> their dependents. [Emphasis in original.] Under 74-4902(7) a member's dependent child is specifically included as a beneficiary of the program. In view of these provisions it seems clear to us that [KPERS] is designed to protect the minor dependents of a member as well as the member himself.
>
> "This court as a matter of public policy has always vigorously protected the right of a dependent child to receive support from his father. The denial of relief to the minor children in cases such as this might well cast upon the public the burden of supporting a pensioner's children and relieve him and his property of that obligation. Such a holding in our judgment would be perversive of the true purpose and policy of our exemption laws and the intent of the legislature in providing the exemption contained in K.S.A. 74-4923." Mahone, 213 Kan. at 351-52 (emphasis added).

The Kansas Court of Appeals determined in In re Marriage of Sedbrook, 16 Kan.App.2d 668 (1992) that municipal pension benefits are marital property subject to equitable division upon the dissolution of marriage. The court then addressed the effect of an anti-alienation provision contained within the retirement plan for firefighters of the city of Wichita. City of Wichita, Charter Ordinance No. 131, § 16 provides:

> "EXEMPTIONS. The right to a service retirement annuity, disability annuity, death annuity or any annuity or benefit under the provisions of this ordinance by whatsoever name called, or a refund, is personal with the recipient thereof, and the assignment or transfer of any such annuity or benefit or any part thereof shall be void, except as may be provided herein. Any such annuity or benefit shall not answer for debts contracted by the person receiving the same, and it is the intention of this ordinance that they shall not be subject to execution,

> attachment, garnishment, or affected by any judicial proceedings."

After acknowledging the purpose of anti-alienation provisions as determined in Mahone, the Court of Appeals stated:

> "We believe a spouse must be considered as a dependent to be granted protection under the plan and not treated as a creditor. A spouse is a member of the family unit the retirement plan is designed to protect. We hold the anti-alienation provisions, in particular those relating to exemption from garnishment, attachment, and prohibition of assignment, do not apply to the claims of a spouse at the time of the marital dissolution." Sedbrook, 16 Kan.App.2d at 683-84.

With this in mind, we review the provisions of the anti-alienation clause contained in KPERS. Subsection (b) of K.S.A. 1991 Supp. 74-4923, as amended by L. 1992, ch. 321, § 10 states:

> "(b) Any annuity, benefits, funds, property or rights created by, or accruing to any person under the provisions of K.S.A. 74-4901 et seq. or 74-4951 et seq., and any acts amendatory thereof or supplemental thereto, shall be exempt from any tax of the state of Kansas or any political subdivision or taxing body of the state; shall not be subject to execution, garnishment or attachment, or any other process or claim whatsoever, except such annuity or benefit or any accumulated contributions due and owing from the system to such person are subject to decrees for child support or maintenance, or both, as provided in K.S.A. 60-1610 and amendment thereto; and shall be unassignable, except that within 30 days after the death of a retirant the lump-sum death benefit payable to a retirant pursuant to the provisions of K.S.A. 74-4989 and amendments thereto may be assignable to a funeral establishment providing funeral services to such

> retirant by the beneficiary of such retirant. The Kansas public employees retirement system shall not be a party to any action under article 16 of chapter 60 of the Kansas Statutes Annotated and is subject to orders from such actions issued by the district court of the county where such action was filed. Such orders from such actions shall specify either a specific amount or specific percentage of the amount of the pension or benefit or any accumulated contributions due and owing from the system to be distributed by the system pursuant to this act." (Emphasis added).

The emphasized portion of the anti-alienation provision has been in existence since enactment of the statute in 1961. L. 1961, ch. 427, § 23. Following the court's decision in Mahone, the legislature amended the anti-alienation provision to provide that KPERS benefits were not subject to "any other process or claim whatsoever, including decrees for support or alimony. . . ." L. 1974, ch. 338, § 1 (emphasis denotes new language). In 1982, the term "maintenance" replaced "alimony." L. 1982, ch. 152, § 24. After amendments in L. 1990, ch. 282, § 11 and L. 1991, ch. 238, § 3, the anti-alienation provision stated that any annuity, benefit, or funds "shall not be subject to execution, garnishment or attachment, or any other process or claim whatsoever, except such annuity or benefit or any accumulated contribution due and owing from the system to such person are subject to decrees for child support or maintenance, or both, as provided in K.S.A. 60-1610 and amendments thereto. . . ." At no time has the anti-alienation clause expressly addressed the effect of a decree for the division of property following dissolution of marriage.

As evidenced in Sedbrook, courts have increasingly acknowledged that retirement benefits are essentially deferred compensation and, when earned during marriage, constitute marital property that may be subject to a decree for division of property. See Sedbrook, 16 Kan.App.2d at 679-80. We find no distinguishing feature in KPERS which would permit us to reach a different conclusion regarding any annuity or benefit earned under KPERS. A spouse of the member of KPERS is a part of the unit the retirement plan is designed to protect. The spouse is not to be treated as a creditor of the member. The spouse is not to be regarded as one of the parties subject to

the anti-alienation provision set forth in K.S.A. 1991 Supp. 74-4923, as amended. Therefore, any annuity or benefit earned pursuant to K.S.A. 74-4901 et seq. may be subject to a decree for the division of property following dissolution of marriage.

Very truly yours,

ROBERT T. STEPHAN
Attorney General of Kansas

Richard D. Smith
Assistant Attorney General

RTS:JLM:RDS:jm

ATTACHMENT 3

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COPY OF SEDBROOK QDRO

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
DOMESTIC DEPARTMENT

IN THE MATTER OF THE MARRIAGE OF LUANNE SEDBROOK, Petitioner, and DELBERT D. SEDBROOK Respondent.	Case No. 89 D 3423

QUALIFIED DOMESTIC RELATIONS ORDER

NOW on this _____ day of _____, 1993, the following Qualified Domestic Relations Order is entered into pursuant to the Journal Entry filed herein on the 23rd day of August, 1993. Petitioner appears in person and by and through her attorney of record, Stephen J. Blaylock. Respondent appears in person and by and through his attorney of record, David J. Lund.

The Court FINDS and ORDERS as follows:

Respondent (plan participant), whose present address is 2324 S. Crestway, Wichita, Sedgwick County, Kansas 67218, and

whose Social Security Number is 442-38-2723, and the Plan Administrator shall make division of benefits inuring to Respondent under the Wichita Police and Fire Pension Fund, to the Petitioner (alternate payee) whose present address is 3026 East Funston, Wichita, Sedgwick County, Kansas 67211, and whose Social Security Number is 515-46-1250 as part of the property division and not as support. Correspondence regarding administration of the plan should be directed to the Plan Administrator, c/o Keith Brown, Pension Management, City of Wichita, City Hall, 12th floor, 455 N. Main, Wichita, Kansas, 67202, phone number (316) 268-4549.

The Alternate Payee must notify the Plan Administrator in writing by certified mail of any change of address.

Payment of benefits shall be made as follows: The Alternate Payee is to receive fifty percent (50%) of the gross benefits, including increases thereon, which have accrued to the participant as of the next payment due the participant after the Plan Administrator receives this Order. Payments shall be made to the Alternate Payee in life annuity form and shall be made in accordance with the terms and provisions of the Plan, including any future increases.

Benefits as set forth herein shall be paid in a manner permitted by the plan, if not by annuity, and by the law, as may be amended from time to time.

This Court shall retain jurisdiction over the payments as set out herein, until such retirement benefits shall have been

fully paid to Petitioner and further shall reserve the right to modify this Order should it be later determined that it is not in compliance with any laws, statutes, or city ordinances.

Petitioner and Respondent shall include all of the taxable portion of said benefits as received by him or her in his or her gross taxable income. Petitioner's benefits when paid, shall not be taxable income or deductible on the Respondent's tax returns. In the event the IRS determines that the benefits are taxable to Respondent when paid to Petitioner, said taxes shall be paid on a pro-rata basis by Petitioner and Respondent.

_____
JUDGE OF THE DISTRICT COURT

APPROVED:

WOODARD, BLAYLOCK, HERNANDEZ,
PILGREEN & ROTH

BY: _____
STEPHEN J. BLAYLOCK
Attorneys for Petitioner
Supreme Court No. 07223

DEWEY & LUND

BY: _____
DAVID J. LUND
Attorneys for Respondent
Supreme Court No. 11618

STEPHEN J. BLAYLOCK

BIOGRAPHY

STEPHEN J. BLAYLOCK is a partner in the Wichita law firm of Woodard, Blaylock, Hernandez, Roth & Day where his practice is in the areas of divorce, pension, estate planning and selected areas of tax. He received his B.A. degree in economics and J.D. degree from the University of Kansas. He is a frequent lecturer for the Kansas Bar Association, Washburn Law School, and other organizations in the area of tax issues, pension plans, and property division as they relate to divorce. He is Co-Author of the "Family Law" Chapter for the Kansas Bar Association Domestic Relations Committee, and presently on the Kansas Bar Association Family Law Executive Committee. Mr. Blaylock is a member of the American Academy of Matrimonial Lawyers and serves as chair of their tax committee. He is listed in the "Best Lawyers in America" under Domestic Law. He recently authored "Retirement Benefits; Tax Ramifications Reviewed and Applied" in the Summer of 1993 edition of the Journal of the American Academy of Matrimonial Lawyers. Steve has been practicing law since June of 1971.

STATE OF KANSAS

BOB TOMLINSON
REPRESENTATIVE 24TH DISTRICT
STATE CAPITOL
TOPEKA, KS 66612-1504
913 296-7640

5722 BIRCH
ROELAND PARK, KS 66205
913 831-1905

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: EDUCATION
LOCAL GOVERNMENT
JOINT COMMITTEE ON PLANNING EDUCATION

February 21, 1994

Testimony before the
SubCommittee on Judiciary
HOUSE BILL 3037

HB3037 is the type of legislation that we should be striving for. It is a common sense solution that benefits the probate courts of this state, the attorneys that practice there and the clients in the probate process.

Rep. Bob Tomlinson

Testimony on House Bill 2868
House Judiciary Committee
February 22, 1994

by J. C. Long, UtiliCorp United

Chairman Carmody and Members of the Committee:

My name is J. C. Long and I appear today on behalf of UtiliCorp United, which has four divisions doing business in Kansas which are: Kansas Public Service, Peoples Natural Gas, Missouri Public Service and WestPlains Energy.

Mr. Chairman, UtiliCorp United applauds Representative Macy's concerns on enforcing delinquent persons in their ordered support of another person. We believe that this bill could and would help locate individuals who should pay the mandated support ordered by the courts or others who have jurisdiction on these matters.

Since we do business in eight other states, we have testified in favor of this concept in these other states. We believe that additional tools are needed to find "dead beat dads" or others who are negligent in their duties.

We support this bill, but have some concerns about the use of this information, the costs that will be incured by a public utility and who can actually make the request for information.

I have a handout which our company suggested to the Nebraska Legislature when they had hearings on this bill. We hope that you would consider these amendments in the final draft of this bill.

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(3) No county attorney, authorized attorney, the Department of Social Services, any of their employees, authorized representatives, or any other person having knowledge of the source of the information required to be provided under subsection (2), shall reveal to any person, including the affected subscriber, the identity of the source of such information, or any information which would enable a person to identify the source of such information. The source of such information shall be considered to be confidential information for all purposes under Nebraska law.

(4) No county attorney, authorized attorney, the Department of Social Services, any of their respective employees, authorized representatives, or any other person having knowledge of such information or source of the information required to be provided under subsection (2), shall use such information for any other purpose other than the purposes stated in subsection (2), or provide such information to any third party for any reason whatsoever.

(5) Provided that a utility shall comply with the provisions of this section, any county requesting the information required to be provided under subsection (2) shall indemnify the providing utility against, and hold it harmless from, any and all claims, judgments, expenses, damages, costs, attorney fees, and other expenditures related to and arising out of the providing of such information to the county (or agency, office, or person under the administration, control, or direction of the county).

(6) Any utility providing information in compliance with subsection (2) shall be entitled to payment of a reasonable fee from the requesting person, office, or agency to recover its costs of providing such information.

HOUSE BILL 2868

House Judiciary Committee
Judiciary Subcommittee #2
February 22, 1994

Testimony of Kay Farley
Coordinator of Children and Family Programs
Office of Judicial Administration

Representative Carmody and members of the subcommittees:

Thank you for the opportunity to appear in support of House Bill 2868.

One of the first steps in the enforcement of a support order is to determine the residence of an obligor for service of process. This is not an easy task. Of particular problem has been the difficulty in obtaining information from public utilities because of confidentiality restrictions.

This bill would authorize public utilities to provide specified information to public offices which are enforcing child support orders within ten days of the request. Kansas law currently places a similar responsibility on employers. Employer information has proven very beneficial, if an employer is known. If an employer is not known, public utilities is the next best local resource for address information.

I urge your favorable consideration of this bill.

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2-24-94

HOUSE BILL 2869

House Judiciary Committee
Judiciary Subcommittee #2
February 22, 1994

Testimony of Kay Farley
Coordinator of Children and Family Programs
Office of Judicial Administration

Representative Carmody and members of the subcommittees:

Thank you for the opportunity to appear in support of House Bill 2869.

Once the residence of a delinquent support obligor is known, the next step in the enforcement process is to determine the income sources and assets of the obligor so that the most appropriate and efficient enforcement tools can be used to obtain support payments for the children. Obtaining information from financial institutions has been a particular problem because of confidentiality restrictions.

This bill would authorize financial institutions to provide specified information to public offices which are enforcing child support orders within ten days of the request. Information regarding bank balances would provide the public office with information that would allow the public office to determine whether a garnishment is appropriate. Information regarding loan applications, line of credit and credit cards would provide leads for tracing assets that would be subject to the child support order.

I urge your favorable consideration of this bill.

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The KANSAS BANKERS ASSOCIATION
A Full Service Banking Association

February 22, 1994

TO: House Subcommittee on Judiciary

FROM: Kathleen A. Taylor
Kansas Bankers Association

RE: HB 2869: Enforcement of support

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to appear before you to discuss **HB 2869**. As you know, this bill would allow any public office to request and it would require any financial institution to provide, customer service information relating to the enforcement of an order for support.

Our members have raised some concerns about this bill as it relates to the confidentiality of the information provided. There are also concerns about the potential liability for releasing information that may prove to be inaccurate or that may be in violation of federal law.

Currently, all banks are subject to a federal law known as the Right to Financial Privacy Act (12 USC 3401, et. seq.) This law is designed to protect the rights of financial institution customers to a reasonable amount of privacy from federal government scrutiny. As an Act that is designed to protect the bank customer's expectation of confidentiality, it directs financial institutions **not** to release customer's records to governmental officials except in response to some form of written customer authorization or written legal demand. This demand may be in the form of an administrative summons or subpoena, a judicial subpoena, a search warrant, or a formal written administrative request. Any disclosures must be made pursuant to specified procedures.

Congress, by requiring a written legal demand, has recognized that it is the agency's responsibility to assert that they are seeking information about the right person, and from an entity they believe has the information being sought.

Our concern with this bill, even though it contains a requirement that the public entity has reasonable cause to believe the named person has funds on deposit, is that it will be used as a tool for searching for available funds. This is the problem that has developed with garnishments. For while the garnishment statute also contains language that the garnishing creditor must have a good faith belief that there are assets of the judgment debtor in the institution, some garnishing creditors use these as a way of seeking out available funds for garnishment, and so they "blanket" garnish every institution in the area. For the institution, this translates into many hours spent by employees of the institution, answering these requests (for which there are no accounts in the institution) - hours which could be spent conducting the business of banking.

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Office of Executive Vice President
Eighth and Jackson • Top

In addition, the request that is required by this proposed statute does not meet the standards required by the federal law. According to federal law, a governmental official must first, by personal service or by mail, notify both the person whose records are sought and the financial institution holding the records that the subpoena or other demand has been issued. A statutory waiting period is then required, to give time for the individual to challenge the access to bank records. It is only after this statutory waiting period has expired and the customer has not instituted a court challenge - and if the governmental official has given the financial institution the required certification that the government has complied with the Act's procedures, that the financial institution may disclose the information in the individual's files to the official.

We believe that absent these or similar procedures, there is a chance that a bank which complies with the state law, may subject itself to penalties under the federal law for failure to comply with the necessary safeguards presented there, before handing over the customer's confidential financial information.

The penalty for disclosing a customer's records in violation of the federal law may result in a fine of $100.00, plus actual damages sustained by the customer as a result of the disclosure, and any punitive damages, if the violation is found to have been "willful or intentional". Injunctive relief to require that the Act be followed is also available. Costs and reasonable attorney fees may be assessed in successful actions for these civil penalties or for injunctive relief.

The federal law also provides that, in certain cases, the financial institution may then obtain governmental reimbursement for the reasonable costs of record production. It seems reasonable that the institution providing this information should recover at least some of the cost involved. If the governmental authority was unable to bear the cost itself, an option may be to set up a system that mirrors a financial institution's ability to "set-off" under the Uniform Commercial Code. In other words, before the funds were sent to the governmental authority, the institution would be allowed to recoup its costs of compliance from the funds, then send the remaining balance to the government.

In summary, it is difficult to argue with the policy presented here and that is to help the system collect court ordered support. However, our industry is very uncomfortable with the lack of safeguards presented in this bill, especially considering the confidentiality of the information being requested.

HOUSE JUDICIARY COMMITTEE

SUBCOMMITTEE NO. 2 FEBRUARY 22, 1994

HB 2869: INFORMATION FROM FINANCIAL INSTITUTIONS

TESTIMONY OF ANNE MCDONALD, COURT TRUSTEE, 29TH JUDICIAL DISTRICT

HB 2869 authorizes financial institutions to respond to respond to requests for specific information presented to them by child support enforcement agencies. The information may be used only by the agency in carrying out its mandated duties and the utility will not be liable for providing the information. The information requested all relates to accounts and loan applications, items are necessary to identify assets of the absent parent and which would be a part of any debtor examination. This procedure is very similar to the one authorized in 1985 as part of the Income Withholding law, codified at K.S.A. 23-4,108 (a).

Being able to obtain employer information via the letter allowed by that statute has been extremely helpful. I am sure this additional source of information will also be very beneficial, for two primary reasons. First, it will probably be current and provide information upon which the enforcement agency can act quickly. Many of the more difficult cases involve an absent parent who works for cash or quits when an Income Withholding Order is sent to the employer. But if the assets of these parents could be located through the financial institution, they could be served with subpoena or attachment documents. And subsection (c) states

that the institution shall not disclose the release of the information so the absent parent won't be warned ahead of time and as able to dodge service. This is the second reason this source of information is particularly valuable.

The bill also clearly states that no such request [for information] is to be made unless there is reasonable cause to believe the named person has an account. Thus the agency cannot go on a mere fishing expedition which would cause added work for the financial institution. The request for information form sent to employers has been in existence for almost ten years now and become an accepted part of business. I am confident that the information request form authorized by this bill will follow the same track and urge you to recommend HB 2868 favorably.

Respectfully submitted,

Anne McDonald, Court Trustee
Wyandotte County Courthouse
710 No. 7th St.
Kansas City, Kansas 66101
(913) 573-2992 FAX: 573-2969

HOUSE BILL 2869

House Judiciary Committee
Judiciary Subcommittee #2
February 22, 1994

Testimony of Kay Farley
Coordinator of Children and Family Programs
Office of Judicial Administration

Representative Carmody and members of the subcommittees:

Thank you for the opportunity to appear in support of House Bill 2869.

Once the residence of a delinquent support obligor is known, the next step in the enforcement process is to determine the income sources and assets of the obligor so that the most appropriate and efficient enforcement tools can be used to obtain support payments for the children. Obtaining information from financial institutions has been a particular problem because of confidentiality restrictions.

This bill would authorize financial institutions to provide specified information to public offices which are enforcing child support orders within ten days of the request. Information regarding bank balances would provide the public office with information that would allow the public office to determine whether a garnishment is appropriate. Information regarding loan applications, line of credit and credit cards would provide leads for tracing assets that would be subject to the child support order.

I urge your favorable consideration of this bill.

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HB 2871
House Judiciary Subcommittee
February 22, 1994

Testimony of Gary Jarchow
Court Trustee, 18th Judicial District of Kansas

Representative Carmody and members of the subcommittee:

Thank you for the opportunity to appear before you to discuss the proposed amendment to K.S.A. 40-218.

K.S.A. 44-514 was amended last year to authorize courts to order involuntary assignments of workers compensation for current and past due support. Court Trustees across the state have started to obtain many ivoluntary assignment orders, usually to collect current or past due child support. In Sedgwick County alone we have obtained at least twenty orders.

K.S.A. 40-218 authorizes service of process on the commissioner of insurance of any action or garnishment proceeding against an insurance company. It also authorizes the commissioner to charge a $25 fee for service of process.

The Insurance Commissioner will not accept involuntary assignment orders or garnishments from Court Trustees unless accompanied by the $25 fee. The proposed amendment would provide for a waiver of the fee for public officers responsible for support enforcement.

The key words are **public office** and **enforcement of support.** Public policy should exempt court orders secured by public officials to enforce collection of court-ordered support from the fee requirement. Public offices should be exempt from paying the fee, just as we are exempt from payment of docket fees and court costs under K.S.A. 60-2005. And it would impose an additional burden on support obligees if the requirement to pay the fee were passed on to them.

Thank you for your consideration of this matter.

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HOUSE BILL 2871

House Judiciary Committee
Judiciary Subcommittee #2
February 22, 1994

Testimony of Kay Farley
Coordinator of Children and Family Programs
Office of Judicial Administration

Representative Carmody and members of the subcommittees:

Thank you for the opportunity to appear in support of House Bill 2871.

Over the last year, court trustee programs have been experiencing a problem in that the Kansas Insurance Department has begun requiring a $25 service of process fee before the Department will serve an income withholding order or garnishment on an insurance company. This has resulted in delay in the processing of these orders and garnishments.

The majority of these orders and garnishments have been IV-D related cases and SRS has been requested to provide the $25 fee. It seems inappropriate for one state agency to pay a processing fee to another state agency. As such, we would like to see an exception made to the $25 service of process fee for public offices enforcing support orders.

I urge your favorable consideration of this bill.

STATE OF KANSAS

ELAINE L. WELLS
REPRESENTATIVE, FIFTY-NINTH DISTRICT
OSAGE AND NORTH LYON COUNTIES
R.R. 1, BOX 166
CARBONDALE, KANSAS 66414
(913) 665-7740

STATE CAPITOL
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TOPEKA, KS 66612-1504
(913) 296-7637

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE-CHAIR: GOVERNMENT ORGANIZATION AND ELECTIONS
MEMBER: PUBLIC HEALTH AND WELFARE
JUDICIARY

TESTIMONY ON H.B. 2903

LICENSE PLATES FOR DUI OFFENDERS

Thank you Mr. Chairman for the hearing on this bill, and for my opportunity to testify on it.

This proposed legislation has been law in the state of Iowa for two years. It is an attempt to let the public, police officers and the highway patrol know who may be driving a vehicle under the influence of alcohol.

H.B. 2903 requires that on the third or subsequent conviction of a DUI offense, the offender will be required to surrender all license plates registered or owned by the offender. The person convicted may then apply to the director of vehicles for a new license plate which must bear a special series of letters and number so as to be readily identified by law enforcement officers. When a vehicle has such a plate, an officer can stop the vehicle at any time. If a person operates a vehicle on a street or highway at a time when a court has ordered the surrender of the license plate, that person will be guilty of a nonperson class C misdemeanor.

With the "mark" of being a DUI offender, it is also an attempt to deter such offenses.

In searching for proposals such as this, other states have addressed similar proposals. Florida allows a judge to order a DUI offender to have a bumper sticker indicating the offense. According to an article in a government magazine, these actions have worked to limit the number of drunk drivers on our highways.

Costs of the program proposed in this bill are covered by the offender with a fee for a new plate.

The main problem experienced in Iowa is the time lapse between the arrest of the third offense and the conviction. We may chose to address this with suggestions by MADD or other solutions such as requiring the surrender of the license plate on the third arrest rather than the third conviction. Another possible suggestion made by a District Court Judge is to issue a new driver's license after

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the first or second offense indicating the DUI conviction or diversion.

It is not my intent to establish an administrative nightmare. It is my intent to address the problem of drunk driving. If we can identify those offenders to let the public and the police know who they are we will all benefit.

Again thank you and I would be happy to respond to questions.

STATE OF KANSAS

Betty McBride, Director
Robert B. Docking State Office Building
915 S.W. Harrison St.
Topeka, Kansas 66626-0001

(913) 296-3601
FAX (913) 296-3852

Department of Revenue
Division of Vehicles

To: The Honorable Michael O'Neal, Chairman
House Judiciary Subcommittee

From: Rick Scheibe, Vehicle Services Administrator
Division of Vehicles, Kansas Department of Revenue

Date: February 21, 1994

Re: House Bill 2903

Mr. Chairman, Members of the Committee,

My name is Rick Scheibe. I am appearing before you today on behalf of Betty McBride, Director of the Division of Vehicles, and the Kansas Department of Revenue regarding House Bill 2903.

This bill allows the Division of Vehicles to issue a license plate with a special series of letters and numbers to persons convicted of a third and subsequent violation of K.S.A. 8-1567.

Upon the third and subsequent conviction, the court would have the authority to suspend the convicted person's vehicle registration and license plate, and the registration and license plates of any vehicle registered jointly with a spouse or owned or leased jointly with a spouse, and require the registration receipts and license plates returned to the county treasurer. We take exception with this stipulation because county treasurers do not have the capability or authority to revoke a person's registration. This action can only be carried out at the state level. It is also our requirement that the license tag must accompany the registration for revocation purposes.

If the convicted person has a restricted driver's license or a member of their family has a valid driver's license, the person may apply for a special license plate.

Implementation of this bill would pose several problems for the Division. The most difficult problem to overcome is allowing the transfer of ownership of a vehicle owned by the convicted person. The requirement that the Division determine that the sale of a vehicle is in good faith, and not for the intent of circumventing this act, would be extremely difficult to enforce. First, section (3) (c) allows the court 10 days to notify the Division of any orders issued pursuant to

subsection (a). This is ample time for a convicted person to transfer ownership of their vehicle to someone else. And once the application for a title is processed, a new title can be issued in as little as three to five days. In fact, a new title could be issued before we received the notice from the court.

Our registration records are keyed to the owner's name, therefore it is impossible to monitor, with 100% accuracy, all of the possible vehicle transactions which could occur. For example, if the convicted person drops a middle initial, shortens a name from Michael to Mike, adds or deletes a Jr. or Sr., or transfer their vehicle to an adopted child or stepchild with a last name different from their own, we wouldn't be able to distinguish between an attempt to bypass the law or a valid vehicle sale to a perfect stranger. Another scenario could be the transfer by sale of their vehicle to a married daughter or transferring the vehicle to a divorced daughter who retained her married name. These are only a few of the many ways a convicted person may circumvent this law, and it would be virtually impossible for the division to prevent any of these scenarios from occurring.

There is great concern on the part of the Division that since the responsibility for identifying a legitimate transfer of ownership versus an attempt to circumvent the law lies with the Director of Vehicles, it appears that the Division would bear the legal ramifications of that decision.

Thank you for allowing me the opportunity to present my testimony. I would stand for your questions.

MADD™

Mothers Against Drunk Driving

3601 SW 29th Street • Topeka, KS 66614 • (913) 271-7525 • 1 (800) 228-6233
KANSAS STATE OFFICE

February 17, 1994

Chairman Michael R. O'Neal
House Judiciary Committee
Room 426-S
State Capitol
Topeka, KS 66612

Dear Chairman O'Neal and Committee Members:

At the request of Representative Elaine Wells and sponsors of HB 2903, MADD provided information regarding license plate confiscation including provisions for replacement of confiscated plates with specially designed plates pertaining to vehicles of third time DUI offenders. House Bill 2903 appears to be patterned after Iowa's law, which has been in effect for approximately two years. MADD supports the concept of license plate confiscation; however, elements of HB 2903 should be addressed.

HB 2903 addressing license plate confiscation contains a provision for the issuance of a special license plate to a third time offender providing the offender has a restricted driver's license. MADD does not support the issuance of a restricted driver's license to a third time offender under any circumstances in lieu of hard driver's license suspension.

Iowa's program has encountered problems due largely to time lapses involved with both the criminal and administrative procedures. In both the Iowa law and HB 2903, the convicting court is given the responsibility for confiscating the license plate while the Division of Motor Vehicles has been given the administrative authority to issue special plates based on established criteria. In Iowa, as in Kansas, the administrative procedure often takes place prior to the criminal procedures, and in both instances, disposition of the offender may take 20-30 days. Consequently, in Iowa offenders are selling their vehicles or transferring titles prior to criminal or administrative sanctions.

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In order for license plate confiscation to be successful, it appears some administrative measure is required at the time of violation which would prevent the sale or transfer of the vehicle title by the offender. Perhaps some form of action related to the administrative per se law, i.e., confiscation of registration subject to immediate administrative procedure could be implemented. As in the case of license suspension, issuance of a temporary registration subject to restricting the sale of the vehicle or transfer or registration be applied.

Unless this issue is addressed, it is doubtful such a law could be successful.

Sincerely,

Carol Lierz

Carol Lierz
State Chairperson
Kansas MADD

Session of 1994

HOUSE BILL No. 2893

By Representative Nichols
(By Request)

2-4

AN ACT concerning criminal procedure; relating to inquisitions; amending K.S.A. 22-3101 ~~, 22-3102 and 22-3103~~ and repealing the existing section~~s~~.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 22-3101 is hereby amended to read as follows: 22-3101. (1) If the attorney general, an assistant attorney general, ~~or~~ the county attorney~~, an assistant county attorney,~~ *the district attorney* ~~or an assistant district attorney~~ of any county is informed or has knowledge of any alleged violation of the laws of Kansas, such person may apply to a district judge to conduct an inquisition. An application for an inquisition shall be in writing, verified under oath, setting forth the alleged violation of law. Upon the filing of the application, the judge with whom it is filed ~~shall~~, on the written praecipe of ~~the attorney general, assistant attorney general or county~~ *such* attorney, *shall* issue a subpoena for the witnesses named in such praecipe commanding them to appear and testify concerning the matters under investigation. Such subpoenas shall be served and returned as subpoenas for witnesses in criminal cases in the district court.

(2) If ~~the~~ ~~*such*~~ attorney ~~general, assistant attorney general or county attorney of any county~~ is informed or has knowledge of any alleged violation ~~of~~ *in* this state pertaining to gambling, intoxicating liquors, criminal syndicalism, racketeering, bribery, tampering with a sports contest, narcotic or dangerous drugs or any violation of any law where the accused is a fugitive from justice, ~~he or she~~ *such attorney* shall be authorized to issue subpoenas for such persons as ~~he or she shall have~~ *such attorney has* any reason to believe ~~have~~ *or has* any information relating thereto or knowledge thereof, to appear before ~~him or her~~ *such attorney* at a time and place to be designated in the subpoena and testify concerning any such violation. For such purposes, any prosecuting attorney shall be authorized to administer oaths.

(3) Each witness shall be sworn to make true answers to all questions propounded to ~~him or her~~ *such witness* touching the

or

the

general, assistant attorney general, county attorney or district attorney, or in the absence of the county or district attorney a designated assistant county or district attorney,

If an assistant county or district attorney is designated by the county or district attorney for the purposes of this subsection, such designation shall be filed with the administrative judge of such judicial district.

matters under investigation. The testimony of each witness shall be reduced to writing and signed by the witness. Any person who disobeys a subpoena issued for such appearance or refuses to be sworn as a witness or answer any proper question propounded during the inquisition, may be adjudged in contempt of court and punished by fine and imprisonment.

~~Sec. 2. K.S.A. 22-3102 is hereby amended to read as follows:~~ 22-3102. No person called as a witness at an inquisition shall be required to make any statement which will incriminate ~~him~~ *such person*. The attorney general, assistant attorney general ~~or~~, county attorney ~~may~~, *assistant county attorney, district attorney or assistant district attorney*, on behalf of the state, *may* grant any person called as a witness at an inquisition immunity from prosecution or punishment on account of any transaction or matter about which such person shall be compelled to testify ~~and~~. Such testimony shall not be used against such person in any prosecution for a crime under the laws of Kansas or any municipal ordinance. After being granted immunity from prosecution or punishment, as herein provided, no person shall be excused from testifying on the ground that ~~his~~ *such person's* testimony may incriminate ~~him~~ *such person*.

Sec. 3. K.S.A. 22-3103 is hereby amended to read as follows: 22-3103. If the testimony taken at an inquisition discloses probable cause to believe that a crime has been committed within the county, the attorney general, assistant attorney general ~~or~~, county attorney, *assistant county attorney, district attorney or assistant district attorney* may file such testimony, together with ~~his~~ *such attorney's* complaint or information, verified on information and belief, against the person or persons alleged to have committed the crime. The complaint and the testimony filed therewith shall have the same effect as if the complaint or information had been verified positively and a warrant shall thereupon be issued for the arrest of such person ~~or persons as in other criminal cases.~~

Sec. 4. K.S.A. 22-3101 ~~, 22-3102 and 22-3103 are~~ hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.

Renumber the sections accordingly

is

26-2

STATE OF KANSAS

JUDITH K. MACY
REPRESENTATIVE, FORTY-THIRD DISTRICT
JOHNSON COUNTY
P.O. BOX 572
DESOTO, KANSAS 66018

STATE CAPITOL BLDG.
ROOM 272-W
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
RANKING MINORITY: GOVERNMENTAL ORGANIZATION & ELECTIONS
MEMBER: JUDICIARY
LOCAL GOVERNMENT
JOINT COMMITTEE ON CHILDREN & FAMILIES

TESTIMONY ON HB 2870
HOUSE JUDICIARY COMMITTEE
February 21, 1994

Mr. Chairman and Members of the Committee:

I want to thank you for holding a hearing on HB 2870 and I appreciate the opportunity to be allowed to present testimony on this bill.

Under current law, convicted felons may have legal access to weapons so long as they do not fall within the exceptions available in these statutes.

For example, a convicted felon may be charged under the aggravated weapons violation (K.S.A. 21-4202) only if that prior conviction was within the preceding 5 years. A felony conviction that was greater than 5 years prior does not create an "aggravated" violation.

Under K.S.A. 21-4203, persons are prohibited from selling, giving or transferring firearms to convicted felons only if the prior conviction was within the last 5 years under certain circumstances and 10 years under other circumstances.

I have attached a balloon to this testimony that was inadvertently left out of the bill when it was drafted. Under current law (K.S.A. 21-4204) convicted felons may posses firearms after waiting 5 years after certain convictions and 10 years after receiving other convictions. The balloon prohibits persons convicted of "person felonies" from possessing firearms.

The amendments to these Statutes and the ballon will prohibit persons convicted of a "person" felony from being allowed these

House Judiciary
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exceptions from prosecution. The bill, as amended, would not affect juveniles or persons convicted of "property" crimes. Additionally, there is a provision that if the conviction of the felony has been expunged or if the person has been pardoned, this amendment would not apply.

It is my understanding that Federal law prohibits persons convicted of a felony from possessing firearms and that the Kansas law has created some difficulty with Federal prosecutors.

We passed a version of this bill last year on a vote of 121/1 out of the House. I have more narrowly drawn this bill so that it would not apply to juveniles and will not apply to drug crimes. Apparently these were 2 areas of concern in Senate Judiciary last year. Obviously, this is a policy decision for each of us. It is my feeling that convicted felons should not be permitted free access to firearms. I hope that you will make the same decision and report this bill favorably.

Thank you.

Judith K. Macy
State Representative
43rd District

HB 2870

TOC
Chas Simmons

SUBJECT

Criminal possession of firearms.

SUMMARY

This proposal would amend K.S.A. 1993 Supp. 21-4204 by making it unlawful for an individual who has been convicted of a felony committed while in the possession of a firearm from possessing any type of firearm in the future. For those individuals who were not in the possession of a firearm at the time of commission of a felony for which they were convicted, the prohibition on the possession of any type of firearm would be ten years if the conviction involved those crimes specified in K.S.A. 1993 Supp. 21-4204(b). If the conviction did not involve those crimes, the prohibition would be five years.

POLICY IMPLICATIONS/BACKGROUND

Current law makes it unlawful for an individual who has been convicted of crimes specified in K.S.A. 1993 Supp. 21-4204(b), * from possessing any firearm for a period of ten years after conviction or release from incarceration. However, for those convicted of crimes not listed in (b), the restriction now applies only to firearms with a barrel less than 12 inches long for a period of five years after conviction or release from incarceration. This proposal would establish a lifetime prohibition on the possession of firearms by individuals who were in the possession of a firearm at the time they committed a felony offense. The prohibition would be for a ten year period for all firearms if the felony conviction was for one of the crimes specified in subsection (b) but the individual was not in possession of a firearm at the time the crime was committed. For crimes not specified in subsection (b), the prohibition would be for a 5 year period for all firearms. Current parole conditions prohibit parolees from possessing a firearm while on parole. However, unless the firearm is less than 12 inches long or the parolee has been convicted of certain offenses, possession is not unlawful. As a result, enforcement of the condition has not always been possible since parole officers are sometimes not informed by law enforcement agencies that a parolee was found to be in possession of a rifle or shotgun.

FISCAL IMPACT

Due to the large number of offenders to which these provisions could apply, considerable additional felony prosecutions could occur. It is not possible at this time, however, to estimate how many convictions and commitments may result.

IMPACT ON OTHER STATE AGENCIES

Law enforcement agencies, prosecutors, and courts will likely be impacted as a result of this proposal. It is not possible at this time to estimate the extent of that impact.

21-3401-Murder in 1st degree
21-3402-Murder in 2nd degree
21-3403-Voluntary manslaughter
21-3404-Involuntary manslaughter
21-3411-Aggravated assault on a law enforcement officer
21-3414-Aggravated battery
21-3415-Aggravated battery against a law enforcement officer
21-3419-Criminal threat
21-3420-Kidnapping
21-3421-Aggravated kidnapping
21-3427-Aggravated robbery
21-3502-Rape
21-3506-Aggravated criminal sodomy
21-3518-Aggravated sexual battery
21-3716-Aggravated burglary
65-4127a-Controlled substances
65-4127b-Controlled substances violations

DEPARTMENT OF CORRECTIONS
STATE OF KANSAS

LEGISLATIVE PROPOSAL NO. _____

☐ "CLEAN-UP"

☐ "SUBSTANTIVE"

DRAFT NO.	DATE

Introduce Through _____

APPROVED BY GOVERNOR ☐ Yes ☐ No

Notes and comments:

DOC PERSONNEL TO FOLLOW UP:

An Act Concerning:

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

Sec. 1. That K.S.A. 1993 Supp. 21-4204 be amended to read as follows: 21-4204. (a) Criminal possession of a firearm is:

(1) Possession of any firearm by a person who is both addicted to and an unlawful user of a controlled substance;

(2) Possession of any firearm by a person who has been convicted of a felony under the laws of Kansas or any jurisdiction, or was adjudicated a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony,

and was found to have been in possession of a firearm at the time of commission of the offense.

~~(2)~~(3) possession of ~~a~~ any firearm ~~with a barrel less than 12 inches long~~ by a person who within five years preceding such violation has been convicted of a felony, other than those specified in subsection (b), under the laws of Kansas or any other jurisdiction, has been released from imprisonment for a felony or was adjudicated a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony, and was found not to have been in the possession of a firearm at the time of commission of the offense.

~~(3)~~(4) possession of any firearm by any person who, within the preceding 10 years has ben convicted of a ~~crime~~ *felony* to which this subsection applies; but was not found to have been in the possession of a firearm at the time of commission of the offense; or has been released from imprisonment for such a crime, or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony and has not had the conviction of such crime expunged or been pardoned for such crime;

~~(4)~~(5) possession of any firearm by any person, other than a law enforcement officer, in or on any school property or grounds upon which is located a building or structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades 1 though 12 or at any regularly scheduled school sponsored activity or event; or

~~(5)~~(6) refusal to surrender or immediately remove from school property or grounds or at any regularly scheduled school sponsored activity or event any firearm in the possession of any person, other than a law enforcement officer, when so requested or directed by any duly authorized school employee or any law enforcement officer.

(b) Subsection (a)~~(3)~~(4) shall apply to a felony under K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a or 65-4227b, and amendments thereto, or a crime under a law of another jurisdiction which is substantially the same as such felony.

(c) Subsection (a)~~(4)~~(5) shall not apply to:

(1) Possession of any firearm in connection with a firearms safety course of instruction or firearms education course approved and authorized by the school;

(2) any possession of any firearm specifically authorized in writing by the superintendent of any unified school district or the chief administrator of any accredited nonpublic school;

(3) possession of a firearm secured in a motor vehicle by a parent, guardian, custodian or someone authorized to act in such person's behalf who is delivering or collecting a student; or

(4) possession of a firearm secured in a motor vehicle by a registered voter who is on the school grounds, which contain a polling place for the purpose of voting during polling hours on an election day.

(d) Violation of subsection (a)(1) or (a)~~(4)~~(5) is a class B nonperson select misdemeanor; violation of subsection (a)(2), (a)(3) or (a)(3) is a severity level 8, nonperson felony; violation of subsection (a)~~(5)~~ (6) is a class A nonperson misdemeanor.

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

28-5

Subcommittee #1 Report
Be passed as amended
2-23-94

House Judiciary
Attachment 29
2-24-94

Session of 1994

HOUSE BILL No. 2870

By Representatives Macy, Dean, Dillon, Gross, Hochhauser, Reardon, Sader, Sawyer, Weinhold and J. Wells

2-4

AN ACT concerning crimes and punishment; relating to weapons; relating to seizure thereof; amending K.S.A. 1993 Supp. 21-4202 and 21-4203 , 21-4204 and 21-4206 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1993 Supp. 21-4202 is hereby amended to read as follows: 21-4202. *(a)* An aggravated weapons violation is a violation of any of the provisions of K.S.A. 21-4201 and amendments thereto by a person who: *(1)* Within five years preceding such violation has been convicted of a *nonperson* felony under the laws of Kansas or any other jurisdiction or has been released from imprisonment for ~~a~~ *such nonperson* felony; *or*

(2) has been convicted of a person felony pursuant to the Kansas laws or in any other jurisdiction which is substantially the same as such crime or has been released from imprisonment for such crime, and has not had the conviction of such crime expunged or been pardoned for such crime.

(b) Aggravated weapons violation is a severity level 9, nonperson felony for a violation of subsections (a)(1) through (a)(5) or subsection (a)(9) of K.S.A. 21-4201 and amendments thereto. Aggravated weapons violation is a severity level 8, nonperson felony for a violation of subsections (a)(6), (a)(7) and (a)(8) of K.S.A. 21-4201 and amendments thereto.

Sec. 2. K.S.A. 1993 Supp. 21-4203 is hereby amended to read as follows: 21-4203. (a) Criminal disposal of firearms is knowingly:

(1) Selling, giving or otherwise transferring any firearm with a barrel less than 12 inches long to any person under 18 years of age;

(2) selling, giving or otherwise transferring any firearms to any person who is both addicted to and an unlawful user of a controlled substance;

(3) selling, giving or otherwise transferring any firearm ~~with a barrel less than 12 inches long~~ to any person who, within the preceding five years, has been convicted of a felony under the laws of this or any other jurisdiction or has been released from imprisonment for a felony; ~~or~~

, other than those specified in subsection (b),

and was found not to have been in possession of a firearm at the time of the commission of the offense

H 29

(4) selling, giving or otherwise transferring any firearm to any person who~~, within the preceding 10 years,~~ has been convicted of a ~~crime to which this subsection applies~~ *~~person felony under the laws of this or any other jurisdiction which is substantially the same as such crime~~* or has been released from imprisonment for such a crime, and has not had the conviction of such crime expunged or been pardoned for such crime~~.~~

, within the preceding 10 years, felony to which this subsection applies, but was not found to have been in the possession of a firearm at the time of the commission of the offense

; or

(5) selling, giving or otherwise transferring any firearm to any person who has been convicted of a felony under the laws of this or any other jurisdiction and was found to have been in possession of a firearm at the time of the commission of the offense

~~(b) Subsection (a)(4) shall apply to a felony under K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a or 65-4127b, and amendments thereto, or a crime under a law of another jurisdiction which is substantially the same as such felony.~~

reinsert

~~(c)~~ (b) Criminal disposal of firearms is a class A nonperson misdemeanor.

(c)

Sec. 3. K.S.A. 1993 Supp. 21-4202 ~~and~~ 21-4203 are hereby repealed.

Insert Sec. 3, 4 and 5, see attached

, 21-4204 and 21-4206

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

22-2512 and K.S.A.

Sec. 3. K.S.A. 1993 Supp. 21-4204 is hereby amended to read as follows: 21-4204. (a) Criminal possession of a firearm is:

(1) Possession of any firearm by a person who is both addicted to and an unlawful user of a controlled substance;

(2) possession of any firearm by a person who has been convicted of a felony under the laws of Kansas or any other jurisdiction, or was adjudicated a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony, and was found to have been in possession of a firearm at the time of the commission of the offense;

(3) possession of ~~a~~ any firearm ~~with a barrel less than 12 inches long~~ by a person who, within five years preceding such violation has been convicted of a felony, other than those specified in subsection (b), under the laws of Kansas or any other jurisdiction, has been released from imprisonment for a felony or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony, and was found not to have been in possession of a firearm at the time of the commission of the offense;

~~(3)~~ (4) possession of any firearm by any person who, within the preceding 10 years, has been convicted of a ~~crime~~ felony to which this subsection applies, but was not found to have been in the possession of a firearm at the time of the commission of the offense, or has been released from imprisonment for such a crime, or was adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony, and has not had the conviction of such crime expunged or been pardoned for such crime;

~~(4)~~ (5) possession of any firearm by any person, other than a law enforcement officer, in or on any school property or grounds upon which is located a building or structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades 1 through 12 or at any regularly scheduled school sponsored activity or event; or

~~(5)~~ (6) refusal to surrender or immediately remove from school property or grounds or at any regularly scheduled school sponsored activity or event any firearm in the possession of any person, other than a law enforcement officer, when so requested or directed by any duly authorized school employee or any law enforcement officer.

(b) Subsection ~~(a)(3)~~ (a)(4) shall apply to a felony under K.S.A. 21-3401, 21-3402, 21-3403, 21-3404, 21-3410, 21-3411, 21-3414, 21-3415, 21-3419, 21-3420, 21-3421, 21-3427, 21-3502, 21-3506, 21-3518, 21-3716, 65-4127a or 65-4127b, and amendments thereto, or a crime under a law of another jurisdiction which is substantially the same as such felony.

(c) Subsection ~~(a)(4)~~ (a)(5) shall not apply to:

(1) Possession of any firearm in connection with a firearms safety course of instruction or firearms education course approved and authorized by the school;

(2) any possession of any firearm specifically authorized in writing by the superintendent of any unified school district or the chief administrator of any accredited nonpublic school;

(3) possession of a firearm secured in a motor vehicle by a parent, guardian, custodian or someone authorized to act in such person's behalf who is delivering or collecting a student; or

(4) possession of a firearm secured in a motor vehicle by a registered voter who is on the school grounds, which contain a polling place for the purpose of voting during polling hours on an election day.

(d) Violation of subsection (a)(1) or ~~(a)(4)~~ (a)(5) is a class B nonperson select misdemeanor; violation of subsection (a)(2) ~~or~~, (a)(3) or (a)(4) is a severity level 8, nonperson felony; violation of subsection ~~(a)(5)~~ (a)(6) is a class A nonperson misdemeanor.

Sec. 4. K.S.A. 1993 Supp. 21-4206 is hereby amended to read as follows: 21-4206. (1) Upon conviction of a violation of K.S.A. 1993 Supp. 21-4219, K.S.A. 21-4201, 21-4202 or 21-4204, and amendments thereto, any weapon seized in connection therewith shall remain in the custody of the trial court.

(2) Any stolen weapon so seized and detained, when no longer needed for evidentiary purposes, shall be returned to the person entitled to possession, if known. All other confiscated weapons when no longer needed for evidentiary purposes, shall in the discretion of the trial court, be destroyed, ~~preserved as county property or~~ forfeited to the law enforcement agency seizing the weapon~~. All weapons forfeited to any law enforcement agency may be donated to the department of wildlife and parks~~ for use within such agency or to the Kansas bureau of investigation for law enforcement, testing, comparison or destruction by the Kansas bureau of investigation forensic laboratory.

Sec. 5. K.S.A. 22-2512 is hereby amended to read as follows: 22-2512. (1) Property seized under a search warrant or validly seized without a warrant shall be safely kept by the officer seizing the same unless otherwise directed by the magistrate, and shall be so kept as long as necessary for the purpose of being produced as evidence on any trial. The property seized may not be taken from the officer having it in custody so long as it is or may be required as evidence in any trial. The officer seizing the property shall give a receipt to the person detained or arrested particularly describing each article of property being held and shall file a copy of such receipt with the magistrate before whom the person detained or arrested is taken. Where seized property is no longer required as evidence in the prosecution of any indictment or information, the court which has jurisdiction of such property may transfer the same to the jurisdiction of any other court, including courts of another state or federal courts, where it is shown to the satisfaction of the court that such property is required as evidence in any prosecution in such other court.

(2) When property seized is no longer required as evidence, it shall be disposed of as follows:

(a) Property stolen, embezzled, obtained by false pretenses, or otherwise obtained unlawfully from the rightful owner thereof shall be restored to the owner;

(b) money shall be restored to the owner unless it was contained in a slot machine or otherwise used in unlawful gambling or lotteries, in which case it shall be forfeited, and shall be paid to the state treasurer pursuant to K.S.A. 20-2801, and amendments thereto;

(c) property which is unclaimed or the ownership of which is unknown shall be sold at public auction to be held by the sheriff and the proceeds, less the cost of sale and any storage charges incurred in preserving it, shall be paid to the state treasurer pursuant to K.S.A. 20-2801, and amendments thereto;

(d) articles of contraband shall be destroyed, except that any such articles the disposition of which is otherwise provided by law shall be dealt with as so provided and any such articles the disposition of which is not otherwise provided by law and which may be capable of innocent use may in the discretion of the court be sold and the proceeds disposed of as provided in subsection ~~(1)(b)~~ (2)(b);

(e) firearms, ammunition, explosives, bombs and like devices, which have been used in the commission of crime, may be returned to the rightful owner, or in the discretion of the court having jurisdiction of the property, destroyed or ~~sold in the discretion of the court having jurisdiction of the property, and the sale and distribution of the proceeds shall be~~ forfeited to the Kansas bureau of investigation as provided in K.S.A. 21-4206 and amendments thereto;

(f) controlled substances forfeited under the uniform controlled substances act shall be dealt with as provided under K.S.A. 65-4135 and amendments thereto;

(g) unless otherwise provided by law, all other property shall be disposed of in such manner as the court in its sound discretion shall direct.

And by renumbering the remaining sections accordingly;

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ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
KYLE G. SMITH, ASSISTANT ATTORNEY GENERAL
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE #1
IN SUPPORT OF HOUSE BILL 2946
February 21, 1994

Mr. Chairman and Members of the Committee:

On behalf of Attorney General Robert T. Stephan and the Kansas Bureau of Investigation, I am very pleased to be here in support of HB 2946, which deals with the problem of drugs and guns, an issue not unfamiliar with the committee this year.

In 1990 I helped put together a package of legislation that Attorney General Stephan submitted to the governor and legislature dealing with the problems of drugs and crimes. At that time, we recommended adoption of a bill based on federal law which creates a mandatory consecutive five year sentence for individuals in possession of firearms during drug violations.

The atmosphere then was considerably different than now and that bill did not pass. HB 2946 accomplishes much those same goals by automatically boosting a drug violation up one level for a first time offender who is convicted and found in possession or close proximity with access to a firearm. On second violation it is made a severity level 1 felony, and third or subsequent violation creates an offgrid person felony which essentially results in no parole eligibility for 15 years.

As you may be aware, while not at the legislature, I serve on the Kansas Bureau of Investigation Narcotic Strike Force, and can attest to

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the ubiquitous presence of guns any time we raid a drug dealer. While legitimate businessmen operate with insurance through AETNA or Farm Bureau, dealers in drugs tend to insure through Smith and Wesson or Uzi.

The message that HB 2946 sends out strong and clear is that if you are gong to commit drug offenses and have a weapon present, you are buying yourself a much longer sentence. Hopefully, even druggers will be able to understand the opposite message, that if you are going to deal drugs, don't be carrying guns, which will make this a much safer society for all of us.

Thank you for your time and consideration. I would urge passage of HB 2946.

#148

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ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
FLOYD L. BRADLEY, SPECIAL AGENT SUPERVISOR
NARCOTICS DIVISION
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE #1
IN SUPPORT OF HOUSE BILL 2946
February 21, 1994

Mr. Chairman and Members of the Committee:

My name is Flody Bradley and I am here on behalf of the Kansas Peace Officers Association to support HB 2946.

As a Supervisor of the KBI Narcotics Division, I have found that the potential for violence in the drug trade has become a daily problem throughout the state. Drug dealers carry weapons as insurance against drug rip-offs and in some cases against law enforcement. I would venture to say that one-third of the shootings that occur in our state are the results of drug deals that have gone bad.

HB 2946 boosts a drug violation up one level for the first time offender who is convicted and found in possession or close proximity with access to a firearm. A second violation is made a severity level 1 felony, and a third or subsequent violation would result in no parole eligibility for fifteen years.

This would send a message to drug dealers that they will serve longer sentences if they are caught with weapons in their possession.

Thank you for your time and consideration and I would urge the passage of HB 2946. I would be happy to answer any questions.

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State of Kansas
KANSAS SENTENCING COMMISSION

House Bill 2946
House Judiciary Committee
February 21, 1994
Comments of Lisa Moots

I simply want to take the opportunity to identify a few issues regarding this bill to which you might wish to give some consideration.

My first concern is that this bill may encourage an offender who is on his third violation of the section to go ahead and use the firearm that triggers its application to shoot or even kill someone, because the mere proximity or accessibility of the firearm makes the third violation an off-grid offense anyway.

More generally speaking, I just want to remind you that the sentences provided by the drug grid are quite lengthy already, and any increase in the duration of those sentences can be expected to have an impact on prison population at the point in time when the release of these offenders would have been expected. The elevation of the severity level from level 3 to level 2 provided in subsection (e) of the proposed amendments to K.S.A. 65-4127b also removes this offense from the application of the special guidelines rule which allows a judge to exercise the non-departure option not to send the offender to prison in an otherwise presumptive prison case where a relatively small amount of marijuana was involved, the offender does not present a danger to public safety, and placement of the offender in an available treatment program would be a more appropriate disposition than prison; because this special rule applies only to cases falling into grid blocks 3-H and 3-I on the drug grid, the elevation of the severity level to level 2 would render it inapplicable when a firearm is present, meaning even more offenders would be sent to prison in the first place, with longer sentences to serve as well.

STATE OF KANSAS

JANICE L. PAULS
REPRESENTATIVE, DISTRICT 102
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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: JUDICIARY
LABOR AND INDUSTRY
TRANSPORTATION
JOINT SENATE AND HOUSE COMMITTEE ON
ADMINISTRATIVE RULES AND REGULATIONS

Testimony before the

House Judiciary Committee

Regarding

House Bill 2858

by

Representative Janice L. Pauls

District 102

Mr. Chairman and members of the committee, thank you for the opportunity to present this bill to the committee. HB 2858 was introduced at the request of the Reno County Attorney's office, located in Hutchinson. Kevin Fletcher, Assistant Reno County Attorney, will follow me to present testimony.

Basically, HB 2858 raises the following penalties for a conviction of the crime of manufacturing a controlled substance:

	HB 2858	**Present Law**
1st conviction of Manufacturing:	Level 2 (46 to 83 Months)	Level 3 (14 to 51 Months)

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	HB 2858	Present Law
2nd Offense:	Level 1 (138 to 204 Months)	Level 2
3rd Offense:	Level 1 (No change)	Level 1

The sentence under HB 2858, while tougher than the present law, is still lower than the sentencing in effect prior to the Sentencing Guidelines. Prior to Sentencing Guidelines this was a Class B felony, with a minimum sentence of 5 to 15 years and a maximum of 20 years to life.

The bill also adds a provision that elevates any drug manufacturing conviction to a severity Level 1 felony conviction if the manufacturing was done by a person over 18, within 1,000 feet of a school.

Further if the defendant is an unsuccessful chemist in an attempt to manufacture a controlled substance, the defendant may still be convicted under this statute with manufacturing a controlled substance.

Attached please find a copy of the Fiscal Note, which indicates no fiscal impact for this change for at least three years. The cost following that time would be between $4,300 to $5,500 annually if bed space were available. The Department of Corrections provided no actual numbers for an increase of inmates they would project to be added to the system through convictions under this bill.

Thank you for your attention.

Janice L. Pauls

Janice L. Pauls
Representative
District 102

33-2

STATE OF KANSAS

DIVISION OF THE BUDGET
Room 152-E
State Capitol Building
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(913) 296-2436
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Joan Finney
Governor

Gloria M. Timmer
Director

February 17, 1994

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

Dear Representative O'Neal:

SUBJECT: Fiscal Note for HB 2858 by Representative Pauls

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2858 is respectfully submitted to your committee.

HB 2858 would elevate the penalty for the first conviction of manufacturing a controlled substance from a level 3 drug offense to a level 2 drug offense. The bill would elevate the second offense from a level 2 drug offense to a level 1 drug offense. Third and subsequent offenses would remain level 1 drug offenses. The bill also has a provision that would make the penalty for conviction of manufacturing a controlled substance within 1,000 feet of school property a level 1 drug offense. In addition, the bill contains a provision that would make no distinction between a successful or a failed attempt at manufacturing a controlled substance. The bill would take effect upon publication in the statute book.

The Department of Corrections indicates that any fiscal impact resulting from this bill would not be felt for at least three years, and perhaps longer, depending on the admissions pattern for these offenses. According to the Department, if the increase in the inmate population resulting from longer lengths of stay is small and correctional facility capacity is sufficient, any additional costs would be limited to the per capita costs for basic support and health care, the total of which is estimated at $4,300 annually. For those offenders who would participate in programs, the annual cost would increase to $5,500 per offender.

According to the Department, in the event that effects of this bill, in combination with other legislation or changes in law enforcement, prosecution, judicial or parole policies, result in substantial inmate population increases, one-time prison construction and equipment costs would be necessary. In addition, annual costs to staff to operate additional bedspace would be incurred.

Sincerely,

Gloria M. Timmer

Gloria M. Timmer
Director of the Budget

cc: Jan Johnson, DOC
Jackie Cortright, Sentencing Commission

2858.fn

KANSAS BUREAU OF INVESTIGATION

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ROBERT T. STEPHAN
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TESTIMONY
FLOYD L. BRADLEY, SPECIAL AGENT SUPERVISOR
NARCOTICS DIVISION
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY SUBCOMMITTEE #1
IN SUPPORT OF HOUSE BILL 2858
February 21, 1994

Mr. Chairman and Members of the Committee:

My name is Floyd Bradley and I am here on behalf of the Kansas Peace Officers Association to support HB 2858 to reinstate penalties for illegal manufacturing of controlled substances.

Previously, under K.S.A. 65-4159 this crime was considered to be a class B felony with no probation or parole in an effort to keep these very dangerous laboratories out of the State of Kansas. Many states that have had problems with clandestine labs provide for a twenty year mandatory sentence in order to prevent criminals from setting up laboratories in their state.

When the sentencing guidelines was instituted, somehow this crime was reduced down to a level 3 felony for the first offense. This is a considerable reduction from what was originally set. We are urging you to pass HB 2858 in order to bring it into line with the seriousness of the offense.

Thank you for your consideration. I would be happy to answer any questions.

#150

House Judiciary
Attachment 34
2-24-94

COUNTY ATTORNEY
Timothy J. Chambers

ASSISTANT COUNTY ATTORNEYS
Kevin C. Fletcher
Keith E. Schroeder
David B. Kurt - Juvenile

OFFICE OF THE
RENO COUNTY ATTORNEY
The 27th Judicial District of Kansas

Law Enforcement Center
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(316) 694-2715
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Victim-Witness Service
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Diversion Coordinator
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TESTIMONY OF KEVIN C. FLETCHER
FIRST ASSISTANT RENO COUNTY ATTORNEY

before the

HOUSE JUDICIARY COMMITTEE, FEBRUARY 21, 1994
Re: House Bill 2858, K.S.A. 65-4159,
Manufacturing Controlled Substances

K.S.A. 65-4159 has been seriously diminished in its severity by the 1993 Session Laws and the Sentencing Guidelines. K.S.A. 65-4159, prior to 1993, was a Class B Felony for manufacturing or attempting to manufacture. This carried a sentencing range of a minimum of five (5) years to no more than fifteen (15) years and the maximum of not less than twenty (20) years nor more than life. A person convicted under K.S.A. 65-4159 was sent to prison; probation, community corrections, and suspended sentence were not allowed.

The 1993 Session Laws, Chapter 291, Sec. 239, K.S.A. 1993 Supp., 65-4159, makes a first offense of manufacturing a level 3 offense; a second offense, a level 2 offense; and a third or subsequent offense, a Level 1 offense. These offenses are handled on the drug grid. Under the drug grid, a first offense, a level 3 would have a range of 14 months to 51 months. Second offense, 46 months to 83 months, a third or subsequent offense, 138 months to 204 months. The range depends on criminal history. If no prior

record, the only way to get much time, requires the prosecutor to ask for departure.

This is a large decline in time in prison considering that this is such a serious offense. Manufacturing is the making of the illegal drug, not possessing. The making is done only for the intent to sell it. Manufacturing is far more serious than any possession with intent to sell or sale of a drug. The Legislature made it clear in the pre-1993 law under K.S.A. 65-4159, that you were to be treated harshly.

The Legislature still considers K.S.A. 65-4159 a serious enough offense to put it as an aggravating factor for drug grid departures, 1993 Session Laws, Chapter 291, Section 276(1). The Legislature should change the language of K.S.A. 65-1159 to read, "a first offense of manufacturing should be a level 2 offense and a second or subsequent offense a Level 1 offense."

K.S.A. 65-4159 should be modified to include an enhancement for when the location of manufacturing is in or on or within a thousand (1,000) feet of a school zone. This should be a Level 1 offense or increased amount of months in prison above the regular time for the offense when it is not within a thousand (1,000) feet of a school zone. It seems to not be very logical that we enhance the selling or possessing with intent to sell drugs within one thousand (1,000) feet of a school zone, but do not enhance manufacturing, an even more serious offense, within a thousand (1,000) feet of a school zone.

Another correction to K.S.A. 65-4159 is needed. K.S.A. 65-

4159 prior to 1993 included in its definition an attempt to commit the crime. Manufacturing or attempting to manufacture were and are in the 1993 law considered the same crime. Pursuant to 1993 Session Law, Chapter 291, Section 277, attempt to commit manufacturing gives a defendant six months less time in prison than manufacturing. The 1993 law of six months less time for attempt to manufacture should not be applied to K.S.A. 65-4159 due to its peculiar statutory definition.

In conclusion, if the Kansas Legislature wishes to be consistent in its position to be harsh on drug dealers, as is shown by the presumptive prison for drug dealers under the sentencing guidelines, a person manufacturing or attempting to manufacture a drug should be treated more harshly. The reasoning of the Kansas Legislature in enacting K.S.A. 65-4159 was to treat drug manufacturers very seriously. The logic and reasoning of this position is sound. This reasoning must be followed through by amending K.S.A. 65-4159 to keep it that way. Otherwise, it is the same penalty for a criminal to manufacture as it is to sell a drug.

Once a decision has been made by a person to commit the crime of manufacturing a drug, then the consequences commensurate with the crime must follow. Rather than passing laws that say we are tough on drug dealers, let's pass laws that are tough on crime.

Subcommittee #1 Report
Be passed as amended
2-23-94

House Judiciary
Attachment 36
2-24-94

Session of 1994

HOUSE BILL No. 2858

By Representative Pauls

2-4

AN ACT concerning controlled substances; relating to unlawful manufacturing of a controlled substance; amending K.S.A. 1993 Supp. 65-4159 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1993 Supp. 65-4159 is hereby amended to read as follows: 65-4159. [~~(a)~~] Except as authorized by the uniform controlled substances act, it shall be unlawful for any person to manufacture any controlled substance. Any person violating the provisions of this section with respect to the unlawful manufacturing or attempting to unlawfully manufacture any controlled substance, upon conviction, is guilty of a drug severity level 3 2 felony, except that, upon conviction for a second ~~offense, such person shall be guilty of a drug severity level 2 felony, and upon conviction for a third~~ or subsequent offense, such person shall be guilty of a drug severity level 1 felony and the sentence for which shall not be subject to statutory provisions for suspended sentence, community work service, or probation. *The provisions of subsection (d) of K.S.A. 21-3301, and amendments thereto, shall not apply to a violation of attempting to unlawfully manufacture any controlled substance pursuant to this section.*

[~~*(b) Notwithstanding any other provision of law, upon conviction*~~ *of any person for violating subsection (a), such person shall be guilty of a drug severity level 1 felony if such person is 18 or more years of age and the substances involved were manufactured within 1,000 feet of any school property upon which is located a structure used by a unified school district or an accredited nonpublic school for student instruction or attendance or extracurricular activities of pupils enrolled in kindergarten or any of the grades one through 12.*

Nothing in this subsection shall be construed as requiring that school be in session or that classes are actually being held at the time of the offense or that children must be present within the structure or on the property during the time of any alleged criminal act. If the structure or property meets the description above, the actual use of that structure or property at the time alleged shall not ~~*be a defense to the crime charged or the sentence imposed.*~~]

Sec. 2. K.S.A. 1993 Supp. 65-4159 is hereby repealed.

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

36-2

ROBERT B. DAVENPORT
DIRECTOR

KANSAS BUREAU OF INVESTIGATION

DIVISION OF THE OFFICE OF ATTORNEY GENERAL
STATE OF KANSAS
1620 TYLER
TOPEKA, KANSAS 66612-1837
(913) 232-6000

ROBERT T. STEPHAN
ATTORNEY GENERAL

TESTIMONY
EILEEN BURNAU
KANSAS BUREAU OF INVESTIGATION
BEFORE THE HOUSE JUDICIARY COMMITTEE
IN SUPPORT OF HOUSE BILL 3038
February 22, 1994

Mr. Chairman and Members of the Committee:

On behalf of the Kansas Bureau of Investigation, I, Eileen Burnau, Supervisor of the Biology Department of the KBI Forensic Laboratory, am here to testify in support of HB 3038 which addresses two issues:

- Collection of evidence from sexual assault victims.
- Recovery of costs of the sexual assault evidence kit and examinations of sexual assault victims.

Physical evidence is crucial for the investigation and prosecution of sexual assault cases. Frequently, the best evidence is on the victim. Collection of this evidence creates unique situations in that it can only be done by health-care personnel during the medical examination.

In 1977, K.S.A. 65-448 was passed requiring physicians to examine victims of sexual assaults and to collect evidence. After the law was implemented, two problem areas were identified:

- evidence was not being submitted to the Forensic Laboratory in the majority of sexual assault cases;
- when evidence was submitted, it was frequently of poor quality.

In 1988, the KBI received a federal grant to identify how evidence could better be collected from victims of sexual assaults and thereby better assist in the investigation and prosecution of sexual assault cases.

In working towards the goal of improving evidence collection, the KBI worked in conjunction with the Kansas Department of Health and Environment, hospitals and law enforcement agencies. Not only has the quality of the evidence improved, but there has been a significant increase in the number of cases now submitted into the Forensic Laboratory. A major factor contributing to the improvement was the development of a standardized sexual assault evidence collection kit. Since 1989, the kit has been provided to Kansas hospitals at no cost.

By requiring hospitals to use an approved kit, HB 3038 strengthens K.S.A. 65-448 by ensuring the best possible evidence will be collected in sexual assault cases. In addition, should the decision be made to recover the cost of the sexual assault evidence collection kit, HB 3038 provides the mechanism to do so.

The KBI recommends its passage. Thank you for your time and consideration.

Attachment: Article in the Kansas Peace Officer, *Sexual Assault Evidence Collection* by Eileen Burnau

Collecting evidence in

SEXUAL ASSAULT

By Eileen Burnau

Physical evidence is crucial for the investigation and prosecution of sexual assault cases. Physical evidence can help identify the assailant. Even if the assailant is known to the victim, scientific evidence is distinctly involved in corroborating the identity of the attacker.

The Kansas Legislature in 1977 passed KSA 65-448 requiring every physician at a medical facility to perform a physical examination, when requested, for the purpose of gathering evidence from people who may be victims of rape, sodomy, aggravated sodomy, incest, aggravated incest or indecent liberties.

Several problem areas were identified after the law was passed. No evidence was submitted to the forensic laboratory in the majority of sexual assault cases and, when it was, it was frequently of poor quality.

The Kansas Bureau of Investigation received a two-year grant from the U.S. Department of Justice in July 1988. The primary goal of the grant was to improve the collection and preservation of physical evidence from sexual assault victims.

The following is a review of the role of evidence in sexual assault cases and a discussion of the problem areas identified in the collection of that evidence. I will also explain the development of the standardized evidence collection kit that is now available to all Kansas hospitals.

Role of physical evidence

Sexual assaults are violent crimes directed against women, men and children. Sexual assaults include rape, indecent liberties with a child, sodomy, sexual battery and incest. Kansas rape statistics show:

- One rape occurs every 9 hours and 48 minutes.
- There were 895 reported rape cases in 1989—a 63 percent increase over 1977 and a 17 percent increase over 1988.
- In 45 percent of the cases, the victim knew the assailant.
- More than 60 percent of the rapes occurred in residences or apartments.
- During 1988, 81 percent of the reported rapes occurred in cities with populations greater than 10,000.

In *Scientific Evidence in Criminal Cases,* Andre Moenssens states that the crime of rape is peculiar from other crimes of violence in two respects;

1. "It rarely takes place in the presence of witnesses other than the assailant and the victim.

2. "It characteristically involves a relationship between a man and a woman, either as strangers or as acquaintances."

He further discusses the importance of physical evidence in rape cases. In an alleged rape by a stranger, physical evidence can help identify the assailant. In a situation where the assailant is an acquaintance of the victim, the issue becomes less one of identity and more whether sexual intercourse took place.

Moenssens states that even if the assailant is known to the victim, scientific evidence is distinctly involved in corroborating the identity of the attacker.

Collection of evidence

Normally, law enforcement officers are responsible for collecting evidence. In rape cases, however, evidence is obtained from two different sources—the law enforcement officer and the physician.

Law enforcement officer The types of evidence collected and submitted in sexual assault cases are dependent upon the circumstances and the nature of the case. Physical evidence usually includes clothing from the victim and items from the crime scene such as bedding or car seats. Once a suspect has been identified, evidence may include his clothing and items from his residence.

Physician One of the most valuable sources of evidence linking the victim and suspect is evidence located in or on the victim's body after the assault. This evidence is not collected by the law enforcement officer but rather by the physician at the time of the medical examination.

37-3

Evidence collected by the physician includes swabbing from all body orifices, pubic combings, fingernail scrapings, and debris and body secretions that may be found on the victim's body. These items, along with known samples of the victim's blood, saliva, head and pubic hairs, are put together in what is called a sexual assault evidence collection kit or, as it has become known, a "rape kit."

History of the kit

The KBI and Kansas Department of Health and Environment in 1978 established guidelines for the examination of sexual assault victims that included collecting certain samples from the victim's body by utilizing a rape kit. These guidelines, along with a sample rape kit and a copy of KSA 65-448, were mailed to all Kansas hospitals.

Most hospitals attempted to comply with the recommended guidelines either by producing their own kits or by purchasing commercial kits. As a result, hospitals followed a variety of protocols in the examination of sexual assault victims. The different protocols had no uniformity in the collection, preservation or the handling of evidence.

Identifying problem areas

The Forensic Laboratory identified two problem areas in sexual assault cases. One was with the quality of sexual assault evidence that was being submitted to the KBI for examination; the other was with the low rate of evidence submission as compared to the number of reported rapes.

Quality of evidence submitted The Forensic Laboratory had been monitoring and evaluating the quality of rape kits submitted for examination. In many instances, samples were inadequate or missing, preventing a complete and thorough examination.

For example, in 25 percent of the cases, vaginal swabs were either not collected or improperly collected and preserved; oral swabs were not obtained in 63 percent of the cases; 51 percent of the cases did not have rectal swabs; and 48 percent of the time the known hairs were unsuitable for comparison purposes.

Low ratio of cases submitted as compared to reported rapes Prior to receiving the grant, it was determined that the KBI received evidence in 35 percent of the reported rape cases. Not included were rapes reported in Johnson County and Wichita, since these two areas have their own laboratories.

A vast discrepancy was discovered among Kansas counties as it pertains to the ratio of submitted cases to reported cases. The range for the various counties studied was from 8 percent to 75 percent.

While there may be many explanations as to the difference among Kansas counties in the submission ratios, it should be noted that in the two counties with the highest ratio, law enforcement agencies and the major hospitals had maintained close communication with the Forensic Laboratory; had received training in the collection and preservation of evidence; and have had active advocacy organizations for the victims of sexual assaults.

The KBI developed a prototype kit in 1988 in conjunction with the Kansas Department of Health and Environment. This kit was mailed to all Kansas hospital administrators and emergency room directors along with a letter explaining the grant program and a survey asking for their evaluation and comparison of the prototype rape kit to the ones they were currently using.

Approximately 70 percent of the hospitals responded to the survey. When the medical personnel compared the KBI prototype kit to the ones they were using, the overwhelming majority reported that the KBI kit was better. Comments on the survey indicated that hospitals believe the KBI kit is comprehensive, complete and well organized. Of the hospitals responding to the survey, 98 percent reported that they want to use it.

After the response was received from the medical community, the KBI and the state identified a commercial supplier for the kits and established a communication network with all emergency room directors. All hospitals were notified when the commercial kits became available for distribution in October 1988.

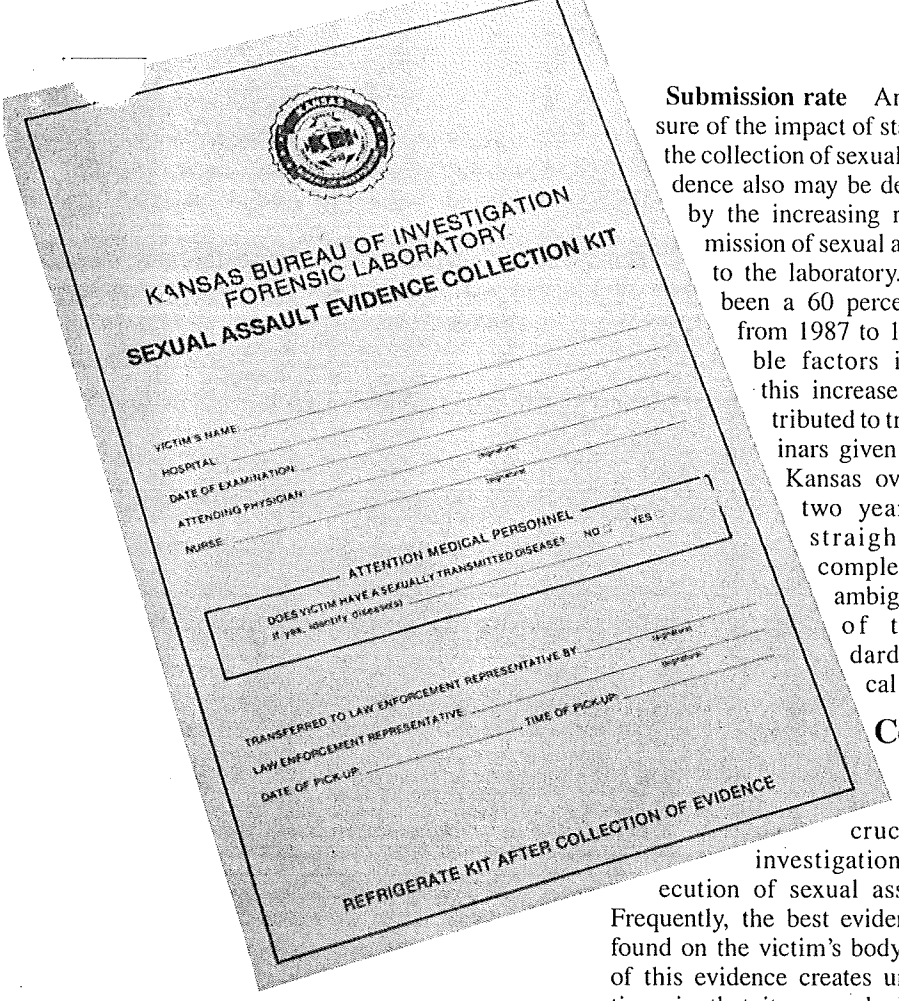
Record keeping, ordering and mail-

Kit contents

- The sexual assault evidence collection kit contains the necessary material to ensure uniform and complete collection of evidence in cases of sexual assaults.

Also included in the kit are the following:

- Instruction sheet describing in detail how to collect all evidentiary items necessary for the forensic laboratory
- Authorization form to be signed by the victim, allowing for the collection and release of evidence
- Victim information and sexual assault history form. This form provides information that may be necessary for the interpretation of results in the forensic laboratory.
- Anatomical drawings form to document observations made during the physical examination of the victim
- A copy of KSA 65-448, the statute explaining who is responsible for the cost of the examination. This is given to the victim at the time of the examination.
- Brochure from the Crime Victims Compensation Board, informing the victim about financial assistance that is available. This is also given to the victim at the time of the examination.


KANSAS BUREAU OF INVESTIGATION
FORENSIC LABORATORY
SEXUAL ASSAULT EVIDENCE COLLECTION KIT
VICTIM'S NAME
HOSPITAL
DATE OF EXAMINATION
ATTENDING PHYSICIAN
NURSE
ATTENTION MEDICAL PERSONNEL
DOES VICTIM HAVE A SEXUALLY TRANSMITTED DISEASE? NO YES
TRANSFERRED TO LAW ENFORCEMENT REPRESENTATIVE BY
LAW ENFORCEMENT REPRESENTATIVE
TIME OF PICK-UP
DATE OF PICK-UP
REFRIGERATE KIT AFTER COLLECTION OF EVIDENCE

KBI provides the kits to all Kansas hospitals.

ing systems were established. The KBI now provides rape kits at no cost to any hospital that requests them. Approximately 90 percent of Kansas hospitals that perform rape examinations are not utilizing the kit.

Impact of standardization

The KBI feels that standardizing sexual assault evidence collection had a major impact in improving the quality of evidence being submitted and on increasing the number of cases received in the forensic laboratory.

Quality of evidence Laboratory workers have evaluated the quality of evidence in every sexual assault case for the past four years. Although the computerized program for analyzing quality is not "on line," a random check of the evaluation forms revealed that the quality of evidence now being received is superior to what was collected previously. Criminalists can now do a more complete and thorough examination toward identifying the assailant.

Submission rate Another measure of the impact of standardizing the collection of sexual assault evidence also may be demonstrated by the increasing rate of submission of sexual assault cases to the laboratory. There has been a 60 percent increase from 1987 to 1989. Possible factors influencing this increase can be attributed to training seminars given throughout Kansas over the past two years and the straightforward, complete and unambiguous nature of the standardized medical kit.

Conclusion

Physical evidence is crucial for the investigation and prosecution of sexual assault cases. Frequently, the best evidence may be found on the victim's body. Collection of this evidence creates unique situations in that it can only be done by health care personnel during the medical examination.

KSA 65-448 became law in 1977; it requires physicians to examine victims of sexual assaults and to collect evidence. However, after the law was implemented, two problem areas were identified: evidence was not being submitted to the forensic laboratory in the majority of sexual assault cases and, when it was submitted, it was frequently of poor quality.

The KBI received a federal grant in 1988 to explore alternatives available so that the laboratory could receive the best possible evidence and thereby better assist in the investigation of sexual assault cases.

The grant enabled KBI, working in conjunction with the Kansas Department of Health and Environment, hospitals and law enforcement agencies, to significantly improve evidence collection procedures in sexual assault cases.

Not only has the quality of evidence improved, but also there has been a significant increase in the number of cases being submitted to the forensic laboratory. A major factor contributing to the improvement was the development of a standardized sexual assault evidence collection kit. This kit is now provided to Kansas hospitals at no cost.

Questions about this program, the distribution of kits, or the collection and preservation of evidence in general may be directed to the KBI Forensic Laboratory.

About the author

Eileen Burnau is the supervisor of the Serology/Trace Section at the Kansas Bureau of Investigation Forensic Laboratory. She holds a bachelor of science degree from Idaho State University and a master of public administration degree from the University of Kansas.

Her 15 years of experience in forensic serology includes training at Georgetown University in Washington, D.C.; the Serological Research Institute in Emeryville, California; and the FBI Academy at Quantico, Virginia. Burnau recently completed graduate course work in DNA profiling sponsored by the FBI and the University of Virginia.

Burnau is a member of KPOA and its Legislative Committee.


Eileen Burnau

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TESTIMONY ON H.B. 2849

PRESENTED TO:

1994 HOUSE JUDICIARY SUBCOMMITTEE #1

PRESENTED BY:

RANDY PROCTOR, DIRECTOR
SRS MENTAL HEALTH SERVICES

ON BEHALF OF:

DONNA L. WHITEMAN, SECRETARY
SOCIAL AND REHABILITATION SERVICES

SRS Mission Statement

"The Kansas Department of Social and Rehabilitation Services empowers individuals and families to achieve and sustain independence and to participate in the rights, responsibilities and benefits of fullcitizenship by creating conditions and opportunities for change, by advocating for human dignity and worth, and by providing care, safety and support in collaboration with others."

Testimony on H.B. 2849
Presented to the House Judiciary Subcommittee #1
February 22, 1994

SRS/MHRS supports efforts to protect public safety. However, H.B. 2849 proposes a mental health remedy for a criminal justice system problem.

Kansans have a legitimate concern for safety and protection from violent sexual predatory acts. In many instances these are heinous crimes which demand severe sanctions. These sanctions should be applied by the criminal justice system. Civil commitment decriminalizes these behaviors with no increase in the effectiveness of treatment.

Even if civil commitment procedures are changed to accommodate the long-term care and treatment for persons determined to be sexually violent predators in a secure facility, it is interesting to note the Washington statute states: "The facility shall not be located on the grounds of any state mental facility or regional habilitation center because these institutions are insufficiently secure for this population." In Washington the Sexual Predator Program is administered and operated by the Department of Social and Health Services and is located within the Department of Corrections institutions complex. The DOC in Washington provides meals, clothing, laundry services, medical and dental services, and barber services in addition to the perimeter security.

Section 1 of H.B. 2849 suggests legislative intent to very narrowly apply civil commitment procedures for the long-term care and treatment for persons determined to be sexually violent predators to those deemed to be the most dangerous. However, if the procedures outlined in H.B. 2849 are more liberally implemented, the fiscal note for providing treatment and care in a secure facility could dramatically escalate in future years.

Assuming the responsibility of a new population places an undue burden on an already overtaxed mental health system and increases the possibility of diverting resources from the established targeted populations of adults with severe and persistent mental illness and children/adolescents with severe emotional disturbance. If this bill is enacted, SRS/MHRS recommends separate funding streams and budgets specifically targeted to this initiative.

Association of Community
Mental Health Centers of Kansas, Inc.
700 SW Harrison, Suite 1420 • Topeka, Kansas 66603-3755
Phone (913) 234-4773 • Fax (913) 234-3189

Testimony on H.B. 2849
Presented to House Judiciary Subcommittee
February 22, 1994

The Association of Community Mental Health Centers opposes the passage of H.B. 2849 in its current form, for the following reasons:

1. H.B. 2849 inappropriately decriminalizes sexual offenses, by the use of civil commitment. Civil commitment should only be used to commit individuals who are determined to be dangerous to themselves or others because of their mental illness, but who do not possess criminal intentions or malice of forethought.

2. The bill, in its current form, does not guarantee that sexual predators will be housed separately from individuals, including children, with mental illness. The safety of these most vulnerable people is not adequately assured in H.B. 2849.

3. By including sexual predators under the diagnosis of mental illness, the bill further stigmatizes the mentally ill in our society.

4. The bill does nothing to truly correct the current system of sentencing and treating sexual offenders. Sexual offenders must have state-of-the-art sex offender programs while they are in prison and intensive aftercare programs once they are released in order to protect society.

5. The cost of treating sexual predators in the Department of Social and Rehabilitation Services (SRS) institutions could syphon limited resources from the truly needy. We question why the Legislature would reverse its visionary plan to reform the mental health system by "back filling" SRS institutions with dangerous sexual predators?

INTRODUCTION

Especially problematic to the mental health community about H.B. 2849 is the provision which mandates that violent sexual predators be civilly committed to SRS institutions after they have served their sentences in the criminal justice system. We do not disagree that society must be protected from violent sexual offenders who are without a doubt unmanageable and dangerous people. Our position is that if an individual has committed a serious and especially violent sexual crime, they should be incarcerated for life with no possibility of parole like any other exceptionally dangerous individual. If there is a concern about safety when certain individuals are released from prison and are at large in the community, the criminal justice system should provide close supervision and intensive aftercare programs.

SAFETY OF THE MENTALLY ILL IN STATE HOSPITALS

The bill mandates that once a sexual offender is classified as a sexually violent predator they are remanded to SRS custody, to be housed in a secure facility, which is not defined in the bill. We do not believe that the bill, in its present form, provides enough protection to patients with mental illness currently receiving treatment in the state hospitals. The Washington law, though quite similar to H.B. 2849, provides greater protection for the truly mentally ill in state hospitals. The Washington law states that the facility for sexual offenders should not be located on the grounds of any state mental facility because these institutions are not sufficiently secure for violent sexual predators. We request that H.B. 2849 be amended to include a provision that the facility to house sexual predators shall not be located at a state hospital but at a Department of Corrections (DOC) institution.

THE NEED TO REDESIGN CURRENT TREATMENT AND SENTENCING OF SEXUAL OFFENDERS

The current system of sentencing and treating violent sexual predators is broken. The criminal justice system currently does not accommodate the very special treatment and sentencing needs of sexual offenders. We would be very supportive of flexible sentencing guidelines which could sentence violent sexual predators for life with provisions for release if they undergo successful treatment.

The Community Mental Health Centers are ready to play a role in assisting DOC in developing more sophisticated treatment programs behind the walls for sexual offenders. Several of our centers have already been contacted to serve on a task force to redesign the DOC sexual offender program. We urge that the Legislature encourage DOC to look

to models that have been developed in other states as well as Canada in redesigning the prison sexual offender program. The treatment program must be introduced long before the expiration of the offender's active sentence. The Legislature, if truly committed, to making a difference, must fund state-of-the-art sex offender programs.

In addition, sexual offenders (in fact all offenders) who are released from prison must have aftercare programs (relapse prevention in the case of sex offenders) which should be closely monitored and enforced by DOC. There appears to be consensus that the treatment of the sex offender is never complete. Following a state-of-the-art intensive treatment program in prison, participants must continue in aftercare counseling. Payment for such aftercare should come from the offender themselves, but if they are unable to pay, DOC should be required to pay for the aftercare to ensure that the individual is receiving it.

In 1993, there were 330 individuals granted probation who had committed rape, indecent liberties with a minor, aggravated sodomy, enticement of a child, sexual battery, aggravated sexual battery, among other crimes. Based on what the Community Mental Health Centers have observed and experienced first-hand, these individuals are not receiving adequate, consistent, and monitored aftercare. It is no wonder that they re-offend. The system is broken! Let us not try to repair it with another quick fix that simply gives society the illusion that the problem of sexual offenders is solved. We should not act emotionally but in a rational and sensible way: first, redesign the sex offender program currently in force and second, introduce a comprehensive aftercare treatment program. If H.B. 2849 is implemented in a similar fashion as it is in Washington, only 30 of the 300 sexual offenders will be civilly committed every year and that will leave 300 offenders free to terrorize communities.

Sex offenders should not be treated as one heterogeneous group. It is crucial that a presentencing assessment and evaluation take place to determine both the place for and type of treatment that will be selected for a sex offender. For example, a first-time incest offender whose offense did not include acts of violence or serious threats of violence, most likely can be better treated on an outpatient basis. However, that individual must actually be sentenced to the outpatient program with the threat of incarceration in a maximum correctional facility should he not fully comply with the outpatient program guidelines. Assessments and evaluations may find that other individuals who are repeat offenders could be treated initially in an inpatient program and then slowly worked into an outpatient setting.

FISCAL IMPACT OF H.B. 2849

The current provisions of H.B. 2849 have the potential to strain the mental health system of which we are a partner to the state, as part of the Mental Health Reform Act of 1990, the intent of which was to downsize the state hospitals. H.B. 2849 would simply be a

backdoor method to achieve life of incarceration for the sexual predator, which we do not oppose. We do, however, strongly oppose the use of the mental health system as a dumping ground for these individuals either at the state hospitals or at the community level.

CONCLUSION

H.B. 2849 improperly decriminalizes by, civil commitment, crimes, which are most criminal and heinous in nature. The crimes committed by violent sexual predators demand severe sanctions, best administered by the criminal justice system. We urge the Committee to consider redesigning the current sex offender programs (both in prison and after) and introduce stricter penalties; only in this way will the intended results of H.B. 2849 of protecting society be realized.

TESTIMONY FOR HOUSE BILL 2849

As the director of the Community Mental Health Division of Prairie View Inc., in Newton, Kansas, I applaud your efforts in trying to deal with this very difficult issue of sex offenders. As a representative from a provider of mental health services to sex offenders in the community, I support the testimony that has been provided by the Association of Community Mental Health Centers in opposition to the passage of House Bill 2849. We at Prairie View have had an intensive outpatient sex offender treatment program for almost ten years. Several of our staff have had extensive training in this area and we are concerned about what we see happening in our society. We are as concerned as you are for the safety in our communities. We believe, however, that this bill does not go far enough in dealing with the larger problems related to sex offenders. This bill, in some ways, just deals with the tip of the iceberg.

Staff at Prairie View have been working with other outpatient providers in the area to look at the whole issue of treatment of sex offenders. We have identified many problems that I believe you the legislature could help address. Our society is needing to spend more and more resources in dealing with this problem, not only in the incarceration of the offender, but also in the treatment of the victims of these offenses. It is our belief that a more comprehensive approach needs to be developed by the State to respond to this crisis.

House Judiciary
Attachment 40
2-24-94

THIS APPROACH SHOULD ADDRESS THE FOLLOWING:

1) Prevention and education.

2) A systematic process by which persons who have sexually offended are evaluated, tested, and screened for appropriate treatment settings.

3) A comprehensive and coordinated array of treatment options be available across the State for this population, both outside and inside prisons.

4) A set of criteria and protocol be established that providers would need to meet in order to assure competency and quality in the treatment programs.

5) A clear understanding of responsibilities between the Department of Corrections and treatment providers to assure the safety of the community.

6) For persons who are evaluated and found to be "a sexually violent predator", that they be maintained in a secure setting that has been developed as part of the comprehensive plan.

Research indicates that most offenders were also victims of sexual crimes. If we, as a society, are unable to address this issue in a comprehensive manner, we will continue to create more victims and increase the number of offenders. My recommendation is that the Department of Corrections work together with treatment providers across the State to develop a comprehensive plan in dealing with sex offenders. It is only in this way, that we will begin to deal with this growing problem in our society. We at Prairie View, along with other community mental health centers, would be very interested in working with the Department of Corrections in developing such a plan.

Thank you for your time and your commitment to dealing with this very difficult issue.

Walter Thiessen LSCSW

Walter Thiessen, Director
Community Mental Health Center

KANSAS PSΨCHOLOGICAL ASSOCIATION

Analysis of HB 2849

The following are specific issues and areas of concern that might be weighed when considering HB 2849 and the sexual predatory, violent offender:

Page 1, lines 22-25

Sexual offenders with antisocial personalities or antisocial traits are certainly problematic in terms of treatment and recidivism. My worry is that the statute over-focusses on those conditions, to the neglect of equally problematic conditions. Equally problematic are adults receiving the diagnosis of Pedophilia, Not Limited to Incest, Exclusive. These are adults who have an established sexual preference for prepubescent children and are unlikely to find adult sexual relations meaningful or satisfying. These adults tend to have many victims, are not likely to engage in physical violence, and have little appreciation for how their behavior damages children. They maintain well-entrenched cognitive distortions regarding their offending behavior that prevent them from considering new information and changing their behavior. These men are the sort of offenders the general public thinks of when asked to think of a typical pedophile. On the other hand, some offenders who have only one or two victims and whose crimes are incestuous in nature can also be seen as SVP because of the denial and distortions surrounding their behavior towards their own children or step-children. May times their behavior is just as entrenched and aggressive as other types, even though confined to familial relationships. Finally, adults presenting with sexually sadistic behavior patterns would be likely candidates for SVP designation. It would not be productive for this legislation to focus too narrowly on antisocial offenders. At the same time, one can begin to appreciate the scope of the problematic behavior that would be addressed with such a bill. The costs of commitment and confinement should be considered in this regard especially in light of the refractory nature of these conditions.

Page 1, Line 25-26

This statement confuses the likelihood of re-offense for SVP with the likelihood of re-offense for sexual offenders in general. The probability of recidivism for the former group is likely to be much higher than for the latter group. It is important to note that the vast majority of sexual offenders, particularly sexual offenders against children, are convicted of sexually volent crimes as defined by this statute. These adults almost always present with a mental abnormality as defined by DSM-III-R. The majority of offenders would not need to be committed under this statute to ensure community safety. I am concerned about the public reaction that would result if all offenders convicted of these offenses are seen and treated by the public and the judicial/mental health system as SVP's. Clarity and specificity in conceptualization and language seems essential.

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Page 1, line 35

Professionals in this area do not think of "curing" sexual offenders; the focus is on equipping the offenders with the skills to control their impulses toward deviant behavior. The efficacy of teaching these skills to most sexual offenders is well established, in spite of comments to the contrary. Conversely, the difficulties involved in teaching these skills to SVP's is also well established.

Page 2, lines 1-4

I wonder if it is possible to expand the definition of SVP to include offenders convicted of one sexually violent offense who complete a reputable sex offender treatment program and then go on to commit a second sexually violent offense. That should stand as evidence that even with appropriate intervention, the offender is not able or willing to control sexually deviant behavior. In this case, the determination of SVP would be made after the second conviction but before incarceration. It is clear that the best predictor that incarceration/treatment will not function as a deterrent is an individual's past failure to benefit from those learning experiences.

Page 2, lines 1-8

The text speaks to the prediction of violent behavior. The literature regarding the prediction of violent behavior is not conclusive; some would say it is not even promising. I suspect challenges will most likely occur at this point in the process with revolving "expert witnesses" testifying on both sides of the argument. Any evaluator will be ethically required to address the validity of his or her predictions. I wonder if it would be possible to have the court appoint an expert acceptable to all parties to evaluate the alleged SVP. Would that be more judicially and financially efficient? At any rate, it should be understood that any predictions of future behavior in this realm may have limited validity.

Page 2, line 21-22

Criminal sodomy includes consensual, though illegal, homosexual behavior. If consensual gay/lesbian adult sexual behavior is defined as a sexually violent offense and that person has any sort of "mental abnormality," and that person enters a relationship with the purpose of being sexual with another adult, then it seems to me that the person is committing another sexually violent offense which is very predictable. Could that person be committed under this statute? Aggravated criminal sodomy could cover crimes of oral/anal assault against a child or those behaviors toward an adult who did not consent. Would it be possible to remove criminal sodomy from the list of sexually violent offenses without damaging the intent of the statute?

Page 3, lines 7-11

The statute addresses how the "agency with jurisdiction" will notify the county in which the offender was charged. That agency will typically be DOC. DOC will likely have information that the offender is a SVP because treaters working with the offender will have reached that conclusion. Presently, offender treatment is provided by a private contractor operating within DOC. Consequently, according to statute, valid and informed consent needs to be obtained from the offender in order to release treatment information to DOC. The offender can revoke his or her release at any time, and information provided to DOC would be significantly restricted at that point. The offender could leave the system after serving his or her maximum time, the treaters could see that offender as a SVP, but because the consent to release information about therapy had been revoked, DOC could not be alerted to set the necessary process in motion. I wonder about a provision in the statute to address that possible scenario.

Page 3, lines 26-28

The text addresses issues of immunity from liability for "agencies with jurisdiction, its employees, and officials." I would suggest that the immunity extend to employees of private contractors working within DOC, as well as to experts retained by the court to address pertinent issues within this process or to other practitioners who might be involved in the legal process around this statute.

Page 3, lines 41-43

If probable cause exists to believe that the offender is a SVP, the court appoints a person "professionally qualified" to examine the offender to confirm that finding. That professional must have access to all pertinent information, including that information that might be held by treaters working within but not employed by DOC. Many professionals are prohibited by statute from disclosing treatment information without the offender's consent; the client's right to privilege must be protected or the professional is guilty of unethical and illegal behavior. It is imperative that the evaluating professional have access to all information so that the determination of whether or not the offender is a SVP does not rest only on the professional's observations of and interview with the offender. I wonder if it would be possible to address access to information held by private contractors employed by DOC as well as other possible sources of information.

Page 5, lines 12-40

I believe the probability that a professional would take a position that an individual once found to be a SVP is no longer dangerous is very low. Our ability to change an individual's sexual preference for children or eliminate the urge to express sexual and violent impulses together is limited. Lengthy periods of commitment with little likelihood of release are almost inevitable.

Perhaps that is simply the goal of this statute. In my opinion, adequate facilities and treaters to address this pattern of deviant behavior does not exist within the Department of Social and Rehabilitation Services. Significant funding to establish and maintain such a state of the art treatment facility and monitoring program would be essential.

Some more general issues that might be considered around this bill are:

In regard to issues of mandating post-incarceration supervision, I believe that any individual who has committed a sexual crime could benefit from post-incarceration supervision and treatment. Perhaps the length of supervision/treatment could be arbitrarily set at five years for each of the sexually violent offenses identified in his bill. In many cases, it would be possible to relax that requirement once the parole officer and the therapist are able to assess the offender's reintegration into the community and the offender's ability to implement his or her relapse prevention plan.

Two points come to mind, following that. Firstly, to be most efficient, there would need to be very close coordination between those providing treatment to offenders during incarceration and those providing follow-up treatment. That coordination occurs in other states under the auspices of a statewide agency that coordinates all aspects of sexual offender treatment. Perhaps such an approach should be considered in Kansas.

Secondly, if community agencies are to be expected to provide quality treatment over the long term to individuals reintegrating into the community, resources must be made available to those agencies. Upon release from DOC with a conviction for a sexual offense, particularly a sexual offense against a child, offenders are often under-employed, if not unemployed, for extended periods of time. Consequently, their financial resources are inadequate to pay for the necessary treatment. In my opinion, the provision of quality treatment following incarceration will not be a viable financial possibility for agencies if the state does not allocate sufficient funding. The short-sighted solution of mandating post-release treatment but not providing funding will only result in the illusion that the problem has been effectively addressed.

I hope thoughts are useful. I know that SVP's and the heinous acts they commit command immediate attention in our society. I would hope that the legislature remembers, however, that the vast majority of victims of sexually assaultive crimes are not victimized by SVP's. I would hope that eventually attention and monetary resources are directed to this population of victims and offenders, as well. If every SVP in Kansas could be identified and committed under this proposed statute, hundreds of women and children would continue to be assaulted; I believe the damage those assaults produce and the impact on society of failing to effectively intervene with prevention and remediation strategies in these cases is profound and is, in certain ways, more damaging than the profound damage that results from the crimes committed by the SVP.

--Tom Locke, Ph.D.

KANSAS PSYCHOLOGICAL ASSOCIATION

Highlights of Analysis of HB 2849

February 22, 1994

I am Tom Locke, Ph.D., and am appearing before you today on behalf of the Kansas Psychological Association, its president Michelle Coker, Ph.D., and the board of governors. I would like to express my appreciation for the opportunity to comment and to provide feedback to you on this important piece of legislation. I have enclosed our more detailed written analysis of the bill. In the interests of time today, however, allow me to highlight some of the more salient issues.

Expanding the definition of sexually violent offender to those that commit a second offense.

Those individuals found to commit a second offense, especially after having received some treatment, have a high probability of re-offender. Immediate intervention in this area might help to limit and to contain these individuals more effectively.

Removing criminal sodomy

Including this as one criterion for the definition of SVP, may create some significant difficulties. It would include consensual, albeit illegal, sexual activity between consenting adults in gay/lesbian relationships, if one of the adults was found to have a "mental abnormality". Differing views regarding this type of sexual activity notwithstanding, it does not seem to be appropriate to include this group of individuals in the SVP group.

Need to address issues of privilege and immunity for private contractors

Given the current arrangement within DOC to utilize private contractors, it seems important to expand the immunity provided in the bill to include these individuals. Because of issues of confidentiality as well as issues related to making diagnoses, esp. given the impact of that diagnosis on those individuals involved, immunity should be extended to those individuals involved clinically in making decisions and diagnoses. Not to do so, forces practitioners into a bind of needing to comply with the requirements in the legislation, only to put themselves at extreme risk for litigation.

Difficulties inherent in predicting future sexual and violent behavior.

The bill is heavily dependent on trained diagnosticians to make the determination of whether or not the person is likely to commit another offense. Prediction of this type of behavior, and of violent behavior in particular, is extremely problematic. The research literature on the validity of such predictions suggest that they are risky at best. This can create a

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difficulty in that whether or not someone is released from commitment is dependent on information that we may not be able to reliably provide as treaters.

Dangers of warehousing individuals once they are committed under this statute

This issue arises from several factors. As noted above, it is highly unlikely that many practitioners feel that they would be in a position to be able to predict with much confidence, that the person in question is no longer a risk to society. Secondly, treatment approaches with these individuals appear to have limited effectiveness. Only those programs that are thoroughly considered and that are quite lengthy and involved have shown much success. Even then, their effectiveness has been questioned in some respects. The result is that once a person is committed under such provisions as in this bill, the likelihood of a long term involvement on the part of the state is quite high. This can lead to an ever growing population that may have little probability of release.

In conjunction to this, we believe that it is imperative that any such program and procedures, instituted by the state be adequately funded and considered in terms of the amount of programming it would require. Failure to do so, not only increases the risk of warehousing, but perhaps more dangerously, gives the impression of dealing with the problem of sexual offenders but only superficially. Without adequate funding, it is possible that attempts to address this significant problem will only create more serious problems.

We would like to thank-you again for the opportunity to testify today on this important and difficult issue. As I noted, we have provided a more detailed written analysis of the bill for your consideration. I would be happy to answer any questions the sub-committee might have now or at a later date.

STATE OF KANSAS

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TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER: ENERGY & NATURAL RESOURCES
GOVERNMENTAL ORGANIZATION
& ELECTIONS
LOCAL GOVERNMENT

February 22, 1994
RE: HB 2912

Mr. Chairman, members of the committee, Thank You for the opportunity to come before you today in support of House Bill 2912.

It contains an idea whose time has come. An idea that should become law that will benefit all people of Kansas.

The law dealing with assault, assault on a law enforcement officer, battery and battery on a law enforcement officer has not changed in the last 10 years.

In that same time period the incidents of assault and battery have increased by 162.4%. I would refer you to the third page of my handout which was taken from the most recent K.B.I. crime statistics. This shows a need. This shows that a portion of our criminal code is broken and in need of fixing.

The bill would require mandatory minimum sentences similar to our present D.U.I. laws. I am of the opinion that the people of this state want all violent crime to have certain punishment. Surely if we believe that a person convicted of D.U.I. must serve jail time, when often the person that defendant hurts is himself, we can and should require a defendant who intentionally causes injury to another, to serve jail time.

If we can require by statute in D.U.I. cases drug and alcohol counseling should not we require anger management counseling in assault and battery cases?

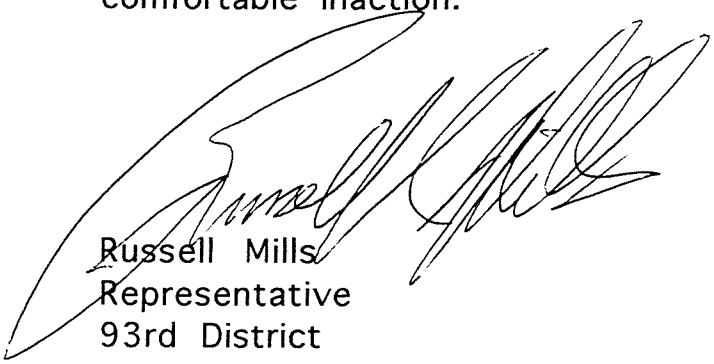
House Judiciary
Attachment 43
2-24-94

It is my sincere belief that if this bill becomes law, it will act as a preventative measure and you will see a drop in the number of aggravated battery and other more violent crimes.

President Kennedy once said:
"There are risks and costs to a program of action. But they are far less than the long-range risks and costs of comfortable inaction."

Our present assault and battery statutes are an example of just how true the statements of President Kennedy were.

Today we can take the first step in developing a "program of action" to deal with a clearly recognizable problem with the assault and battery statutes, or we can continue to accept the continued high cost of comfortable inaction.



Russell Mills
Representative
93rd District

RM/ykr

SIMPLE ASSAULT / BATTERY

Assault is defined in Kansas under K.S.A. 21-3408 as:

> *"An assault is an intentional threat or attempt to do bodily harm to another coupled with apparent ability and resulting in immediate apprehension of bodily harm. No bodily contact is necessary."*

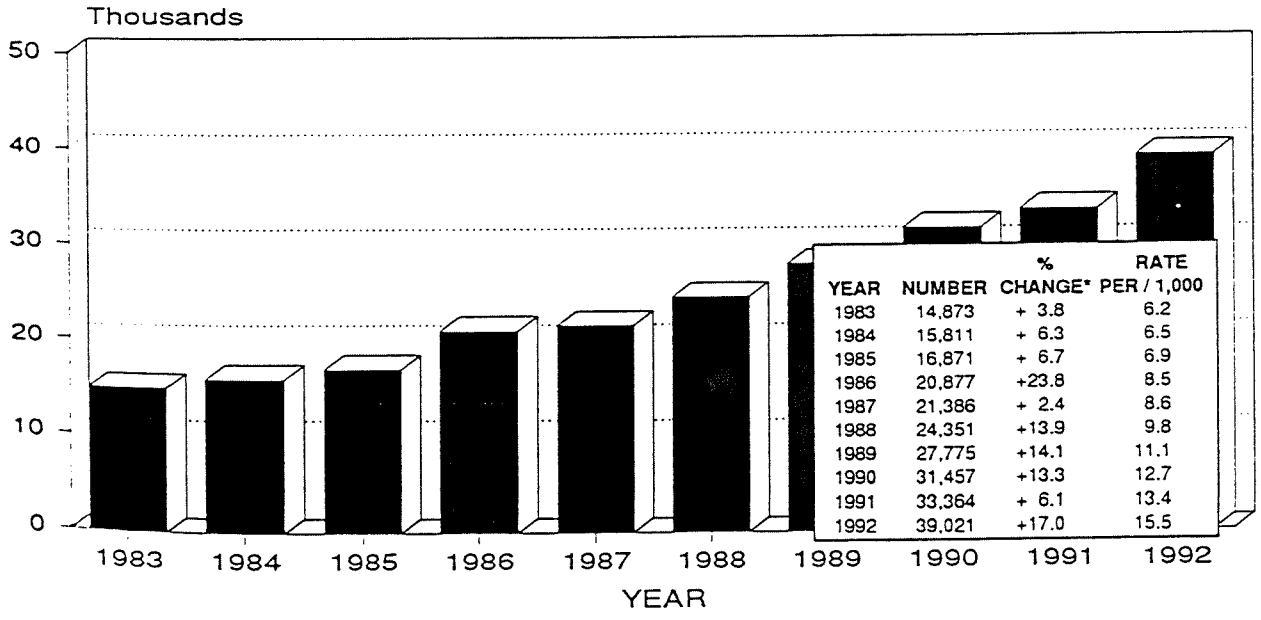
Battery is defined in Kansas under K.S.A. 21-3412 as:

> *"Battery is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent or angry manner."*

Simple assault / battery (the threat of violence that could result in personal injury) is a Part II crime. In 1992, this totalled 39,021 reflecting a 17.0% increase from 1991. The trend shows a continuing pattern of simple assault / battery increasing in the last decade by 162.4%.

Most simple assault / battery happens in a single residence and is committed by an acquaintance (21.6%) or by a family member (30.3%) of the victim; most victims, 5,347, are between the ages of 20 and 25. The majority of simple assault / battery offenses occurred on a weekend (51.2%) and happened between the hours of 8:00 P.M. and 2:00 A.M.

SIMPLE ASSAULT / BATTERY TREND
1983 - 1992



YEAR	NUMBER	% CHANGE*	RATE PER / 1,000
1983	14,873	+ 3.8	6.2
1984	15,811	+ 6.3	6.5
1985	16,871	+ 6.7	6.9
1986	20,877	+23.8	8.5
1987	21,386	+ 2.4	8.6
1988	24,351	+13.9	9.8
1989	27,775	+14.1	11.1
1990	31,457	+13.3	12.7
1991	33,364	+ 6.1	13.4
1992	39,021	+17.0	15.5

*All percentages rounded.

43-3

History: L. 1969, ch. 180, § 21-3405; L. 1972, ch. 113, § 1; L. 1992, ch. 298, § 7; L. 1993, ch. 291, § 22; July 1.

Revisor's Note:
This section was also amended by L. 1992, ch. 239, § 295, but such amended version was repealed by L. 1993, ch. 291, § 283, effective July 1, 1993.

CASE ANNOTATIONS

20. Cited: violation as lesser included offense of aggravated vehicular homicide (21-3405a), distinction in manner of driving causing accident examined. State v. Hickey, 12 K.A.2d 781, 782, 757 P.2d 735 (1988).

21. History of 8-2117 (juvenile traffic offenders) examined; limitations on length and places of incarceration determined. State v. D.L.P., 13 K.A.2d 647, 652, 778 P.2d 851 (1989).

22. What constitutes a "traffic offense" as defined in 8-2117(d) examined; driving with suspended license (8-262) held not within definition. State v. Frazier, 248 K. 963, 970, 811 P.2d 1240 (1991).

21-3405a.

History: L. 1984, ch. 39, § 48; L. 1985, ch. 48, § 14; L. 1988, ch. 47, § 3; L. 1989, ch. 88, § 1; Repealed, L. 1992, ch. 298, § 97; Repealed, L. 1993, ch. 291, § 283; July 1.

CASE ANNOTATIONS

6. "Viable fetus" as not a "human being" within meaning of first degree murder statute (21-3401) determined. State v. Green, 245 K. 398, 401, 781 P.2d 678 (1989).

7. Conviction reversed where state failed to inform accused of statutory rights pursuant to 8-1001(f). State v. Luft, 248 K. 911, 811 P.2d 873 (1991).

21-3405b.

History: L. 1988, ch. 47, § 1; L. 1990, ch. 97, § 2; Repealed, L. 1992, ch. 298, § 97; Repealed, L. 1993, ch. 291, § 283; July 1.

21-3406. Assisting suicide. Assisting suicide is intentionally advising, encouraging or assisting another in the taking of the other's life which results in a suicide or attempted suicide.

Assisting suicide is a severity level 9, person felony.

History: L. 1969, ch. 180, § 21-3406; L. 1992, ch. 298, § 8; L. 1993, ch. 291, § 23; July 1.

Revisor's Note:
This section was also amended by L. 1992, ch. 239, § 295, but such amended version was repealed by L. 1993, ch. 291, § 283, effective July 1, 1993.

21-3407.

History: L. 1969, ch. 180, § 21-3407; Repealed, L. 1992, ch. 183, § 9; Repealed, L. 1993, ch. 291, § 283; July 1.

CASE ANNOTATIONS

5. Wrongful birth as recognized tort, type of damages and period of time covered determined. Arche v. United States of America, 247 K. 276, 281, 798 P.2d 477 (1990).

21-3408. Assault. Assault is intentionally placing another person in reasonable apprehension of immediate bodily harm.

Assault is a class C misdemeanor.

History: L. 1969, ch. 180, § 21-3408; L. 1992, ch. 298, § 9; July 1, 1993.

Attorney General's Opinions:
Assault; battery; prosecution for intentional exposure to HIV. 92-29.

CASE ANNOTATIONS

21. Failure to allege essential elements of offense in information as voiding conviction thereof noted. Zapata v. State, 14 K.A.2d 94, 96, 782 P.2d 1251 (1989).

22. Evidence required for instruction on aggravated assault examined; immediate apprehension of bodily harm as necessary element noted. State v. Dixon, 248 K. 776, 785, 811 P.2d 1153 (1991).

21-3409. Assault of a law enforcement officer. Assault of a law enforcement officer is an assault, as defined in K.S.A. 21-3408 and amendments thereto, committed against a uniformed or properly identified state, county or city law enforcement officer while such officer is engaged in the performance of such officer's duty.

Assault of a law enforcement officer is a class A person misdemeanor.

History: L. 1969, ch. 180, § 21-3409; L. 1992, ch. 239, § 46; L. 1993, ch. 291, § 24; July 1.

21-3410. Aggravated assault. Aggravated assault is an assault, as defined in K.S.A. 21-3408 and amendments thereto, committed:

(a) With a deadly weapon;

(b) while disguised in any manner designed to conceal identity; or

(c) with intent to commit any felony.

Aggravated assault is a severity level 7, person felony. A person convicted of aggravated assault shall be subject to the provisions of subsection (h) of K.S.A. 1993 Supp. 21-4704 and amendments thereto.

History: L. 1969, ch. 180, § 21-3410; L. 1992, ch. 298, § 10; L. 1993, ch. 291, § 25; July 1.

Revisor's Note:
This section was also amended by L. 1992, ch. 239, § 295, but such amended version was repealed by L. 1993, ch. 291, § 283, effective July 1, 1993.

CASE ANNOTATIONS

52. Essential elements of offense that must be alleged in information to sustain conviction determined. Zapata v. State, 14 K.A.2d 94, 782 P.2d 1251 (1989).

53. Use of statements made during polygraph exam to impeach, comments on postarrest silence, evaluation of competency, jury instructions examined. State v. Green, 245 K. 398, 399, 781 P.2d 678 (1989).

54. Felony-murder not supporte of aggravated assault. State v. Leo 807 P.2d 81 (1991).

55. Evidence required for instru sault examined; immediate apprel as necessary element noted. State 785, 811 P.2d 1153 (1991).

56. Cited where variety of jur included offenses, impossibility, ar amined. State v. DeHerrera, 251 918 (1992).

57. Evidence supporting deterr as adult (38-1636) upheld; admis dence of gang membership examir K. 755, 756, 840 P.2d 483 (1992)

58. Felony murder merger, e mony, withholding impeachment camera hearing, cross-examinatior v. Humphrey, 252 K. 6, 8, 845

59. Trial of juvenile as adult, cation of rape shield statute. Stat 118, 843 P.2d 203 (1992).

60. Voluntariness of confession of accused, investigative service examined. State v. Snodgrass, 25 720 (1992).

61. Cited; law enforcement o and in performance of official K.A.2d 761, 766, 844 P.2d 734

62. Jury selection, confession, shield statute, photographic exhi structions, peremptory challenge amined. State v. Walker, 252 (1993).

63. Issue of fact regarding wh cause to arrest driver preclude immunity. Burgess v. West, 817 (1993).

21-3411. Aggravatec forcement officer. Aggrav enforcement officer is an defined in K.S.A. 21-34 thereto, committed agai properly identified state, enforcement officer whil gaged in the performance

Aggravated assault of a ficer is a severity level person convicted of aggra enforcement officer shall visions of subsection (g) 21-4704, and amendment

History: L. 1969, ch 1992, ch. 239, § 48; L. July 1.

CASE ANNO

24. Failure to allege essent information as voiding convictic State, 14 K.A.2d 94, 97, 782

25. Instructions on self-defer sonableness of search, length o v. Tyler, 251 K. 616, 619, 84

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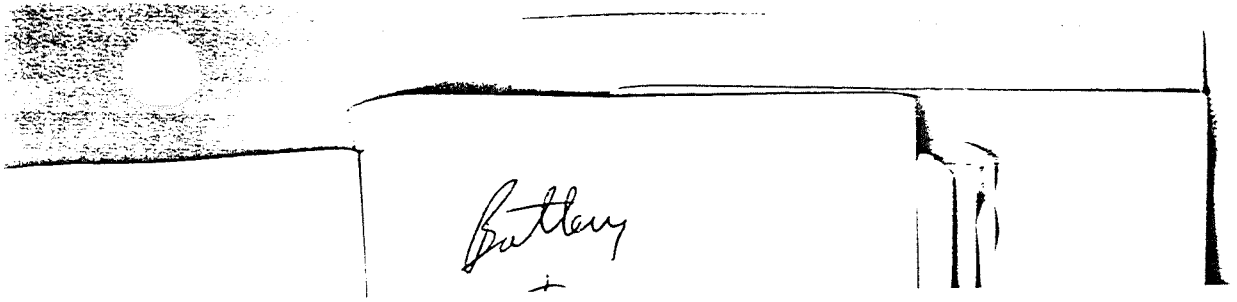

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§ 10; L. 1993, ch. 291, § 25;

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ASE ANNOTATIONS
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instructions examined. State v. Green,
781 P.2d 678 (1989).

54. Felony-murder not supported by underlying felony of aggravated assault. State v. Leonard, 248 K. 427, 431, 807 P.2d 81 (1991).

55. Evidence required for instruction on aggravated assault examined; immediate apprehension of bodily harm as necessary element noted. State v. Dixon, 248 K. 776, 785, 811 P.2d 1153 (1991).

56. Cited where variety of jury instructions on lesser included offenses, impossibility, and terroristic threats examined. State v. DeHerrera, 251 K. 143, 145, 834 P.2d 918 (1992).

57. Evidence supporting determination to try juvenile as adult (38-1636) upheld; admission of confession, evidence of gang membership examined. State v. Hooks, 251 K. 755, 756, 840 P.2d 483 (1992).

58. Felony murder merger, exclusion of expert testimony, withholding impeachment evidence, absence at in camera hearing, cross-examination rights examined. State v. Humphrey, 252 K. 6, 8, 845 P.2d 592 (1992).

59. Trial of juvenile as adult, selection of jury, application of rape shield statute. State v. Walker, 252 K. 117, 118, 843 P.2d 203 (1992).

60. Voluntariness of confession, extrajudicial statement of accused, investigative services for indigent defendant examined. State v. Snodgrass, 252 K. 253, 254, 843 P.2d 720 (1992).

61. Cited; law enforcement officer properly identified and in performance of official duty. State v. Lyne, 17 K.A.2d 761, 766, 844 P.2d 734 (1992).

62. Jury selection, confession, gang membership, rape shield statute, photographic exhibits, trial misconduct, instructions, peremptory challenge, "Hard 40" statute, examined. State v. Walker, 252 K. 279, 281, 845 P.2d 1 (1993).

63. Issue of fact regarding whether officer had probable cause to arrest driver precluded summary judgment on immunity. Burgess v. West, 817 F.Supp. 1520, 1521, 1526 (1993).

21-3411. Aggravated assault of a law enforcement officer. Aggravated assault of a law enforcement officer is an aggravated assault, as defined in K.S.A. 21-3410 and amendments thereto, committed against a uniformed or properly identified state, county or city law enforcement officer while such officer is engaged in the performance of such officer's duty.

Aggravated assault of a law enforcement officer is a severity level 6, person felony. A person convicted of aggravated assault of a law enforcement officer shall be subject to the provisions of subsection (g) of K.S.A. 1993 Supp. 21-4704, and amendments thereto.

History: L. 1969, ch. 180, § 21-3411; L. 1992, ch. 239, § 48; L. 1993, ch. 291, § 26; July 1.

CASE ANNOTATIONS

24. Failure to allege essential elements of offense in information as voiding conviction thereof noted. Zapata v. State, 14 K.A.2d 94, 97, 782 P.2d 1251 (1989).

25. Instructions on self-defense and lesser offenses, reasonableness of search, length of sentence examined. State v. Tyler, 251 K. 616, 619, 840 P.2d 413 (1992).

26. Admissibility of evidence negating specific intent, competency of evidence of collateral facts examined. State v. Friberg, 252 K. 141, 142, 843 P.2d 218 (1992).

27. Cited; law enforcement officer properly identified and in performance of official duty. State v. Lyne, 17 K.A.2d 761, 766, 844 P.2d 734 (1992).

28. Issue of fact regarding whether officer had probable cause to arrest driver precluded summary judgment on immunity. Burgess v. West, 817 F.Supp. 1520, 1521, 1526 (1993).

21-3412. Battery. Battery is:

(a) Intentionally or recklessly causing bodily harm to another person; or

(b) intentionally causing physical contact with another person when done in a rude, insulting or angry manner.

Battery is a class B person misdemeanor.

History: L. 1969, ch. 180, § 21-3412; L. 1992, ch. 298, § 11; L. 1993, ch. 291, § 27; July 1.

Revisor's Note:
This section was also amended by L. 1992, ch. 239, § 49, but such amended version was repealed by L. 1993, ch. 291, § 283, effective July 1, 1993.

Law Review and Bar Journal References:
"Corporate Criminal Liability for Injuries and Death," Patrick Hamilton, 40 K.L.R. 1091, 1105 (1992).

Attorney General's Opinions:
Assault; battery; prosecution for intentional exposure to HIV. 92-29.

CASE ANNOTATIONS

28. Cited; doctrine of merger examined; convictions of felony murder (21-3401) and child abuse (21-3609) reversed. State v. Lucas, 243 K. 462, 470, 759 P.2d 90 (1988).

29. Court's affirmative duty to instruct on lesser included offenses when supported by evidence examined. State v. Colbert, 244 K. 422, 427, 769 P.2d 1168 (1989).

30. When instruction that battery is lesser included offense of aggravated battery (21-3414) unnecessary examined. State v. Young, 14 K.A.2d 21, 27, 784 P.2d 366 (1989).

31. Replacement of juror with alternate juror not yet discharged on reasonable cause permissible; no grounds for mistrial shown. State v. Stallings, 246 K. 642, 646, 792 P.2d 1013 (1990).

32. Failure to instruct on lesser included offense examined where gun is used as a club in aggravated battery charge. State v. Wagner, 248 K. 240, 807 P.2d 139 (1991).

33. Conviction hereunder not multiplicitous with kidnapping and rape convictions. State v. Richmond, 250 K. 375, 376, 827 P.2d 743 (1992).

34. Battery as a lesser included offense of child abuse examined. State v. Allison, 16 K.A.2d 321, 322, 323, 823 P.2d 213 (1992).

35. Battery is a lesser included offense to aggravated robbery based on proof of facts alleged in complaint. State v. Hill, 16 K.A.2d 432, 434, 825 P.2d 1141 (1992).

36. Instruction on aggravated battery as raising implication that a more serious charge involved examined. State v. DeHerrera, 251 K. 143, 148, 834 P.2d 918 (1992).

37. Jury selection by voter registration lists, evidence of gang membership examined. State v. Bailey, 251 K. 156, 158, 834 P.2d 342 (1992).

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38. Factual circumstances examined in aggravated battery case where instruction on lesser included offense of battery not required. State v. Deggs, 251 K. 342, 834 P.2d 376 (1992).

39. Jury selection, confession, gang membership, rape shield statute, photographic exhibits, trial misconduct, instructions, peremptory challenge, "Hard 40" statute, examined. State v. Walker, 252 K. 279, 281, 845 P.2d 1 (1993).

40. Mentioned in reversing conviction for aggravated robbery; trial court erred in not giving instruction on battery as lesser included offense. State v. Clardy, 252 K. 541, 544, 847 P.2d 694 (1993).

41. Test determining whether excessive force used during arrest is what reasonable officer would do in heat of moment. Swanson v. Fields, 814 F.Supp. 1007, 1008, 1009, 1016 (1993).

21-3413. Battery against a law enforcement officer. Battery against a law enforcement officer is a battery, as defined in K.S.A. 21-3412 and amendments thereto:

(a) (1) Committed against a uniformed or properly identified state, county or city law enforcement officer other than a correctional officer or employee as provided in subsection (a)(2), while such officer is engaged in the performance of such officer's duty; or

(2) committed against a correctional officer or employee by a person in custody of the secretary of corrections, while such officer or employee is engaged in the performance of such officer's or employee's duty.

(b) Battery against a law enforcement officer as defined in subsection (a)(1) is a class A person misdemeanor. Battery against a law enforcement officer as defined in subsection (a)(2) is a severity level 7, person felony.

(c) As used in this section:

(1) "Correctional institution" means any institution or facility under the supervision and control of the secretary of corrections.

(2) "Correctional officer or employee" means any officer or employee of the Kansas department of corrections or any independent contractor, or any employee of such contractor, working at a correctional institution.

History: L. 1969, ch. 180, § 21-3413; L. 1990, ch. 97, § 3; L. 1992, ch. 239, § 50; L. 1993, ch. 291, § 28; July 1.

CASE ANNOTATIONS

13. Test determining whether excessive force used during arrest is what reasonable officer would do in heat of moment. Swanson v. Fields, 814 F.Supp. 1007, 1008, 1009, 1016 (1993).

21-3414. Aggravated battery. [See Revisor's Note] (a) Aggravated battery is:

(1) (A) Intentionally causing great bodily harm to another person or disfigurement of another person; or

(B) intentionally causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted; or

(C) intentionally causing physical contact with another person when done in a rude, insulting or angry manner with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted; or

(2) (A) recklessly causing great bodily harm to another person or disfigurement of another person; or

(B) recklessly causing bodily harm to another person with a deadly weapon, or in any manner whereby great bodily harm, disfigurement or death can be inflicted.

(b) Aggravated battery as described in subsection (a)(1)(A) is a severity level 4, person felony. Aggravated battery as described in subsections (a)(1)(B) and (a)(1)(C) is a severity level 7, person felony. Aggravated battery as described in subsection (a)(2)(A) is a severity level 5, person felony. Aggravated battery as described in subsection (a)(2)(B) is a severity level 8, person felony. A person convicted of aggravated battery shall be subject to the provisions of subsection (h) of K.S.A. 1993 Supp. 21-4704 and amendments thereto.

History: L. 1969, ch. 180, § 21-3414; L. 1992, ch. 298, § 12; L. 1993, ch. 291, § 29; July 1.

Revisor's Note:

This section was also amended by L. 1992, ch. 239, § 51, but such amended version was repealed by L. 1993, ch. 291, § 283, effective July 1, 1993.

For 1992 enactment relating to aggravated battery, see 21-3414a.

Law Review and Bar Journal References:

"Corporate Criminal Liability for Injuries and Death," Patrick Hamilton, 40 K.L.R. 1091, 1105 (1992).

Attorney General's Opinions:

Assault; battery; prosecution for intentional exposure to HIV. 92-29.

CASE ANNOTATIONS

91. Cited; doctrine of merger examined; convictions of felony murder (21-3401) and child abuse (21-3609) reversed. State v. Lucas, 243 K. 462, 471, 759 P.2d 90 (1988).

92. Conviction affirmed; amendment of complaint, information or indictment before verdict or finding, admission of incriminating statements examined. State v. Rasch, 243 K. 495, 758 P.2d 214 (1988).

93. Aggravated battery resulting in death cannot serve as collateral felony for felony-murder (21-3401) purposes. State v. Prouse, 244 K. 292, 297, 767 P.2d 1308 (1989).

94. Defendant's attempted impeachment of testimony of prosecution witness; imposition of more severe sentence following second trial; instruction on multiple counts examined. State v. Macomber, 244 K. 396, 769 P.2d 621 (1989).

95. Identification upon return
tions of "dangerous weapon" an
struction on simple battery exam
244 K. 422, 769 P.2d 1165 (1989

96. Rules for admission in e
against interest (60-460(j)) restate
Jackson, 244 K. 621, 772 P.2d 7

97. Alibi (22-3218) and insani
cumstances requiring notice of int
voluntary intoxication (21-3208) c
beas Corpus Petition of Mason, 2
179 (1989).

98. Failure to instruct on bat
child abuse (21-3609) as separat
cluded crime determined. State
27, 31, 784 P.2d 366 (1989).

99. Exculpatory evidence, pri
tiplicitous charges, sufficiency c
identification instruction, senter
ined. State v. Smith, 245 K. 381,

100. Right to Miranda warning
todial interrogation, right against
status evidence, murder statute
field, 245 K. 431, 432, 781 P.2d

101. Prosecution as adult, doct
trolling sentence examined. State
781 P.2d 700 (1989).

102. Nolo contendere plea to u
stituting waiver of statute of limi
determined. Lowe v. State, 14 K.
(1990).

103. Defendant's right to coun
to modify sentence (21-4603(3)
Pierce, 246 K. 183, 184, 787 P.2

104. Facts indicating investiga
than custodial interrogation requir
amined. State v. Jones, 246 K. 2

105. Nolo contendere plea to u
stituting waiver of statute of limi
determined. Lowe v. State, 14 K
1313 (1990).

106. Raising objections to inst
not raised at trial examined. Sta
625, 793 P.2d 243 (1990).

107. Dismissal of juror and re
struct on lesser included offense,
codefendants examined. State v.
P.2d 1013 (1990).

108. Court's lack of authority
serve time in county jail as co
amined. State v. Walbridge, 248
(1991).

109. Rules governing motions
newly discovered evidence reite
248 K. 130, 804 P.2d 983 (1991).

110. Whether gun used as
weapon, failure to instruct on les
3412), prior conviction examined
K. 240, 807 P.2d 139 (1991).

111. Self-defense instruction in
defendants, limiting testimony
fense killing examined. State v.
P.2d 1383 (1991).

112. Evidence required to est
as lesser offense of attempted fir
ined. State v. Dixon, 248 K. 7
(1991).

113. Jurisdiction to hear appe
sentence not involving presump

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CASE ANNOTATIONS

62. Cited; indigent defendant's right to transcript of sentencing hearing following denial of sentence modification examined. State v. Duckett, 13 K.A.2d 122, 764 P.2d 134 (1988).

63. Sentencing examined where two criminal offenses with identical elements but different penalties involved. State v. Nunn, 244 K. 207, 228, 768 P.2d 268 (1989).

64. Time limits on district court's jurisdiction to modify sentences and exceptions thereto (21-4603(3)) examined. State v. Saft, 244 K. 517, 769 P.2d 675 (1989).

65. Where statute itself corrects sentence, correction of record of sentencing clerical in nature, and no hearing required. State v. Young, 14 K.A.2d 21, 38, 784 P.2d 366 (1989).

66. Appeal from probation denial following guilty plea where statutory presumption of probation applies (21-4606a) examined. State v. VanReed, 245 K. 213, 215, 777 P.2d 794 (1989).

67. Seven factors for consideration in sentencing not detailed where court exceeded minimum sentence; no abuse of discretion shown. State v. Meyers, 245 K. 471, 479, 781 P.2d 700 (1989).

68. Sentence enhancement within limits prescribed by law and without partiality, prejudice, oppression or corrupt motive not disturbed on appeal. State v. Trotter, 245 K. 657, 664, 783 P.2d 1271 (1989).

69. Mere reference to and adoption of presentence report as insufficient to overcome elements in 21-4601, 21-4606 and 21-4606a examined. State v. Tittes, 245 K. 708, 710, 784 P.2d 359 (1989).

70. Consequences of third or subsequent conviction of driving with suspended license determined. State v. Harpool, 246 K. 226, 229, 788 P.2d 281 (1990).

71. Ambiguous plea agreement as strictly construed against state determined. State v. Marks, 14 K.A.2d 594, 595, 796 P.2d 174 (1990).

72. Effect of 21-4603(3)(a) on court's discretion to modify sentence, nature of SRDC recommendation examined. State v. Moon, 15 K.A.2d 4, 5, 801 P.2d 59 (1990).

73. No requirement that life sentence be changed to term of years; question of good time credits is one for legislature. State v. Carmichael, 247 K. 619, 622, 623, 801 P.2d 1315 (1990).

74. Amendments to sentencing statutes regarding modification (21-4603(3)(a)) and presumption of probation (21-4606a) determined as substantive and applicable prospectively. State v. Sylva, 248 K. 118, 119, 804 P.2d 967 (1991).

75. Trial court's consideration of events occurring after crime for which defendant being sentenced examined. State v. Hannah, 248 K. 141, 143, 804 P.2d 990 (1991).

76. Mandate in 1989 Supp. 21-4603(3)(a) (now 1990 Supp. 21-4603(4)(a)) regarding sentence modification examined in depth; held constitutional. State v. Reed, 248 K. 792, 794, 811 P.2d 1163 (1991).

77. Penalties for class E felonies compared with provisions of 8-262(a)(3) for convictions of driving with a suspended license (minor over 14 years of age). State v. Frazier, 248 K. 963, 965, 811 P.2d 1240 (1991).

78. Time during which probation may be revoked examined; probation period held limited to maximum sentence time. State v. Grimsley, 15 K.A.2d 441, 443, 808 P.2d 1387 (1991).

79. Appellate court review of minimum sentence not involving presumptive probation after plea of guilty or nolo contendere examined. State v. Salinas, 15 K.A.2d 578, 579, 811 P.2d 525 (1991).

80. Record of criminal activity examined where court imposed consecutive maximum sentences within statutory limits. State v. Barraza-Flores, 16 K.A.2d 15, 23, 819 P.2d 128 (1991).

81. Reasonableness of mandatory life sentence and consecutive ten-year sentences examined. State v. Ji, 2[illegible] K. 3, 41, 832 P.2d 1176 (1992).

82. Unless sentence exceeds statutory minimum, there is no basis upon which defendant can allege abuse of discretion. State v. Beechum, 251 K. 194, 197, 202, 833 P.2d 988 (1992).

83. "Hard 40" sentencing instruction examined and approved; question of parole eligibility likelihood examined. State v. Perez, 251 K. 736, 745, 840 P.2d 1118 (1992).

84. Circumstances justifying imposition of enhanced sentence pursuant to habitual criminal act examined. State v. Warren, 252 K. 169, 183, 843 P.2d 224 (1992).

85. Cited in court's examination of defendant's right to allocution under 22-3424(4); substantial justice shown. State v. Spencer, 252 K. 186, 190, 843 P.2d 236 (1992).

86. Imposition of minimum sentence noted as not resulting in "manifest injustice" where firearm used in commission of crime (21-4618(3)). State v. Turley, 17 K.A.2d 484, 486, 840 P.2d 529 (1992).

87. Noted in holding prior conviction used to enhance classification of crime (65-4127b) cannot be used to enhance sentence (21-4504). State v. Geddes, 17 K.A.2d 588, 59[illegible] 841 P.2d 1088 (1992).

88. Cited; application of 21-4618 to conviction of unlawful possession of firearm is erroneous. State v. Edwards, 252 K. 860, 871, 852 P.2d 98 (1993).

21-4501a. Application of certain penalties; review and reduction of previous sentences; crimes committed prior to July 1, 1993. (a) The minimum term of imprisonment established by subsection (e) of K.S.A. 21-4501 and amendments thereto shall apply retrospectively to individuals sentenced on or after May 17, 1984, for a class E felony.

(b) If an individual has been sentenced to a minimum term of imprisonment of more than one year for a class E felony and the sentence was imposed on or after May 17, 1984, such minimum sentence is hereby reduced to one year.

(c) If an individual's minimum term of imprisonment is reduced by this section, the individual shall be eligible for parole as provided by K.S.A. 22-3717 and amendments thereto, based upon the individual's reduced minimum term of imprisonment.

(d) The provisions of this section shall not apply to crimes committed on or after July 1, 1993.

History: L. 1984, ch. 119, § 10; L. 1988, ch. 115, § 11; L. 1992, ch. 239, § 232; July 1, 1993.

21-4502. Classification of misdemeanors and terms of confinement; possible disposition. (1) For the purpose of sentencing, the following classes of misdemeanors and the punishment

CL

[illegible] the terms of confinem[illegible] each class are established:

(a) Class A, the sentence [illegible] a definite term of confinem[illegible] jail which shall be fixed by [illegible] not exceed one year;

(b) Class B, the senten[illegible] be a definite term of confine[illegible] jail which shall be fixed by [illegible] not exceed six months;

(c) Class C, the senten[illegible] be a definite term of confine[illegible] jail which shall be fixed by [illegible] not exceed one month;

(d) Unclassified misdem[illegible] include all crimes declared t[illegible] without specification as to [illegible] for which shall be in accorc[illegible] tence specified in the statu[illegible] crime; if no penalty is pro[illegible] the sentence shall be the s[illegible] vided herein for a class C

(2) Upon conviction of [illegible] person may be punished by [illegible] in K.S.A. 21-4503 and an[illegible] instead of or in addition [illegible] provided in this section.

(3) In addition to or in [illegible] sentence authorized by law[illegible] evidence that the act cons[illegible] meanor was substantially [illegible] session, use or ingestic[illegible] beverage or alcoholic liqu[illegible] the court may order such p[illegible] satisfactorily complete an [illegible] ucation or training progra[illegible] administrative judge of the[illegible] licensed by the secretary [illegible] bilitation services.

(4) Except as provided [illegible] addition to or in lieu of [illegible] authorized by law, whene[illegible] victed of having committe[illegible] years of age, a misdemeano[illegible] controlled substances act [illegible] *seq.* and amendments the[illegible] 719, 41-727, 41-804, 41-[illegible] 4152, 65-4153, 65-4154 or 6[illegible] ments thereto, the court s[illegible] son to submit to and com[illegible] drug evaluation by a comn[illegible] and drug safety action pr[illegible] suant to K.S.A. 8-1008 [illegible] thereto and to pay a fee n[illegible] established by that statute

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za-Flores, 16 K.A.2d 15, 23, 819 P.2d

s of mandatory life sentence and six sentences examined. State v. Ji, 251 1176 (1992).
ce exceeds statutory minimum, there ich defendant can allege abuse of dis- chum, 251 K. 194, 197, 202, 833 P.2d

ntencing instruction examined and ap- parole eligibility likelihood examined. K. 736, 745, 840 P.2d 1118 (1992).
es justifying imposition of enhanced o habitual criminal act examined. State 169, 183, 843 P.2d 224 (1992).
rt's examination of defendant's right to 22-3424(4); substantial justice shown. 252 K. 186, 190, 843 P.2d 236 (1992).
of minimum sentence noted as not re- t injustice" where firearm used in com- 21-4618(3)). State v. Turley, 17 K.A.2d d 529 (1992).
olding prior conviction used to enhance me (65-4127b) cannot be used to enhance). State v. Geddes, 17 K.A.2d 588, 596, 992).
lication of 21-4618 to conviction of un- of firearm is erroneous. State v. Edwards, 852 P.2d 98 (1993).

. Application of certain penal- and reduction of previous sen- es committed prior to July 1, minimum term of imprisonment y subsection (e) of K.S.A. 21-4501 ents thereto shall apply retro- individuals sentenced on or after 4, for a class E felony.
individual has been sentenced to term of imprisonment of more than a class E felony and the sentence d on or after May 17, 1984, such entence is hereby reduced to one

individual's minimum term of im- is reduced by this section, the in- ll be eligible for parole as provided 22-3717 and amendments thereto, the individual's reduced minimum prisonment.
provisions of this section shall not rimes committed on or after July 1,

L. 1984, ch. 119, § 10; L. 1988, 11; L. 1992, ch. 239, § 232; July

2. Classification of misdemeanors of confinement; possible disposition. e purpose of sentencing, the following misdemeanors and the punishment and the terms of confinement authorized for each class are established:

(a) Class A, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one year;

(b) Class B, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed six months;

(c) Class C, the sentence for which shall be a definite term of confinement in the county jail which shall be fixed by the court and shall not exceed one month;

(d) Unclassified misdemeanors, which shall include all crimes declared to be misdemeanors without specification as to class, the sentence for which shall be in accordance with the sentence specified in the statute that defines the crime; if no penalty is provided in such law, the sentence shall be the same penalty as provided herein for a class C misdemeanor.

(2) Upon conviction of a misdemeanor, a person may be punished by a fine, as provided in K.S.A. 21-4503 and amendments thereto, instead of or in addition to confinement, as provided in this section.

(3) In addition to or in lieu of any other sentence authorized by law, whenever there is evidence that the act constituting the misdemeanor was substantially related to the possession, use or ingestion of cereal malt beverage or alcoholic liquor by such person, the court may order such person to attend and satisfactorily complete an alcohol or drug education or training program certified by the administrative judge of the judicial district or licensed by the secretary of social and rehabilitation services.

(4) Except as provided in subsection (5), in addition to or in lieu of any other sentence authorized by law, whenever a person is convicted of having committed, while under 21 years of age, a misdemeanor under the uniform controlled substances act (K.S.A. 65-4101 *et seq.* and amendments thereto) or K.S.A. 41-719, 41-727, 41-804, 41-2719, 41-2720, 65-4152, 65-4153, 65-4154 or 65-4155, and amendments thereto, the court shall order such person to submit to and complete an alcohol and drug evaluation by a community-based alcohol and drug safety action program certified pursuant to K.S.A. 8-1008 and amendments thereto and to pay a fee not to exceed the fee established by that statute for such evaluation. If the court finds that the person is indigent, the fee may be waived.

(5) If the person is 18 or more years of age but less than 21 years of age and is convicted of a violation of K.S.A. 41-727, and amendments thereto, involving cereal malt beverage, the provisions of subsection (4) are permissive and not mandatory.

History: L. 1969, ch. 180, § 21-4502; L. 1977, ch. 117, § 2; L. 1979, ch. 90, § 4; L. 1989, ch. 95, § 4; July 1.

CASE ANNOTATIONS

6. Cited; presumption in favor of probation (21-4606a) examined where first convictions are Class E felonies. State v. Knabe, 243 K. 538, 539, 757 P.2d 308 (1988).

7. Limitations on conditions of probation and parole (21-4602) determined. State v. Mosburg, 13 K.A.2d 257, 261, 768 P.2d 313 (1989).

8. Offenses charged under Kansas securities act (17-1252 et seq.) determined to be felonies. State v. Kershner, 15 K.A.2d 17, 22, 801 P.2d 68 (1990).

9. Court lacks authority to require defendant to serve time in county jail as condition of probation. State v. Walbridge, 248 K. 65, 67, 805 P.2d 15 (1991).

21-4503. Fines; crimes committed prior to July 1, 1993. (a) Except as provided in subsection (b), a person who has been convicted of a felony may, in addition to or instead of the imprisonment authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(1) For a class B or C felony, a sum not exceeding $15,000.

(2) For a class D or E felony, a sum not exceeding $10,000.

(b) A person who has been convicted of a felony violation of or any attempt or conspiracy to commit a felony violation of any provision of the uniform controlled substances act may, in addition to or instead of the imprisonment authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(1) For a class A felony, a sum not exceeding $500,000.

(2) For a class B or C felony, a sum not exceeding $300,000.

(3) For a class D or E felony, a sum not exceeding $100,000.

(c) A person who has been convicted of a misdemeanor may, in addition to or instead of the confinement authorized by law, be sentenced to pay a fine which shall be fixed by the court as follows:

(1) For a class A misdemeanor, a sum not exceeding $2,500.

(2) For a class B misdemeanor, a sum not exceeding $1,000.

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SENTENCING RANGE - NONDRUG OFFENSES

Category→	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	193 183 173	178 170 161	167 158 150	154 146 138	141 134 127	127 122 115	116 110 104	103 97 92
II	154 146 138	144 137 130	135 128 121	125 119 113	115 109 103	105 100 95	96 91 86	86 82 77	77 73 68
III	103 97 92	95 90 86	89 85 80	83 78 74	77 73 68	69 66 62	64 60 57	59 55 51	51 49 46
IV	86 81 77	81 77 72	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	68 65 61	64 60 57	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

LEGEND

- Presumptive Probation
- Border Box
- Presumptive Imprisonment

Recommended probation terms are:

36 months for felonies classified in Severity Levels 1 - 5
24 months for felonies classified in Severity Levels 6 - 10

Postrelease terms are:

24 months for felonies classified in Severity Levels 1 - 6
12 months for felonies classified in Severity Levels 7 - 10

TESTIMONY
ON
HOUSE BILL 2912
SUBMITTED TO THE
HOUSE JUDICIARY SUBCOMMITTEE
BY
STEVEN R. MCCOY, VICE PRESIDENT
KANSAS STATE TROOPERS ASSOCIATION
FEBRUARY 22, 1994

Good afternoon Mr. Chairman and members of the Committee. I am Master Trooper Steven McCoy and I appear before you today on behalf of the Kansas State Troopers Association to support House Bill 2912.

House Bill 2912 addresses the problem of proper evaluation of offenders who actually attack or cause a law enforcement officer to believe they may receive bodily harm.

Situations where we enforce existing law or intervene in civil matters to prevent injury and protect property often escalate to severe verbal or physical attack.

House Bill 2912 sets the procedure to cause a presentence anger management evaluation of any person who is convicted of a violation of assault, assault of a law enforcement officer, battery and battery of a law enforcement officer.

House Bill 2912 is very complex and will cause additional conditions to be completed prior to final disposition of their case for persons convicted of these crimes.

Proper evaluation and instruction may allow the violator to correct their social behavior and stop additional problems. This would be positive for citizens and law enforcement officers who have contact with them in the future.

The Kansas State Troopers Association requests your favorable consideration of House Bill 2912.

Respectfully submitted,

Steven R. McCoy

Steven R. McCoy, Vice President
Kansas State Troopers Association

Session of 1994

HOUSE BILL No. 2912

By Representative Mills

2-4

AN ACT concerning crimes and punishment; relating to assault, assault of a law enforcement officer, battery and battery of a law enforcement officer; amending K.S.A. 1993 Supp. 21-3408, 21-3409, 21-3412 and 21-3413 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) Community-based anger management education or treatment programs certified in accordance with subsection (b) shall provide:

(1) Presentence anger management evaluations of any person who is convicted of a violation of K.S.A. 21-3408, 21-3409, 21-3412 or 21-3413, 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. 21-3408, 21-3409, 21-3412 or 21-3413, 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 anger management education or treatment program, as provided in this section;

(3) anger management 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. 21-3408, 21-3409, 21-3412 or 21-3413, 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. 21-3408, 21-3409, 21-3412 or 21-3413, and amendments thereto, or the ordinance of a city in this state which prohibits the acts prohibited by that statute, to complete an anger management education or treatment program, as provided in this section; or

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

(b) The presentence evaluation shall be conducted by a community-based program certified in accordance with the provisions of this subsection to provide evaluation and supervision services as

education and treatment program.

Sec. 4. K.S.A. 1993 Supp. 21-3412 is hereby amended to read as follows: 21-3412. *(a)* Battery is:

~~(a)~~ *(1)* Intentionally or recklessly causing bodily harm to another person; or

~~(b)~~ (2) intentionally causing physical contact with another person when done in a rude, insulting or angry manner.

(b) On a first or second conviction battery is a class B person misdemeanor. *On a first conviction of a violation of this section, the defendant shall be sentenced to not less than 72 consecutive hours imprisonment. On a second conviction of a violation of this section, the defendant shall be sentenced to not less than 30 days imprisonment. On a third or subsequent conviction,* ~~*battery is a severity level 5, person felony.*~~ *Any mandatory sentence established in this subsection shall be served either before or as a condition of any grant of probation or suspension, reduction of sentence or parole.*

(c) In addition to any other penalty established by this section, the court shall enter an order which requires that the person enroll in and successfully complete an anger management education program or treatment program, as provided in section 1, or both the education and treatment program.

Sec. 5. K.S.A. 1993 Supp. 21-3413 is hereby amended to read as follows: 21-3413. Battery against a law enforcement officer is a battery, as defined in K.S.A. 21-3412 and amendments thereto:

(a) (1) Committed against a uniformed or properly identified state, county or city law enforcement officer other than a correctional officer or employee as provided in subsection (a)(2), while such officer is engaged in the performance of such officer's duty; or

(2) committed against a correctional officer or employee by a person in custody of the secretary of corrections, while such officer or employee is engaged in the performance of such officer's or employee's duty.

(b) Battery against a law enforcement officer as defined in subsection (a)(1) is a class A person misdemeanor. *On a first conviction of a violation of this subsection, the defendant shall be sentenced to not less than 72 consecutive hours imprisonment. On a second conviction of a violation of this subsection, the defendant shall be sentenced to not less than 30 days imprisonment. On a third or subsequent conviction, battery against a law enforcement officer is a severity level 5, person felony. Any mandatory sentence established in this subsection shall be served either before or as a condition of any grant of probation or suspension, reduction of sentence or pa-*

45-2

the defendant shall be sentenced to not less than one year imprisonment

45-

State of Kansas

KANSAS SENTENCING COMMISSION

SENATE BILL 552

K.S.A. 22-3717 (1993 Supp.) contains the rules for computing the sentence of a person who is on parole or conditional release for a felony committed prior to July 1, 1993, and whose parole or conditional release is revoked due to the commission of a new offense on or after July 1, 1993. The statute currently provides that the indeterminate sentence for the earlier crime will be converted to a specific term of months (12 months for Class C, D, and E felonies; 36 months for Class A and B felonies) and added to the sentence for the new crime. Once this aggregate sentence has been served, the offender is then to be released to the one or two year period of postrelease supervision that is provided for the new crime by statute. However, the application of this statute may allow certain offenders to gain some ultimate advantage by committing a new crime while on parole or conditional release. For example, any offender whose old sentence was life, "Hard 40" life, or an indeterminate sentence with life as the maximum term (such as 15 years-life) was subject to parole for life, or until the Kansas parole board saw fit to discharge them from parole; this meant that they were also subject to revocation for that entire period if they violated parole conditions. The application of the current version of the statute, while requiring the parolee to return to prison to serve 12 or 36 months on the old sentence plus the new sentence first, would operate to eliminate the prospect of a lifetime of parole or postrelease supervision. SB 552 removes any such possible advantage that might be gained by the offender by providing that the parole violator's old sentence will not be converted at all. Instead, after the revocation of parole or conditional release by the parole board, the offender will not begin to serve the new sentence until re-paroled from the old sentence by the board, or until they reach the conditional release or maximum expiration date of the old sentence. In addition, those offenders whose old sentence allowed for lifetime supervision will continue to remain on such supervision after their release from prison unless discharged from supervision earlier by the parole board.

The provision that this change in the law would take effect upon publication in the Kansas Register is intended to immediately remove the existing statutory mandate to the Department of Corrections to convert the old sentences of these offenders and the applicable period of parole or postrelease supervision upon revocation of their parole.

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(913) 296-0923

Jayhawk Tower 700 Jackson Street - Suite 501 Topeka, Kansas 66603-3731

Testimony on SB 552
Submitted by the Kansas Department of Corrections
to the House Judiciary Subcommittee
February 22, 1994

The Department of Corrections supports SB 552.

The amendment to K.S.A. 1993 Supp. 22-3717 proposed in this bill makes it clear that persons convicted of an off-grid crime (first degree murder and treason) will not have their sentences converted to a guidelines sentence in the event they commit a crime after July 1, 1993 while on parole, conditional release, probation, or assignment to a community corrections program. As now written, such an individual's life sentence would convert to a term of 36 months.

First degree murder and treason were always considered off-grid crimes. They were not intended to be impacted by sentencing guidelines. This amendment would leave the previously imposed life sentence in place pursuant to the law as it existed prior to July 1, 1993. This would eliminate the possibility that an individual with a life sentence could end a potential lifetime period of supervision by committing a new felony offense, thus reducing the remaining sentence to a period of only 36 months. Such a result was not intended.

Individuals should not be able to obtain a sentencing advantage by committing a new crime. The method set forth in SB 552 as amended by the Senate does a better job of ensuring that an advantage does not result than does the current provision, while still providing a workable method of sentence computation for the old indeterminate sentences and the new determinate sentences.

As Amended by Senate Committee

Session of 1994

SENATE BILL No. 552

By Committee on Judiciary

1-20

AN ACT concerning crimes, punishment and criminal procedure; relating to violations of parole or postrelease supervision by certain persons; amending K.S.A. 1993 Supp. 22-3717 and repealing the existing ~~section~~,

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1993 Supp. 22-3717 is hereby amended to read as follows: 22-3717. (a) Except as otherwise provided by this section and K.S.A. 1993 Supp. 21-4628 and amendments thereto, an inmate, including an inmate sentenced pursuant to K.S.A. 21-4618 and amendments thereto, shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.

(b) An inmate sentenced for a class A felony, including an inmate sentenced pursuant to K.S.A. 21-4618 and amendments thereto but not including an inmate sentenced pursuant to K.S.A. 1993 Supp. 21-4628 and amendments thereto or on or after July 1, 1993, inmate sentenced for an off-grid offense, shall be eligible for parole after serving 15 years of confinement, without deduction of any good time credits.

(c) Except as provided in subsection (e), if an inmate is sentenced to imprisonment for more than one crime and the sentences run consecutively, the inmate shall be eligible for parole after serving the total of:

(1) The aggregate minimum sentences, as determined pursuant to K.S.A. 21-4608 and amendments thereto, less good time credits for those crimes which are not class A felonies; and

(2) an additional 15 years, without deduction of good time credits, for each crime which is a class A felony.

(d) (1) Persons sentenced for crimes committed on or after July 1, 1993, will not be eligible for parole, but will be released to a mandatory period of postrelease supervision upon completion of the prison portion of their sentence as follows:

(A) Except as provided in subparagraph (C), persons sentenced for nondrug severity level 1 through 6 crimes and drug severity

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relating to the adjudication of the defendant;
21-4603d and
sections; also repealing K.S.A. 1993 Supp. 21-4603e

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of corrections when an inmate has acted in a heroic or outstanding manner in coming to the assistance of another person in a life threatening situation, preventing injury or death to a person, preventing the destruction of property or taking actions which result in a financial savings to the state.

Sec. 2. K.S.A. 1993 Supp. 22-3717 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the Kansas register.

Insert Sec. 2. see attached are

21-4603d, 21-4603e and

2-18-94

Sec. 2. K.S.A. 1993 Supp. 21-4603d is hereby amended to read as follows: 21-4603d. (a) Whenever any person has been found guilty of a crime, the court may adjudge any of the following:

(1) Commit the defendant to the custody of the secretary of corrections if the current crime of conviction is a felony and the ~~criminal---history---score---falls---within--a--presumptive incarceration-category-or-through-a-departure-for-substantial-and compelling--reasons~~ sentence presumes imprisonment, or the sentence imposed is a dispositional departure to imprisonment; or, if confinement is for a misdemeanor, to jail for the term provided by law;

(2) impose the fine applicable to the offense;

(3) release the defendant on probation if the current crime of conviction and criminal history fall within a presumptive nonprison category or through a departure for substantial and compelling reasons subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution. In felony cases, the court may include confinement in a county jail not to exceed 30 days, which need not be served consecutively, as a condition of probation or community corrections placement;

(4) assign the defendant to a community correctional services program in presumptive nonprison cases or through a departure for substantial and compelling reasons subject to such conditions as the court may deem appropriate, including orders requiring full or partial restitution;

(5) assign the defendant to a conservation camp for a period not to exceed 180 days;

(6) assign the defendant to a house arrest program pursuant to K.S.A. 21-4603b and amendments thereto;

(7) order the defendant to attend and satisfactorily complete an alcohol or drug education or training program as provided by subsection (3) of K.S.A. 21-4502 and amendments thereto;

(8) order the defendant to repay the amount of any reward paid by any crime stoppers chapter, individual, corporation or public entity which materially aided in the apprehension or conviction of the defendant; or repay the amount of any public funds utilized by a law enforcement agency to purchase controlled substances from the defendant during the investigation which leads to the defendant's conviction. Such repayment of the amount of any public funds utilized by a law enforcement agency shall be deposited and credited to the same fund from which the public funds were credited to prior to use by the law enforcement agency; or

(9) impose any appropriate combination of (1) ~~and--(2)--or~~, (2), (3), (4), (5), (6), (7) and (8).

In addition to or in lieu of any of the above, the court shall order the defendant to submit to and complete an alcohol and drug evaluation, and pay a fee therefor, when required by subsection (4) of K.S.A. 21-4502 and amendments thereto.

In imposing a fine the court may authorize the payment thereof in installments. In releasing a defendant on probation, the court shall direct that the defendant be under the supervision of a court services officer. If the court commits the defendant to the custody of the secretary of corrections or to jail, the court may specify in its order the amount of

restitution to be paid and the person to whom it shall be paid if restitution is later ordered as a condition of parole or conditional release.

When a new felony is committed while the offender is incarcerated and serving a sentence for a felony or while the offender is on probation, assignment to a community correctional services program, parole, conditional release, or postrelease supervision for a felony, a new sentence shall be imposed pursuant to the consecutive sentencing requirements of K.S.A. 21-4608, and amendments thereto, and the court may sentence the offender to imprisonment for the new conviction, even when the new crime of conviction otherwise presumes a nonprison sentence. In this event, imposition of a prison sentence for the new crime does not constitute a departure.

The court in committing a defendant to the custody of the secretary of corrections shall fix a term of confinement within the limits provided by law. In those cases where the law does not fix a term of confinement for the crime for which the defendant was convicted, the court shall fix the term of such confinement.

(b) Dispositions which do not involve commitment to the custody of the secretary of corrections shall not entail the loss by the defendant of any civil rights.

(c) This section shall not deprive the court of any authority conferred by any other Kansas statute to decree a forfeiture of property, suspend or cancel a license, remove a person from office, or impose any other civil penalty as a result of conviction of crime.

(d) An application for or acceptance of probation or assignment to a community correctional services program shall not constitute an acquiescence in the judgment for purpose of appeal, and any convicted person may appeal from such conviction, as provided by law, without regard to whether such person has applied for probation, suspended sentence or assignment to a community correctional services program.

(e) When it is provided by law that a person shall be sentenced pursuant to K.S.A. 1993 Supp. 21-4628 and amendments thereto, the provisions of this section shall not apply.

And by renumbering the remaining sections accordingly.

STATE OF KANSAS

GRETA H. GOODWIN
REPRESENTATIVE SEVENTY-EIGHTH DISTRICT
COWLEY & BUTLER COUNTIES
420 E. 12TH
WINFIELD, KANSAS 67156
316-221-9058

DURING SESSION
LEGISLATIVE HOTLINE
1-800-432-3924

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
MEMBER:
AGRICULTURE
JUDICIARY
PUBLIC HEALTH AND WELFARE

TESTIMONY ON HB 3040
HOUSE JUDICIARY COMMITTEE
FEBRUARY 22, 1994

Mr. Chairman and Members of the Committee:

I want to thank you for holding a hearing on H 3040 and I appreciate the opportunity to be allowed to present testimony on this bill.

Under the current law, any person who operates a vehicle within this state is deemed to have given consent to submit to one or more tests of the person's blood, breath, urine or other bodily substance to determine the presence of alcohol or drugs. Before a test or tests are administered the person shall be given oral and written notice.

Under the bill as drafted the person may refuse and a search warrant may be issued if the officer has probable cause to believe that the person, while under the influence of drugs or alcohol, operated a vehicle as to cause injury or death of another.

Those of you on the committee know the strong position I take for the punishment of those individuals driving while under the influence of alcohol and/or drugs. Driving should be a privilege and not a right. This privilege should not extend to those who abuse the use of alcohol before getting behind the wheel of an automobile.

Several cases have been thrown out of court due to a technicality of the consents and the blood alcohol tests. The bill is drafted that the officer at the scene of the accident shall have probable cause to believe that the person operated a vehicle while under the influence of alcohol and/or drugs if the vehicle was operated by such person in such a manner as to have caused the death of another person. Under the probable cause theory no consent is necessary and a search warrant can be issued for the withdrawal of blood. Should there be a fatality at a scene of an accident, a consent should not be necessary.

The amendment attached to my testimony addresses the issue of any technicality which might arise on consents. This amendment reflects that if there is a mere technicality on the consent form, it would not invalidate the blood alcohol content test.

Thank you for your time and consideration. I would urge the passage of H 3040. I would be happy to answer any questions.

Kansas Highway Patrol
Summary of Testimony
1994 House Bill 3040
before the
House Judiciary Subcommittee
February 22, 1994

Good afternoon Mr. Chairman and members of the Committee. My name is Sergeant Terry Maple and I appear before you today on behalf of Colonel Lonnie McCollum in support of House Bill 3040.

HB 3040 amends the current law regarding chemical tests in DUI cases. The bill defines when probable cause to request an additonal chemical test exists in fatality crashes where a driver has refused such testing.

The new language in HB 3040 would clarify that the necessary probable cause exists "if the vehicle was operated by such person in a manner as to have caused the death of another." We feel that this language would reduce confusion and clarify when testing is permitted.

I will be glad to stand for any questions the committee may have.

######

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Session of 1994

HOUSE BILL No. 3040

By Committee on Judiciary

2-15

AN ACT concerning driving under the influence of alcohol or drugs; relating to probable cause; amending K.S.A. 1993 Supp. 8-1001 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1993 Supp. 8-1001 is hereby amended to read as follows: 8-1001. (a) Any person who operates or attempts to operate a vehicle within this state is deemed to have given consent, subject to the provisions of this act, to submit to one or more tests 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 vehicle while under the influence of alcohol or drugs, or both, or to believe that the person was 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; 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 vehicle while under the influence of alcohol or drugs, or both, or involving 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, in violation of a state statute or a city ordinance; or (2) the person has been involved in a vehicle 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

constitutional right to consult with an attorney regarding whether to submit to testing; (D) if the person refuses to submit to and complete any test of breath, blood or urine hereafter requested by a law enforcement officer, the person's driving privileges will be suspended for at least one year; (E) if the person submits to and completes the test or tests and the test results show an alcohol concentration of .08 or greater, the person's driving privileges will be suspended for at least 30 days; (F) if the person refuses a test or the test results show an alcohol concentration of .08 or greater and if, within the past five years, the person has been convicted or granted diversion on a charge of driving under the influence of alcohol or drugs, or both, or a related offense or has refused or failed a test, the person's driving privileges will be suspended for at least one year; (G) 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 vehicle while under the influence of alcohol or drugs, or both; (H) 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 vehicle while under the influence of alcohol or drugs, or both; and (I) 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. If a law enforcement officer has reasonable grounds to believe that the person has 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, the person must also be provided the oral and written notice pursuant to K.S.A. 8-2,145 and amendments thereto. Any failure to give the notices required by K.S.A. 8-2,145 and amendments thereto shall not invalidate any action taken as a result of the requirements of this section. 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 unless the certifying officer has probable cause to believe that the person, while under the influence of alcohol or drugs, or both, has operated a vehicle in such a manner as to have caused the death of or serious injury to another person. *As used in this section, the officer shall have probable cause to believe that the person operated a vehicle while under the influence of alcohol or drugs, or both, if the vehicle was operated by such person in such a manner as to have caused the death of another person.* or serious injury to

In such event, such test or tests may be made pursuant to a search warrant issued under the authority of K.S.A. 22-2502, and amendments thereto, or without a search warrant under the authority of K.S.A. 22-2501, and amendments thereto. If the test results show a blood or breath alcohol concentration of .08 or greater, the person's driving privileges shall be subject to suspension, or suspension and restriction, as provided in K.S.A. 8-1002 and 8-1014, and amendments thereto. 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 vehicle while under the influence of alcohol or drugs, or both. If a law enforcement officer had reasonable grounds to believe the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, and the test results show a blood or breath alcohol concentration of .04 or greater, the person shall be disqualified from driving a commercial motor vehicle, pursuant to K.S.A. 8-2,142, and amendments thereto. If a law enforcement officer had reasonable grounds to believe the person had been driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, and the test results show a blood or breath alcohol concentration of .08 or greater, or the person refuses a test, the person's driving privileges shall be subject to suspension, or suspension and restriction, pursuant to this section, in addition to being disqualified from driving a commercial motor vehicle pursuant to K.S.A. 8-2,142, and amendments thereto.

(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.

(4) No test shall be suppressed because of technical irregularities in the consent or notice pursuant to K.S.A. 8-2,145, and amendments thereto.

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

Sec. 2. K.S.A. 1993 Supp. 8-1001 is hereby repealed.

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

5-13

Session of 1994

HOUSE BILL No. 2690

By Representatives Wagnon and Everhart

1-20

AN ACT concerning criminal procedure; relating to the discovery of a crime occurring; amending K.S.A. 1993 Supp. 21-3106 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1993 Supp. 21-3106 is hereby amended to read as follows: 21-3106. (1) A prosecution for murder may be commenced at any time.

(2) Except as provided by subsection (6), a prosecution for any of the following crimes must be commenced within ~~*two years from the date the victim discovers or reasonably should have discovered that the crime occurred or five years after its commission if the victim is less than 16 years of age, whichever occurs later*~~ five years from the date the victim becomes 18 years of age: (a) Indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto; (b) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto; (c) enticement of a child as defined in K.S.A. 21-3509 and amendments thereto; (d) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto; (e) aggravated indecent solicitation of a child as defined in K.S.A. 21-3511 and amendments thereto; (f) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto; or (g) aggravated incest as defined in K.S.A. 21-3603 and amendments thereto.

(3) Except as provided in subsection (6), a prosecution for any crime must be commenced within 10 years after its commission if the victim is the Kansas public employees retirement system.

(4) Except as provided by subsection (6), a prosecution for rape, as defined in K.S.A. 21-3502 and amendments thereto, or aggravated criminal sodomy, as defined in K.S.A. 21-3506 and amendments thereto, must be commenced within five years after its commission.

(5) Except as provided by subsection (6), a prosecution for any crime not governed by subsections (1), (2), (3) and (4) must be commenced within two years after it is committed.

(6) The period within which a prosecution must be commenced shall not include any period in which:

(a) The accused is absent from the state;

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(b) the accused is concealed within the state so that process cannot be served upon the accused;

(c) the fact of the crime is concealed;

(d) a prosecution is pending against the defendant for the same conduct, even if the indictment or information which commences the prosecution is quashed or the proceedings thereon are set aside, or are reversed on appeal; or

(e) an administrative agency is restrained by court order from investigating or otherwise proceeding on a matter before it as to any criminal conduct defined as a violation of any of the provisions of article 41 of chapter 25 and article 2 of chapter 46 of the Kansas Statutes Annotated which may be discovered as a result thereof regardless of who obtains the order of restraint.

(7) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing offense plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(8) A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other officer for execution. No such prosecution shall be deemed to have been commenced if the warrant so issued is not executed without unreasonable delay.

Sec. 2. K.S.A. 1993 Supp. 21-3106 is hereby repealed.

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

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

February 24, 1994

Representative Mike O'Neal
Statehouse, Room 426-S
Topeka, Kansas 6612

Dear Representative O'Neal:

H.B. 2771 increases the penalty in K.S.A. 16-305 to a non-person felony from a misdemeanor (fine $100 to $500, or 10 to 90 days imprisonment). The need for such an increased penalty became apparent during the course of Shawnee county criminal prosecution for $104,780 in unaccounted for prepaid funeral funds of thirty families. Because of the specific statute pertaining to violations of the Funeral and Cemetery Merchandise Agreements, Contracts and Plans Act, K.S.A. 16-301 et seq., the prosecutor was precluded from filing felony theft by deception charges. Following the conclusion of the criminal case, the board voted to seek an increased penalty section which would be consistent with the penalty section for theft by deception, K.S.A. 1993 Supp. 21-3701(b).

I have included newspaper reports of this case. In addition, please be advised that the Board of Mortuary Arts revoked the funeral director license held by Richard Griffin as well as the Tibbits-Griffin funeral establishment license.

If I can provide any further information, please do not hesitate to contact me.

Very truly yours,

OFFICE OF THE ATTORNEY GENERAL
ROBERT T. STEPHAN

Camille Nohe

Camille Nohe
Assistant Attorney General/
General Counsel to the Board of
Mortuary Arts

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The Topeka Capital-Journal

7-28-92

Mortuary ordered shut down

By LISA M. SODDERS
The Capital-Journal

Tibbitts-Griffin Funeral Chapel was ordered to close its doors Monday by the State Board of Mortuary Arts.

Richard L. Griffin, owner of the funeral home, declined comment on the order Monday night, on the advice of his attorney, David L. Miller, who was out of town Monday.

Mack Smith, executive secretary for the board, said the final order denying the mortuary's establishment renewal application was delivered Monday afternoon.

The denial was issued because the funeral home's application didn't contain all the information on prepaid funeral agreements required by state law.

"What that means, for all practical purposes, is that the funeral home is closed," Smith said. "They surrendered their establishment license at that time and agreed to go along with the findings of the board."

A telephone call was made before the order was served to confirm no funerals were pending at the funeral home so there would be no embarrassment for bereaved relatives, Smith said.

> "They agreed to go along with the findings of the board."
> **Mack Smith, mortuary arts board**

The mortuary can ask the Shawnee County District Court for a judicial review within the next 30 days and can petition the board to reconsider its order or delay the effective date of the order. But Smith, who served the order himself, said there was no indication an appeal was forthcoming.

Smith said the board also has submitted information to the Shawnee County District Attorney's office indicating the possibility of more than $100,000 in missing prefinanced funeral money.

Assistant District Attorney Sue Carpenter said Monday she has reviewed that information and the district attorney is contemplating filing criminal charges against Griffin.

The board's order is the latest in a series of actions that began in November, when the board revoked Griffin's license, finding him guilty of 16 counts, including unprofessional and dishonorable conduct, personal incompetency and failure to deposit a total of $14,351 in prepaid funeral agreements in a financial institution.

Griffin repaid all the money, including the interest on those accounts, just days after the November hearing, Smith said. Brian Voigt has served as the funeral director in charge since Griffin's license was revoked.

But on April 30, the board issued a summary order denying the funeral home's establishment license, based on the funeral home's failure to meet state law by providing specific information on prefinanced funeral arrangements. At that time, out of approximately 135 accounts listed on the renewal application, 49 accounts representing 41 consumers and a total of $109,496 didn't list a financial institution, as required by law, Smith said.

On May 1, Miller asked the board to reconsider the order. The board had a hearing July 9 in Lawrence on that request but decided to issue the final order, which was served Monday.

In that order, the board noted the roster of prefinanced funeral agreements submitted with the renewal application didn't include some or all the required information for 34 accounts.

53-2

Funeral director faces charges

■ D.A.'s office says payments to funeral plans weren't paid to proper accounts

By LISA M. SODDERS
The Capital-Journal

A former Topeka funeral home director faces eight criminal charges for allegedly not depositing prearranged funeral plan funds in separate accounts.

Sue Carpenter, an assistant Shawnee County district attorney, said she filed charges only on those cases that fell within the statute of limitations — the two-year limit on prosecuting property crimes.

Although the amount allegedly involved in those eight cases totals about $37,000, Carpenter said she would seek to have the court order Richard L. Griffin to pay back up to $100,000 to his customers whose money allegedly wasn't properly deposited.

Griffin, 57, gave an unspecified post office box address in Pleasanton, in Linn County, when he turned himself in Monday and was booked into Shawnee County Jail.

Griffin, owner of the now-closed Tibbitts-Griffin Funeral Chapel, secured his release by signing a $2,500 bond. Leonard M. Robinson, Griffin's attorney, said he instructed Griffin not to comment on the case.

If convicted of comingling payments of prearranged funeral agreements, an unclassified misdemeanor, Griffin could face a jail term of 10 to 90 days and a fine of $100 to $500 for each count.

Carpenter said: "There are darn few things more personal than an elderly person wanting to make reasonable arrangements for their last responsibility on Earth and then being cheated out of it.

"So, obviously, our primary focus will be on helping the people get their money back, but it's going to be a longer process than we had hoped for."

Carpenter noted the funeral home did make good on the prepaid funeral plans of those consumers who died.

Carpenter said she held off filing criminal charges because she had assurances from attorneys a plan was in the works that would essentially guarantee the prepaid funeral arrangements.

In April, Penwell-Gabel Funeral Home, Highland Park Christian Church and Tibbitts-Griffin were working on a land swap:

- Penwell-Gabel would operate a funeral chapel at the site of the church, 2843 S.E. Minnesota.
- Highland Park Christian Church would move into the Tibbitts-Griffin building at 4803 S.E. 29th, which was built as Shawnee Heights Christian Church, then sold and converted to a funeral home.

As part of the deal, Penwell-Gabel officials said some of the money would go to guarantee all of Tibbitts-Griffin's prepaid funeral arrangements.

The Rev. David L. Myers said the Tibbitts-Griffin building will be the home of the newly renamed Highland Heights Christian Church. The church purchased the building Sept. 8 for an undisclosed amount and has been getting it ready for the congregation's first service there Sunday.

Myers said Penwell-Gabel purchased the church's property on Minnesota at the same time and plans to raze the sanctuary and remodel the church hall for a funeral chapel.

Michael W. Merriam, the attorney representing Penwell-Gabel, confirmed Penwell-Gabel purchased the church property but declined to disclose the purchase price.

But Merriam said Penwell-Gabel didn't buy Griffin's business, only the church property.

Tibbitts-Griffin closed its doors July 27 under an order of the Kansas State Board of Mortuary Arts board which said the funeral home's application for a license renewel didn't contain all the information on prepaid funeral agreements required by state law.

Under state law, the application has to list such information as the number of the account, name of each depositor, the financial institution and the date a deposit was made.

The board revoked Griffin's funeral director's license in November 1991, again because of alleged improprieties in handling prepaid funeral funds.

Griffin repaid all the money, including the interest, just days after the hearing.

But shortly after The Capital-Journal published an article about the revocation, other consumers who had purchased prepaid funeral plans from Tibbitts-Griffin contacted the board.

The families whose accounts didn't list a financial institution on the application discovered the money had never been deposited in the account, said Mack Smith, executive secretary for the board.

Instead, according to the canceled checks provided by families to the board, the money had been deposited in the funeral home's business account, Smith said.

"We tell consumers that when you make a payment for a prefinanced funeral agreement, you always want to receive written verification from the bank," Smith said. "If you don't, you want to call the bank."

53-3

53-4

Ex-funeral home director pleads no contest to mingling funds

By LISA M. SODDERS
The Capital-Journal

A former Topeka funeral home director pleaded no contest Tuesday to one count of mingling payments on prearranged funeral agreements.

Still unresolved, however, is whether clients who paid for those arrangements will be reimbursed.

Richard L. Griffin, Pleasanton, owner of the defunct Tibbitts-Griffin Funeral Chapel, had been charged with eight unclassified misdemeanor counts. According to Assistant District Attorney Sue Carpenter, seven counts were dismissed in exchange for his plea.

Although she had filed only eight charges, based on cases falling within a two-year statute of limitations for property crimes, Carpenter said the state planned to seek full restitution for about 30 families whose prepaid funeral monies weren't deposited in separate accounts.

Carpenter said she chose to prosecute for not keeping the accounts separate, rather than for theft by deception, because there was a state statute specific to Griffin's acts. Also, there was evidence that although he did mix funds, clients received the services for which they had paid.

Information from the State Board of Mortuary Arts indicated about $104,000 was involved, Carpenter said. Griffin's attorney, Leonard M. Robinson, said he provided additional information putting the total amount at slightly more than $104,000.

Griffin also paid $3,000 in restitution Tuesday, Robinson said, noting that his client's funds were very limited.

Robinson declined to discuss the case further, saying he preferred to argue the case in court, not the newspaper.

"We think he ought to make all of these victims whole," Carpenter said. "He had money before, he'll have money again. He owes these people, and he ought to pay them back."

Some of the clients have died, and many are in nursing homes and have family members handling their affairs, Carpenter said.

"The state board is very hopeful that these consumers can be made whole," said Mack Smith, executive secretary for the board of mortuary arts. "There's many families that are out money that they assumed was in the bank. They gave the money to the funeral home in good faith, and they are deserving of every cent, plus interest."

Griffin is scheduled to be sentenced in late January. He is to pay an additional $4,000 then, and the issue of full restitution will be determined.

Carpenter hasn't been retained by District Attorney-elect Joan Hamilton but has said she made special arrangements to have Hamilton's designated first assistant, Joel Meinecke, handle the case.

The funeral chapel was closed June 27 under an order by the mortuary board, which said the home's application for a license renewal didn't contain all the information on prepaid funeral agreements required by state law.

Sent'g Jan 27 @
1:30, Div. 9 —
Conklin
Joel

93-5

3-17-93

Funeral director sentenced

Richard L. Griffin, former owner of the now-defunct Tibbitts-Griffin Funeral Chapel, was ordered to pay $32,231 restitution and spend 15 days in jail for prepaid funeral arrangements wrongdoing.

By LISA M. SODDERS
The Capital-Journal

A former Topeka funeral home director will spend 15 days in jail and pay $32,231 in restitution for co-mingling payments on prepaid funeral arrangements.

But $104,780 in prepaid funeral arrangements is unaccounted for, and some of the families who were counting on those arrangements grumbled bitterly about the sentence given on Tuesday to Richard L. Griffin.

Griffin, 58, Pleasanton, was the owner of the now-defunct Tibbitts-Griffin Funeral Chapel.

Shawnee County District Judge Charlie Andrews said he believes Griffin is sorry, but added, "No matter how much sorrow you express, you have committed a crime that shakes the foundation of our society.

"As one quite elderly woman put it, 'If you can't trust your funeral director, who can you trust?' "

In addition to testimony heard Tuesday, Andrews said he had received a multitude of letters from other victims.

Griffin testified that if he was given jail time, it might jeopardize the $25,000- to $30,000-a-year job he hopes to have within 30 days. So Andrews ordered the 15 days be served consecutively in March, instead of on weekends, so as not to jeopardize the job.

When Griffin was asked by First Assistant District Attorney Joel Meinecke how much in restitution he thought he could pay, Griffin hazarded a guess of $100 to $200 a month.

Not enough, Andrews said.

But Andrews declined to order Griffin to cash in some $6,000 to $7,000 in Individual Retirement Accounts as Meinecke urged. Instead, he ordered Griffin to pay $500 a month, beginning June 1, and placed Griffin on two years supervised probation.

Andrews also has the authority to extend probation another two years so the payments continue. The victims owed restitution will be paid in amounts proportionate to the money they lost, he said.

Griffin has already paid $3,000, and was to make a payment of $4,021 Tuesday.

In a halting, subdued voice, Griffin said the money in question was used solely to operate his business, not on luxury items for himself. And if someone with a prepaid funeral arrangement died, they got what they paid for.

"I don't think there's really a word to express the way I feel," he said, almost inaudibly, when asked how he felt about the victims.

He said he tried for more than a year and a half to sell the business for enough money to reimburse everyone, but when the establishment license renewal was denied in June, it drove down the price. It sold for $425,000 and everything went to pay off the mortgage, he said.

Because of the two-year statute of limitations on property crimes, the Shawnee County District Attorney's office only filed eight counts against Griffin, and Andrews ruled earlier this month only the eight named in the complaint were entitled to restitution.

Andrews said the other $72,000 worth of victims can pursue civil action, but the statute of limitations may be running out for them as well.

Session of 1994

HOUSE BILL No. 2980

By Committee on Judiciary

2-8

AN ACT concerning civil procedure; relating to the identity of an informer; amending K.S.A. 60-436 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 60-436 is hereby amended to read as follows: 60-436. A witness has a privilege to refuse to disclose the identity of a person who has furnished information purporting to disclose a violation of a provision of the laws of this state or of the United States to a representative of the state or the United States or a governmental division thereof, charged with the duty of enforcing that provision, *or to a crime stoppers chapter* and evidence thereof is inadmissible, unless the judge finds that: (a) the identity of the person furnishing the information has already been otherwise disclosed; or (b) disclosure of ~~his or her~~ *such person's* identity is essential to assure a fair determination of the issues. *The privilege extends to documenting records as well as testimony.*

Sec. 2. K.S.A. 60-436 is hereby repealed.

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

member of a

recognized by the Kansas state crime stoppers organization

House Judiciary
Attachment 54
2-24-94