Approved: 4/29/94
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Jerry Moran at 9:00 a.m. on March 22, 1994 in Room 522-S of the Capitol.

All members were present except: Senator Parkinson (excused)

Committee staff present: Mike Heim, Legislative Research Department
Gordon Self, Revisor of Statutes
Darlene Thomas, Committee Secretary

Conferees appearing before the committee:

Representative Joan Wagnon
Dr. James McHenry, Kansas Children's Service League
Carolyn Hill, Social and Rehabilitation Services
Canda Byrne, Kansas Nursing Association
Representative Tim Carmody
Randy Haerrell, Judicial Council
Professor John Kuether, Washburn University Law School
Jan Kruh, American Association of Retired Persons
Ed Larson, Judicial Council
Ruth Driver
Susan Lyon

Others attending: See attached list

HB 2690--statute of limitations on criminal prosecution of childhood sexual abuse

Representative Joan Wagnon testified in support of HB 2690 and provided written testimony (Attachment No. 1). She said the purpose of HB 2690 was to give a prosecutor an opportunity to bring a case against someone who is preying on children.

James McHenry, Ph.D., Kansas Children's Service League testified in support of HB 2690 and provided written testimony (Attachment No. 2). He said that even though the issues raised in HB 2690 were complex, in his opinion, extending the statue of limitations would offer child victims an option some may require. Dr. McHenry said of the total number of abuse cases in Kansas in 1993 that involved physical, sexual or emotional abuse of children, 60% were sexual abuse.

Carolyn Hill, Department of Social and Rehabilitation Services testified in support of HB 2690 and provided written testimony (Attachment No. 3). She said children are powerless to end abuse and may so separate themselves from the abuse they have no memory of the crime in order to survive emotionally or physically.

Canda Byrne, Kansas Nursing Association testified in support of HB 2690 and provided written testimony (Attachment No. 4). She said survivors of abuse may go for years without remembering the traumatic experiences and that in prolonged and repeated trauma, there is little doubt that overwhelming emotion can play havoc with the memory. Ms. Byrne said amnesia following trauma was not uncommon.

Ruth Driver, a victim of child abuse, testified in regard to HB 2690. She said statistics estimate that 25% to 35% of all women and 10% to 12% of all men are sexually abused as children. She said abuse occurs most frequently between the ages of 4 and 12 years of age.

Susan Lyon testified in regard to HB 2690. She said a family member had experienced child abuse at the age of 6. Ms. Lyon said the child had been threatened not to tell about the abuse or something would happen to her and her mother. She said the abused child did not begin dealing with the abuse until she reached the age of 28.

Carolyn Hill, Department of Social and Rehabilitation Services said in 1993 out of 23,000 to 24,000 filings of child abuse only 11% were confirmed.

Chairman Moran closed the hearings on HB 2690.

A motion was made by Senator Petty, seconded by Senator Emert to report HB 2690 favorably.

Senator Petty and Senator Emert withdrew their motion to report HB 2690 favorably.

A motion was made by Senator Petty, seconded by Senator Emert to amend HB 2690 to increase the years from 5 to 10 on page 1, line 20 and report HB 2690 favorably as amended.

A substitute motion was made by Senator Harris, seconded by Senator Oleen to amend HB 2690 to read on page one, lines 18-23 "two years from the date the victim discovers or reasonably should have discovered that the crime occurred or 10 years after its commission if the victim is less than 18 years of age, whichever occurs later" and remove ~~five years from the date the victim becomes 18 years of age:~~ and report the bill favorably as amended. The motion carried.

A motion was made by Senator Bond, seconded by Senator Rock to approve the Senate Judiciary minutes for February 25, February 28, March 1, March 7, March 8, March 9, and March 10. The motion carried.

HB 2992--reduced period of redemption for real estate under foreclosure

A motion was made by Senator Bond, seconded by Senator Emert to amend HB 2992 on page 5, line 2-5 to read "...that the defendant owner has involuntarily lost such owner's source of income after the date of sale and prior to expiration..." and strike all other language.

Senator Bond and Senator Emert withdrew their previous motion on HB 2992.

A motion was made by Senator Vancrum, seconded by Senator Bond to amend HB 2992 on page 5, lines 2-5 to read "...that the defendant owner has involuntarily lost such owner's source of income before or after the date of sale and prior to expiration..." and strike all other language. The motion carried.

A motion was made by Senator Emert, seconded by Senator Martin to report HB 2992 favorably as amended. The motion carried. Senator Feleciano asked to be recorded as voting "no".

SB 797--suspension of professional licenses for contempt in child support proceedings

A motion was made by Senator Vancrum, seconded by Senator Bond to amend SB 797 to add in Section 2(f) *"If the person found guilty of contempt under this subsection is a licensed attorney, the court may file a complaint with the disciplinary administrator if the licensing agency is the Kansas Supreme Court, or the appropriate bar counsel's office if the licensee practices in another state."* (Attachment No. 5). The motion carried.

A motion was made be Senator Vancrum, seconded by Senator Bond to amend SB 797 as amended into HB 2583. The motion carried.

A motion was made by Senator Oleen, seconded by Senator Ranson to amend SB 804 into Sub. HB 2583. The motion carried.

A motion was made by senator Harris, seconded by Senator Martin to further amend Sub. HB 2583 by adding the language in(Attachment No. 6.)The motion carried.

A motion was made by Senator Emert, seconded by Senator Vancrum to report Sub. HB 2583 favorably as amended. The motion carried

Sub. HB 2430--probate elective share to surviving spouse

Representative Tim Carmody testified in support of Sub HB 2430 and provided written testimony (Attachment No. 7). He said Sub. HB 2430 does not change the right of the surviving spouse and children to inherit property in the absence of a will or other disposition. Representative Carmody said Sub HB 2430 changes current law on the right of a surviving spouse to "elect" against, or take a share of, the estate of his or her deceased spouse.

Randy Haerrell, Judicial Council testified in support of Sub HB 2430. He addressed letters of support amending K.S.A. 59-603 and a "position paper" from the Kansas Bar Association (Attachment No. 8).

Professor John Kuether, Washburn University Law School testified in support of Sub HB 2430. He said the current law does not always provide protection for the surviving spouse.

Ed Larson, Judicial Council testified in regard Sub HB 2430. Judge Larson addressed the provisions of Sub. HB 2430 and cited cases as examples of why he supported Sub HB 2430.

Janet Kruh, American Association of Retired Persons testified in support of Sub HB 2430 and provided written testimony (Attachment No. 9). She said under current Kansas probate law, it is possible for a surviving spouse to be denied an adequate income share from the spouse's estate and this situation would be corrected in Sub HB 2430.

Cheryl Cook Boushka provided written testimony on Sub HB 2430 (Attachment No. 10).

Chairman Moran assigned Sub HB 2430 to the Civil Law Committee.

The meeting adjourned at 11:00 p.m.

The next meeting is scheduled for March 22 , 1994 at 12:30 p.m.

GUEST LIST

COMMITTEE: Senate Judiciary **DATE:** 3/22/94

NAME (Please Print)	ADDRESS	COMPANY/ORGANIZATION
Jim McHenry	Topeka	KCSL
R. Harder	Topeka	KDHE
LORNE A. PHILLIPS	TOPEKA	KDHE
CANDA Byrnes	Topeka	KSNA
Jamie Corkhill	"	SRS/CSE
Peggy Schmidt	3416 W. 122nd Terr. Leawood, KS 66209	Speak Out for Stephanie
Lynne Olson	Topeka	advocate for children
Ruth N. Orthner, MSW	1934 SW Hyde, Top 66604	advocate for children
Ron Smith	Topeka	KS BAR ASSOC
Paul Shelby	"	OJA
TONI WHEELER	Topeka	Sen. Karr staff
Juliene Maska	Topeka	AG office
Mary Loth	Topeka	AG office
Marty Vanier	Manhattan	KS Ag Alliance
Sue BOND	Overland Park	
Gena McFarland	Overland Park	OP Chamber of Commerce
Jean Barbee	Topeka	TIAK

STATE OF KANSAS

#1

JOAN WAGNON
REPRESENTATIVE, FIFTY-FIFTH DISTRICT
1606 BOSWELL
TOPEKA, KANSAS 66604
(913) 235-5881
OFFICE:
STATE CAPITOL, 272-W
TOPEKA, KANSAS 66612-1504
(913) 296-7647

TOPEKA

HOUSE OF
REPRESENTATIVES

COMMITTEE ASSIGNMENTS
CHAIRMAN: BOARD OF DIRECTORS, CORPORATION FOR CHANGE
RANKING MINORITY MEMBER: TAXATION
MEMBER: JUDICIARY

Testimony on HB 2690
To Members of the House Judiciary Committee
March 22, 1994

I am enclosing several pieces of information that might be useful in evaluating HB 2690.

I. Information and statistics from the National Victim Center on extending criminal statutes of limitation in childhood sexual abuse cases. (supplied by NCSL)

II. Personal letter from constituent Sharell Jordan advocating the extension of the current statute of limitations. Jordan also praises the Legislature for extending the statute of limitations for civil actions in childhood sexual abuse cases in 1992.

III. Copy of K.S.A. 60-523.
Limitations on actions for recovery of damages suffered as a result of childhood sexual abuse.

This Legislature has already moved to extend the statute of limitations for civil cases. It is time to also extend the statute of limitations for criminal cases of childhood sexual abuse.

IV. NOTE: "Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Ban to Revival," Indiana Law Review, Volume 22, No. 4, 1989, by Thomas G. Burroughs.

Senate Judiciary
3-22-94
Attachment 1-1

National Victim Center

An advocacy and resource center founded in honor of Sunny von Bulow

2111 W[illegible] Boulevard
[illegible]te 300
Arlington, VA 22201
Tel. 703 / 276 2880
Fax 703 / 276 2889

EXTENSIONS OF THE CRIMINAL AND CIVIL STATUTES OF LIMITATION IN CHILD SEXUAL ABUSE CASES

Most states have statutes limiting the time during which crimes other than murder may be prosecuted. All states have time limitations for bringing a legal action for damages from the wrongdoing of another -- a civil action. In recent years, many states have adopted extensions to their criminal and civil statutes of limitation for cases of child sexual abuse and in certain other sexual assault cases. The length of the extension varies greatly between the states, and the justifications for extensions are numerous.

LIMITATION OF PROSECUTION FOR OFFENSES.

The majority of states with limits on the time in which criminal prosecutions must be brought extend such limits in the case of sexual offenses against children. Most states have recognized the power imbalance between child victims and their adult - usually paternal - perpetrators. Child victims are more easily intimidated by offenders. The position of authority occupied by the perpetrator also enables the offender to confuse the child, by both assuring the child that the sexual contact is not wrongful, and at the same time threatening the child with terrible consequences if he or she discloses the activity. This makes reporting of offenses very unlikely. Moreover, child victims may be too young to know how or what to report. States also recognize that child victims may suffer memory repression or severe psychological trauma from the nature of the offense. They may even be unaware of the fact that a crime has been committed against them. For all of these reasons, legislatures have extended the limitations period for the prosecution of child sexual offenses.

Some states have recognized that trauma and memory repression from sexual assault can happen to a victim of any age, and so explicitly base their limitations period for prosecution of such crimes to the date the incident is reported to police, or discovered by the

government.[1] Others extend the limitation for prosecution of sexual offenses for any victim when the offender is within a professional or fiduciary relationship at the time of the offense.[2]

Currently, criminal prosecutions for sexual abuse of a child must be brought within the following time periods:

No limitation:

Alabama (for violent crimes or for sex offenses involving person under 16);
Kentucky (for felonies);
Indiana (rape involving use or threat of deadly force or resulting in serious physical injury);
Maine (incest, rape, or gross sexual assault of victim under 16);
Maryland;
North Carolina;
Rhode Island;
South Carolina;
Vermont (no limitation for aggravated sexual assault);
Virginia (felonies);
West Virginia (felonies); and
Wyoming.

No extension for minors:

D.C.;
Delaware;
Hawaii;
Indiana (but no limitation for some rape charges);
Kentucky (misdemeanors);
New York;
Ohio;
Pennsylvania (generally);
Virginia (misdemeanors); and
West Virginia (misdemeanors).

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[1] Arizona's code, for example, limits criminal prosecutions to 7 years "after actual discovery of the offense by the state . . . or discovery . . . which should have occurred with the exercise of reasonable diligence". *Arizona Code*, § 13-107.

[2] Ill. One year after discovery of the offense by the victim. Ill Code 70-806; Okla. Seven years from the discovery of the crime. OK Code, § 22-152.

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Number of years after the incident:

Colorado - victim under 15, extended 7 years; misdemeanor 3rd degree sexual assaults, ext. 3½ years;
Georgia - 7 years for victim under 14;
Kansas - 5 years for victim under 16;
Mississippi - 7 years;
Missouri - victim under 18, 10 years for felony, 5 years for misdemeanor;
North Dakota (gross sexual imposition, fornication, or incest when victim between 15 and 18) - 7 years;
Oregon - victim under 18, 6 years for felonies, 4 years for certain misdemeanors;
Texas - 10 years.

Number of years after the child turns 18:

Idaho- 5 years;
Illinois - 1 year;
Iowa - victim under 12, 6 mos.;
Louisiana - limitations begins to run when victim turns 17;
Montana - 5 years;
Nevada - until victim turns 21;
New Hampshire - 22 years;
New Jersey - 5 years;
North Dakota - 7 years after victim turns 15;
Pennsylvania - (for sex offenses involving certain family or household members) 5 years.

Number of years after incident or after child turns 18, whichever is longer:

Michigan - 6 years or 21st birthday;
Nebraska - when victim is under 16, 7 years or 7 years after victim's sixteenth birthday;
South Dakota - 7 years or until the victim turns 19;
Tennessee - 4 years or until the victim turns 18;
Washington - 7 years or 3 years after victim turns 18;
Wisconsin - 3 years or until victim turns 21.

Number of years after incident or after child turns 18, whichever is less:

Connecticut - 7 years or 2 years after attaining majority (but never less than 5 years after offense).

Number of years after child reaches a certain age, or after crime is reported, whichever occurs first:

Alaska - one year after crime is reported or person reaches 16;
Arkansas - extension if crime not previously reported and limitations since child turned 18 hasn't run;
Florida - limitations does not begin until child turns 16 or crime is reported;
Massachusetts - limitations does not begin until child turns 16 or crime is reported;
New Mexico - limitations does not begin until child reaches 18 or crime is reported;
Vermont (other than aggravated sexual assault) - before victim turns 24, or 6 years after reporting crime.

Other:

Federal - until child turns 25;
Arizona - 7 years after actual discovery of crime by gov't;
California - 1 year after report to responsible adult by child under 17;
Idaho - 3 years after initial disclosure by victim (for Ritualized Abuse of Child);
Minnesota - 7 years or 3 years after reporting crime, whichever is longer;
Oklahoma - rape or forcible sodomy, limitations runs from date of discovery of crime;
Utah - limitations runs after crime is reported.

LEGISLATIVE TRENDS IN EXTENDING CRIMINAL STATUTES OF LIMITATION

The trend in legislatures has been to continue to extend the limitations period for prosecution of sexual offenses against minors. The longest extension of the criminal statute of limitations for such offenses to date is in New Hampshire - 22 years after the victim turns 18.

New Hampshire's law is expected to attract some constitutional challenges, on the grounds of both due process and ex post facto proscription. New Hampshire's extension statute does not limit its applicability to cases in which the old limitations period had not yet expired as of the effective date of the new law. In general, state and federal courts have upheld the constitutionality of new, longer criminal statutes of limitation as applied to previous crimes so long as the earlier prosecution period for those crimes had not yet run. However, where a statute of limitations for prosecution had previously expired, and a law then attempts to reinstitute a limitations period, constitutional prohibitions of ex post facto laws may be violated.

The due process argument is based on the claim that the long delay between the offense and the prosecution will result in deprivation of the right to be free from stale claims. With the passage of time, the fading of memories and similar factors may deprive the defendant of the right to a fair trial. A recent law review article suggested that, in order to show such a violation of due process, the defendant must prove not only that the delay resulted in actual prejudice to his ability to defend against the charges, but that the delay was unrelated to any investigatorial necessity, and was used only to gain a tactical advantage.[3] The acceptance or rejection of the New Hampshire statute in the courts can be expected to impact the continued extension of limitations for prosecution of child sexual offenses by other legislatures.

LIMITATION OF CIVIL ACTIONS FOR DAMAGES FROM SEXUAL ABUSE.

Nearly every state has a basic suspension of the statute of limitations (tolling) for civil actions while a person is a minor. Many states have also adopted extensions of such time limits specifically for actions to recover damages resulting from sexual abuse. Civil extensions for child sexual abuse cases are most often based upon the discovery rule - by the time the victim discovers the wrongdoing or the relationship of the conduct to the injuries, the ordinary time limitation may have expired. This "delayed discovery" is often due to emotional and psychological trauma and often accompanied by repression of the memory of abuse, child victims frequently do not discover the relationship of their psychological injuries to the abuse until well into adulthood, usually during the course of psychological counseling or therapy. They often do not even discover the FACT of such abuse until they undergo therapy.

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[3] Porto, Brian L., "New Hampshire's New Statute of Limitations for Child Sexual Assault: Is It Constitutional and Is It Good Public Policy?", 26 New England Law Review, 141 (Fall 1991).

1-6

Ruth Driver

835 SW Randolph Ave.
Topeka, KS 66606-1845
(913) 232-1535

February 14, 1994

The Honorable Mike O'Neal
State Representative
State House
Topeka, KS 66612

Dear Representative O'Neal:

I am writing you as Committee Chairman of the House Federal and State Affairs Committee.

I read an article in today's newspaper about Ruth Driver's crusade for abuse victims and would like to share a personal incident regarding this subject. One of our family members was sexually abused by a step-brother while she was ages 6-8, and these horrible events were suppressed in her memory for YEARS. Suddenly one night in a dream at age 16 (10-12 years later), the vivid details of these incidents came back to her and the nightmare began. Luckily, shortly thereafter, we read in the paper about a bill then Senator Wint Winter, Jr., R-Lawrence, introduced allowing individuals to file civil lawsuits three years AFTER DISCOVERING they had been the victims of childhood sexual abuse. Thank goodness this bill passed and our victim was able to at least bring a civil lawsuit against her perpetrator and receive some money for the damages brought against her.

Had it not been for Senator Winter, she could have done nothing because of the length of time involved since the incidents had occurred, thereby being sexually abused once again, so to speak, by the courts by not being allowed to bring prosecution against him. This was Senate Bill No 662 passed in 1992.

Now I see where Ms. Driver is pushing for the law to be changed on the statute of limitation for prosecution of sexual abuse cases involving children, to within two years from the date the victim DISCOVERS THE CRIME OCCURRED. I strongly urge consideration be given to 3 years and this bill be passed. It took our daughter a lot of intense therapy before she was able to even CONSIDER taking action and then it took quite a bit more time to locate an attorney she felt comfortable with and build a case and take action. Two years would probably not have been enough time to adequately do all of this.

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I would also like to respond to the facts in the newspaper that stated you and other committee members are skeptical about the change. In other words, you are far more concerned about giving "fair" treatment to the accused than to the victim!! Sure there are a FEW times when the False Memory Syndrome comes into play and someone is falsely accused, but let me assure you, there are FAR MORE TIMES when the victims are indeed telling the truth and need laws available to them. Why would you think MORE protection should be given to the few falsely accused persons than to the MANY VICTIMS OF SEXUAL ABUSE?? Why would you think more caution and consideration should be given to the accused whose criminal conduct could be raised years after the event at a time when it might be difficult for the "poor guy" (?) to respond, than TO THE VICTIM??? In other words, if it comes back to the victim's memory YEARS after it happened and would pose a hardship for the accused, the victim should have to suffer in silence and not have any legal recourse?? What kind of an archaic and chauvinistic attitude is that?????

I URGE you to study Senate Bill 662 and pattern this bill after it.

Thank you very much for your time and consideration.

Sincerely,

Sharell Jordan

Sharell Jordan

cc: Rep. Joan Wagnon ---THANK YOU!!!!!!!
Rep. Kathleen Sebelius
Rep. Alex Scott
Ruth Driver---THANK YOU!!!!!!!

60-523. Limitations on actions for recovery of damages suffered as a result of childhood sexual abuse. (a) No action for recovery of damages suffered as a result of childhood sexual abuse shall be commenced more than three years after the date the person attains 18 years of age or more than three years from the date the person discovers or reasonably should have discovered that the injury or illness was caused by childhood sexual abuse, whichever occurs later.

(b) As used in this section:

(1) "Injury or illness" includes psychological injury or illness, whether or not accompanied by physical injury or illness.

(2) "Childhood sexual abuse" includes any act committed against the person which act occurred when the person was under the age of 18 years and which act would have been a violation of any of the following:

(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) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto; (D) enticement of a child as defined in K.S.A. 21-3509 and amendments thereto; (E) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto; (F) aggravated indecent solicitation of a child as defined in K.S.A. 21-3511 and amendments thereto; (G) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto; or (H) aggravated incest as defined in K.S.A. 21-3603 and amendments thereto; or any prior laws of this state of similar effect at the time the act was committed.

(c) Discovery that the injury or illness was caused by childhood sexual abuse shall not be deemed to have occurred solely by virtue of the person's awareness, knowledge or memory of the acts of abuse. The person need not establish which act in a series of continuing sexual abuse incidents caused the injury or illness complained of, but may compute the date of discovery from the date of discovery of the last act by the same perpetrator which is a part of a common scheme or plan of sexual abuse.

(d) This section shall be applicable to:

(1) Any action commenced on or after July 1, 1992, including any action which would be barred by application of the period of limitation applicable prior to July 1, 1992;

(2) any action commenced prior to July 1, 1992, and pending on July 1, 1992.

History: L. 1992, ch. 307, § 1; July 1.

Article 6.—VENUE

60-601.

Research and Practice Aids:
Venue ⇐ 5.
C.J.S. Venue § 26.

Law Review and Bar Journal References:
"Divorce Law: Lis Pendens, Judgment Liens, Homestead Exemptions, and Bankruptcy," John C. Peck, Shala M. Bannister and W. Thomas Gilman, 60 J.K.B.A. No. 2, 25, 26 (1991).

60-602.

CASE ANNOTATIONS

2. Cited; statutes (60-3407, 60-3409, 60-3411) limiting recovery in medical malpractice actions as unconstitutional examined. Kansas Malpractice Victims Coalition v. Bell, 243 K. 333, 335, 757 P.2d 251 (1988).

60-604. Actions against corporations. An action against a domestic corporation, or against a foreign corporation which is qualified to do business in this state, other than an action for which venue is otherwise specifically prescribed by law, may be brought in the county in which:

(1) Its registered office is located;

(2) the cause of action arose;

(3) the defendant is transacting business at the time of the filing of the petition;

(4) there is located tangible personal property which is the subject of an action for the possession thereof if immediate possession is sought in accordance with K.S.A. 60-1005 and amendments thereto at the time of the filing of the action; or

(5) equipment or facilities for use in the supply of transportation services, or communication services, including, without limitation, telephonic communication services, are located, where the subject of such action relates to transportation services or communication services supplied or rendered, in whole or in part, using such equipment or facilities.

History: L. 1963, ch. 303, 60-604; L. 1965, ch. 355, § 3; L. 1989, ch. 178, § 2; July 1.

CASE ANNOTATIONS

5. Venue where surety company sued on fidelity bond examined. First Hays Banshares, Inc. v. Kansas Bankers Surety Co., 244 K. 576, 589, 769 P.2d 1184 (1989).

60-605. Actions against nonresidents and nonqualified corporations. An action against a nonresident of this state, or against a corporation which is not qualified to do business in

Indiana Law Review

Volume 22 No. 4 1989

ARTICLES

NOTES

Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival

I. Introduction

In the United States, child sexual abuse and neglect have reached major, if not epic, proportions.[1] An estimated 200,000 to 400,000 children are sexually abused each year.[2] A recent study suggests that perhaps one third of the female population experienced some form of sexual abuse as a child.[3] Increased societal recognition of child sexual abuse, attributable in part to increased reporting requirements, has reignited an age-old debate over the relative scope of such abuse and society's role in curbing it.[4]

The problem has received legislative and executive attention. For example, numerous state legislatures enacted legislation enlarging the criminal statute of limitations for child sex abuse offenses in an effort to facilitate criminal prosecution.[5] Additionally, the United States Attorney General's Office recently advocated the extension of such statutes of limitations.[6] These actions, although well-intentioned, frequently create agonizing dilemmas for the judiciary in applying the revised limitations period, especially where the legislature fails to expressly dictate its intentions as to the revised statute's application. Moreover, the legislation may run afoul of constitutional *ex post facto* prohibitions when applied in accordance with legislative dictates.

Preliminarily, this Note will illuminate the magnitude of the child sexual abuse problem, and the impact of the statute of limitations on

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1. ten Bensel, *Child Abuse and Neglect: The Scope of the Problem*, 35 Juv. and Fam. Ct. J. 1 (Winter 1984) [hereinafter *Child Abuse and Neglect*].

2. Middleton, *Plight of the Victim: A Plea for Action*, 66 A.B.A.J. 1190, 1192 (1980).

3. Landis, *Experiences of 500 Children with Adult Sexual Deviation*, 30 Psychology Q. Supp. 91 (1956).

4. *See* Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?*, 15 J. Contemp. L. 31, 32 (1989) [hereinafter *Protecting Children*].

5. *See, e.g.*, Alaska Stat. 12.10.020(c) (Supp. 1988); Ariz. Rev. Stat. Ann. 13-107(B)(1) (Supp. 1988); Cal. Penal Code 801 (West 1985); Colo. Rev. Stat. 18-3-411 (1986); Tex. Crim. Proc. Code Ann. 12.01 (Supp. 1988).

6. *Attorney General's Task Force on Family Violence, Federal Executive and Legislative and State Legislative Action, Recommendations*, U.S. Atty. Gen., Final Report 103 (Sept. 1984) [hereinafter *Task Force on Family Violence*]. The task force recommended extending the statute of limitations to five years, such period commencing at the time the victim attains majority, or the age of sixteen, whichever first occurs.

the states' ability to prosecute child sexual abusers. The Note will then analyze the constitutional ramification of retroactive application of the revised statute. The Note will further address the various judicial approaches to the interpretation and application of a revised statute of limitations for child sexual abuse, especially where the legislature failed to expressly dictate the revised statute's application. Finally, the Note will suggest a uniform approach to interpretation and application of the revised statute, and propose that the states' compelling interest in prosecuting child sex abusers permits the revival of "time-barred" prosecutions.

II. Child Sexual Abuse - The Problem's Parameters

A. *The Scope of The Problem*

The painful reality of child sexual abuse has emerged from secrecy at least three times previously, only to retreat under threat to the dark chasms and inner recesses of society's consciousness.[7] Each time, however, society ignored, suppressed and condemned the enlightened few who dared suggest the existence of widespread child sexual abuse.[8] Most recently, beginning in 1978,[9] child sexual abuse recaptured the public spotlight, inducing an avalanche of media and scholarly works.[10] Mass child sexual abuse cases blanket the evening news: *McMartin* in Los Angeles, the *Jordan* case in Minnesota, *Country Walk* in Florida, and others.[11] Increased societal cognizance of child sexual abuse is in large part attributable to the implementation of mandatory reporting requirements.[12] Various statutory reporting schemes require medical personnel, educators, relatives, social workers and even attorneys to report abuse.[13] However, even the increased reporting requirements fail to reveal the true scope of the problem. Incest, the most intimate form of child sexual abuse, is commonly unreported.[14] Often, the perpetrator, if not a family

7. *Protecting Children*, *supra* note 4, at 32.

8. *Id.* at 31-36.

9. *Id.* at 32.

10. *Id.* Mass child sexual abuse cases blanket the evening news: *McMartin* in Los Angeles, the *Jordan* case in Minnesota, *Country Walk* in Florida, and others.

11. *Id.* The *McMartin* case is reported as McMartin v. County of Los Angeles, 202 Cal. App. 3d 848, 249 Cal. Rptr. 53 (1988).

12. Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 Fam. L.Q. 151, 153-55 (Summer 1983).

13. Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 Hum. Rts. Ann. 441, 443-44 (1986) [hereinafter *Sexually Abused Children*].

14. *Id.* at 445.

member, is a relative or an adult known to the victim.[15] An estimated 90% of all cases involving female victims under the age of 12 are not reported to the police.[16] Although estimates of the extent of child sexual abuse vary widely, the problem is unquestionably of major magnitude.

Child sexual abuse inflicts staggering economic, psychological and social costs on society and its victims. These costs are "taken out of [the victims'] current and future health, happiness, and . . . productivity. . . . In effect, a large mortgage on their future life is taken out when children's legal interests are not satisfied. . . ."[17] The abused child often becomes the abuser.[18] Other long-term effects may include a propensity for promiscuity and prostitution as well as a predisposition to engage in sexually abusive relationships.[19] Various studies indicate other long-term effects including anxiety, pseudo-seductive behavior, substance abuse, sexual dysfunction, homosexuality and various forms of psychosis such as depression and suicidal obsession.[20]

In response to public outcries over the scope and treatment of the child sexual abuse problem, the criminal justice system initiated numerous

15. Lloyd, Corroboration of Sexual Victimization of Children, Child Sexual Abuse and the Law 122, n.88 (A.B.A. Nat'l Legal Resource Ctr. For Child Advoc. And Prot. (5th ed. 1984)).

16. Libai, *Protection of the Child Victim*, 15 Wayne L. Rev. 977, 1016, n.134 (1969) [hereinafter *Protection of the Child Victim*].

17. Miller & Miller, *Protecting the Rights of Abused and Neglected Children*, 19 Trial 68, 72 (June 1983) [hereinafter *Protecting the Rights*] (quoting Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 Okla. City U.L. Rev. 561 (1980)). Child Abuse & Neglect; *supra* note 1, at 2. The author notes that the initial costs for child protective services is $10,000 per case, exclusive of legal costs. Psychological care may run as high as $24,000 per year. Thus, a conservative estimate of $50,000 a year per case is given. *Id.*

18. DeRose, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long Term Damages*, 25 Santa Clara L. Rev. 191 (1985) [hereinafter *Adult Incest Survivors*.] The well-documented fact that abused children frequently become child abusers is noted as follows:

> In nearly all of the studies of male sexual offenders that have been done to date, well over half or in some cases nearly three-quarters of the men studied who are serving time in prison were found to have been sexually abused as young boys. . . . Therefore . . . from generation to generation, emotional, physical and sexual abuse are behaviors exhibited by men who most likely experienced such abuse in their own childhoods. Sadly, what these men learned from their parents, they learned too well.

Id. at 218, n.139 (quoting S. Butler, Conspiracy of Silence: The Trauma of Incest 67 (1978)).

19. Note, *Sexually Abused Children*, *supra* note 13, at 452.

20. *Id. See also* J. Herman, Father-Daughter Incest 105 (1981); B. Justice & R. Justice, The Broken Taboo: Sex in the Family 184-5 (1979); S. Butler, Conspiracy of Silence: The Trauma of Incest 121 (1978); *Adult Incest Survivors*, *supra* note 18, at 194; *Child Abuse and Neglect*, *supra* note 1, at 4-5.

reforms in an effort to address the needs of child abuse victims.[21] For example, commentators and critics propose that child abuse victims testify on videotaped recordings, thus reducing the trauma experienced by child abuse victims in testifying.[22] Additionally, numerous jurisdictions promulgated mandatory reporting requirements to increase the likelihood that child sexual abuse will be discovered.[23] Thus, increased societal cognizance has encouraged the judiciary and legislature to adopt meaningful measures to assist the child abuse victim.

B. Barriers to Prosecution of Abusers

As a preliminary barrier to prosecution, one must recognize the gross disparity between victim and offender in terms of power, knowledge and resources.[24] Adults and older children utilize this disparity to psychologically manipulate the victim.[25] In the case of incest, the victim is even more vulnerable, for the differences in power, knowledge and resources are multiplied by the victim's dependence upon the offender for life's basic necessities.[26]

Very limited force is required to molest a child. The child victim is seldom able to understand the significance or wrongfulness of the perpetrator's conduct.[27] Over 75% of reported incest cases involve father-daughter relations.[28] The father's position as an authority figure may be utilized to persuade the child to acquiesce. Although the request may seem unpleasant, distasteful, or even frightening, the child may be motivated by a strong desire not to displease the offender.[29] In other cases, the child may be assured that the activity is perfectly normal,

21. *See* Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437 (1985). The article deals with proposed and adopted alterations to California's system. Many of the procedures have been adopted by other states, for example, the revision of reporting requirements.

22. *See* Note, *Sexually Abused Children*, *supra* note 13, at 478-80.

23. *See, e.g.*, CAL. PENAL CODE §§ 11165-11166 (West Supp. 1985). California's bill requires teachers, social workers, probation officers, psychologists, coroners, police, physicians, surgeons, dentists and numerous others to report suspected cases of child abuse. *Id.*

24. ten Bensel, *Child Abuse and Neglect: Definitions of Child Neglect and Abuse*, 35 JUV. & FAM. CT. J. 23, 29 (Winter 1984) [hereinafter *Definitions of Child Neglect*].

25. *Id.*

26. *Id.*

27. Note, *Balancing The Statute Of Limitations And The Discovery Rule: Some Victims Of Incestuous Abuse Are Denied Access To Washington Courts* - Tyson v. Tyson, 10 U. PUGET SOUND L. REV. 721, 727 (1987) [hereinafter *Balancing The Statute Of Limitations*].

28. Note, *Sexually Abused Children*, *supra* note 13, at 445 n.18.

29. Note, *The Crime of Incest Against the Minor Child and the State's Statutory Responses*, 17 J. FAM. L. 93, 96 (1978-79) [hereinafter *Incest Against the Minor Child*].

given the relationship between the adult and child.[30] Whether the cause of the offense is a disparity in power, knowledge or resources, the common result is an unwillingness or inability on the part of the child to report the offense.

Most children never tell anyone about the sexual encounter.[31] An estimated 75% to 90% of incest victims reach adulthood without revealing the incident(s).[32] The failure or inability of the child to report the offense may be motivated by one of several factors. First, incest victims may be ashamed or embarrassed, believing themselves to be the cause of the attack.[33] Other incest victims, frightened by the offender's threats, fear that the innocent parent will break-up the family.[34] Other children fear that revealing the relationship will encourage the father's anger, rejection or physical harm.[35] The child may fear her father will be imprisoned,[36] or at a minimum, that her mother will blame her.[37]

Another major cause of unreported offenses stems from the child's mental defense mechanisms. To cope with undisclosed victimization, children frequently mentally block-out the abuse.[38] As a result, the child may not remember or divulge the abuse for years.[39] Compounding the problem of non-reporting by child victims is the fact that incest occurs

30. *Id.*

31. *Definitions Of Child Neglect*, *supra* note 24, at 31.

32. *Adult Incest Survivors*, *supra* note 18, at 194.

33. *Definitions Of Child Neglect*, *supra* note 24, at 30.

34. *Balancing the Statute of Limitations*, *supra* note 27, at 727.

35. *Id.*

36. *Id.*

37. *Id.* Dr. Judith Herman, a noted expert in father-daughter incest at Harvard Medical School summarizes such incest as follows:

> Incestuous abuse usually begins when the child is between the ages of six and twelve, though cases involving younger children, including infants, have been reported. The sexual contact typically begins with fondling and gradually proceeds to masturbation and oral-genital contact. Vaginal intercourse is not usually attempted until the child reaches puberty. Physical violence is not often employed, since the overwhelming authority of the parent is usually sufficient to gain the child's compliance. The sexual contact becomes a compulsive behavior for the father, whose need to preserve sexual access to his daughter becomes the organizing principle of family life. The sexual contact is usually repeated in secrecy for years, ending only when the child finds the resources to escape. The child victim keeps the secret, fearing that if she tells she will not be believed, she will be punished, or she will destroy the family.

Note, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709, 716 (1987) (quoting Herman, *Recognition And Treatment Of Incestuous Families*, 5 INT'L J. FAM. THERAPY 81, 82 (C. Barnard Ed. 1983)).

38. *Task Force On Family Violence*, *supra* note 6, at 103.

39. *Id.*

in secrecy and exhibits few outwardly detectable signs.[40] Thus, if the child does not report, the abuse may continue unnoticed.

Once abuse is reported, the chance of prosecuting the abuser is low. A mere 24% of all child sexual abuse cases result in criminal action.[41] Once reported, familial indecision[42] or prosecutorial discretion[43] may preclude criminal prosecution. Thus, the vast majority of child sexual abuse incidents go unreported or unprosecuted.

A final impediment to prosecution is the tolling of the statute of limitations. Most criminal statutes of limitations accrue from the date of the offense.[44] Thus, by the time the child becomes emotionally or psychologically capable of confronting the experience and seeks legal redress, the statutory period for prosecution may have expired.[45] Frequently, disclosure may not occur for one to three years subsequent to the offense.[46]

C. *Changing Statutes of Limitations to Increase the Likelihood of Prosecution*

The emotional and psychological barriers to reporting child sex abuse frequently foreclose the victim's opportunity for legal redress and preclude societal intervention.[47] Obviously, the opportunity for legal redress varies

40. Note, *Incest Against The Minor Child*, *supra* note 29, at 96.

41. *Sexually Abused Children*, *supra* note 13, at 446. Even after detection, prosecution is impeded by (1) social skepticism about the reliability of the child's accusations; (2) classification of pedophilia as a mental disorder rather than a criminal offense; (3) procedural systems which traumatize the victim; and (4) reluctance of prosecutors to pursue prosecutions where the case rests primarily upon the content and stability of the child's testimony. *Id.*

42. *Id.* at 448-49.

43. *See supra* note 41.

44. *Task Force on Family Violence*, *supra* note 6, at 103. Of the jurisdictions addressing the issue of retroactive application of the enlarged limitations period within the context of child sexual abuse offenses, the following states have statutes of limitations accruing from the commission of the offense: California, CAL. PENAL CODE §§ 800, 801 (West 1985); Colorado, COLO. REV. STAT. § 18-3-411(2) (1986); Texas, TEX. CRIM. PROC. CODE ANN. § 12.01 (Vernon 1977, 1988 Supp.); Washington, WASH. REV. CODE ANN. § 9A.04.070 (1988). In the remaining two jurisdictions, the limitations period accrues from the time the minor reaches the age of 16: Alaska, ALASKA STAT. § 12.10.030(c) (1984) (The period runs from the earlier of the victim attaining the age of 16, or the report to a peace officer. The section does not extend the limitations period by more than five years.); Massachusetts, MASS. GEN. LAWS ANN. ch. 277, § 63 (West 1972, Supp. 1988) (The limitations period commences at the earlier of the victim attaining the age of 16, or the report to a law enforcement agency.

45. *Task Force on Family Violence*, *supra* note 6, at 103.

46. *Definitions of Child Neglect*, *supra* note 24, at 30.

47. *Task Force on Family Violence*, *supra* note 6, at 103.

in direct proportion to the length and accrual date of the limitations period. Limitations periods commencing at the date of the offense and expiring within five years are currently the norm.[48] However, lesser limitations periods still exist.[49] The statute of limitations in these jurisdictions remains a major impediment to legal redress.

In recognition of the delays common in the reporting of child sex abuse, the United States Attorney General recommended that the states enlarge the statutes of limitations so as to commence from the date of the victim's disclosure.[50]

Where legislatures respond to these concerns by extending the limitations period,[51] retroactive application may become an issue in implementing the revised statute. Several policy considerations support presumption for retroactive application. First, retroactive application furthers the goal of reducing barriers to the prosecution of offenders and of permitting victims an opportunity for legal redress.[52] Abused children must recognize that society is concerned with their plight and that children's rights are being actively protected. Retroactive application of enlarged limitations periods channels the benefits of increased societal and legislative awareness to those children who have been abused, rather than merely protecting the abused children of tomorrow. Early societal intervention diminishes the psychological costs children pay by permitting prompt psychological care, and also by preventing additional abuse at the hands of the offender. Children, not adults, are the judges of our present civilization.[53]

A second policy consideration supporting retroactive application is the need to permit child abuse victims a day in court. The American legal system is designed to channel conflict resolution from the streets into the court system.[54] Fundamental to the operation of the legal system is the requirement that each litigant have his or her "day in court." Although in the criminal context it is the prosecution, not the victim,

48. *See, e.g.*, IDAHO CODE § 19-40 (1987) (prosecution must be commenced within 5 years after offense committed); KAN. CRIM. CODE ANN. § 21-3106 (1971, Supp. 1988) (prosecution must be commenced within 5 years after offense committed).

49. *See, e.g.*, ARK. STAT. ANN. § 5-1-109 (1987) (prosecution must be commenced with 3 years after commission; first degree child sexual abuse is a class C felony per 5-14-108).

50. *Task Force on Family Violence*, *supra* note 6, at 103.

51. *See, e.g.*, Commonwealth v. Bargeron, 402 Mass. 589, 593, 524 N.E.2d 829, 831-32 (1988); State v. Hodgson, 108 Wash. 2d 662, 666, 740 P.2d 848, 850 (1987).

52. As well, society obtains an opportunity to deter, rehabilitate or incarcerate the offender.

53. *Protecting the Rights*, *supra* note 17, at 72.

54. *See, e.g.*, H. GRILLIOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 3 (2d ed. 1979); 1 C. TORCIA, WHARTON'S CRIMINAL LAW 1 (14th Ed. 1978).

who has his "day in court," the victim may experience relief and satisfaction from the defendant's prosecution, and thus indirectly, have his own day in court. The statute of limitations limits this right by forcing the party to bring his or her action in a timely manner or be forever barred. In the civil context, the use of exceptions to the limitations period's accrual such as the "discovery rule," limits the harshness imposed by stringent application of the limitations period.[55]

Retroactive application of revised statutes of limitations can serve a similar function in the context of child sexual abuse.

In the criminal context, the state and not the injured party prosecutes the action. In the civil context, the prospective plaintiff is generally cognizant of the injury when it occurs, and as a result, may bring an action in a timely manner. In the context of child sexual abuse the state is powerless to prosecute the child sex abuse offender until the state is informed of the offense. As discussed above, a variety of physical, emotional and psychological factors prevent the victim from reporting the offense.[56] As a result of this delay in reporting the offense, the limitations period and the state's right to prosecute may expire prior to the time a child reports the offense.

A final policy consideration compelling retroactive application of the enlarged limitations period is the need to punish the offender. One of the principal functions of criminal law is to deter the offender and all aspiring offenders.[57] The deterrence theory is predicated upon the belief that individuals are rational, hedonistic beings.[58] The unpleasantness of punishment, coupled with its certainty, deter the offender from repeating his lawless conduct.[59] A secondary benefit of the deterrence theory is the intimidation of potential offenders.[60] Thus, both the offender and the potential offender, faced with the certainty of severe punishment, will likely refrain from committing a contemplated crime.[61]

55. *See, e.g.*, N.Y. Civ. Prac. L. & R. 214-c (McKinney Supp. 1987). This statute provides in pertinent part:

> "[W]here the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced . . . within one year of such discovery of the cause of the injury."

Id.

56. *See supra* notes 24-39 and accompanying text.

57. 1 C. Torcia, *supra* note 54, § 3. Criminal law may be premised upon any of three theories; deterrence, retribution or reformation. The deterrence theory is particularly appropriate for child sexual abuse offenses because of its focus upon the individual offender. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Studies reveal that child sex abusers are extremely likely to continue their nefarious conduct, absent societal intervention.[62] Documentation of unreported sexual assaults against children dramatize the magnitude of the problem.[63] A study of first offenders[64] demonstrated that many offenders commit numerous offenses prior to prosecution or conviction.[65] Additionally, sexual offenders avoid detection approximately twice as often as they are apprehended.[66] These figures are conservative estimates, given the fact that the majority of offenses go unreported, while numerous others go unrecognized by the criminal justice system.[67] Therefore, absent societal intervention, most offenders will continue their activities unimpeded.

The typical pedophile commits his first offense as an adolescent.[68] Pedophiles are likely to continue their illicit activities once commenced.[69] Thus, from a societal perspective, the opportunity for societal intervention at the earliest possible juncture is imperative so as to maximize deterrence. To be an effective deterrent, the punishment must be certain and severe.[70] Retroactive application of the revised statute of limitations maximizes society's opportunities for intervention, and therefore, increases the deterrent effect of criminal punishment. Furthermore, early intervention extirpates the offender from his criminal habitat, protects the child from continued victimization, and terminates the offender's reign of terror.

Critics contend that society has overreacted to the perceived demon, child sexual abuse.[71] Conceivably, this position has merit. However, at either extreme, either over or under reporting, truth seldom resides.[72] Legislatures mandate longer prison sentences for convicted child sexual offenders, while reducing judicial sentencing discretion.[73] Despite these

62. *See* Groth, Longo, & McFadin, *Undetected Recidivism Among Rapists and Child Molesters*, 28 Crime and Delinq. 450, 451 [hereinafter *Undetected Recidivism*]; *but see* B. Karpan, The Sexual Offender and His Offenses 276-78 (New York 1954).

63. *Undetected Recidivism*, *supra* note 62, at 453.

64. Here, meaning those who experienced a first conviction, and not necessarily their first offense.

65. *Undetected Recidivism*, *supra* note 62, at 453-54. The study's authors interviewed offenders at correctional facilities in Connecticut and Florida. The number of undetected sexual assaults reported by the subjects ranged from 0 through 250. Undetected assaults averaged 4.7, representing the number of different victims molested, rather than the number of sexual contacts. *Id.* Additionally, sexual offenders avoid detection approximately twice as often as they are apprehended.

66. *Id.* at 456.

67. *Id.* at 457.

68. *Id.* at 450.

69. *Id.* at 451.

70. 1 C. Torcia, supra note 54, § 3.

71. *Protecting Children*, *supra* note 4 at 39.

72. *Id.*

73. *Id.*

perceived overreactions, increased societal cognizance has resulted in the correction of at least one glaring impediment to criminal prosecution of the child sexual abuser, that is, the short statute of limitations period.

III. State Court Approaches To the Interpretation and Application of Legislatively Enlarged Statutes of Limitations for the Criminal Prosecution of Child Sexual Abuse Offenses

Within the criminal context,[74] the courts of six[75] jurisdictions have addressed the issue of the interpretation and application of legislatively enlarged statutes of limitations for child sexual abuse offenses. In interpreting and applying these statutes, the courts have applied a variety of procedures.[76] However, a two-step analysis predominates. First, the court must determine whether the revised statute survives *ex post facto* analysis; then, the court must determine how to interpret and apply the statute.

A. Ex Post Facto Analysis

The United States Constitution expressly prohibits the states from enacting *ex post facto* laws.[77] An *ex post facto* law, to be considered impermissible in the criminal context, "must be retrospective; that is, it must apply to events occurring before its enactment and must disadvantage the offender affected by it."[78] The classic exposition of *ex post facto* laws is found in the seminal case of *Calder v. Bull*,[79] which states:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[80]

The *ex post facto* prohibition was intended "to secure substantial personal rights against arbitrary and oppressive legislation, but not to limit legislative control of remedies and modes of procedure which do not affect matters of substance."[81] Thus, although the category of retroactive changes forbidden by the *ex post facto* clause includes more than just the elements and punishment for a crime, the prohibition, as defined in *Calder v. Bull*,[82] arguably does not extend to a retroactive application of the statute of limitations because extension of the statute of limitations performs none of the impermissibles forbidden by the *Calder* decision.

A fundamental issue in determining whether or not retroactive application of an enlarged statute of limitations is barred by the *ex post facto* prohibition is whether the statute of limitations vests substantive rights in the accused, or is merely a procedural barrier. If the statute vests substantive rights, then retroactive application of the statute of limitations should be prohibited by the *ex post facto* clause. If the statute is merely procedural, and vests no substantive rights, the enlarged statute of limitations survives *ex post facto* scrutiny.

In the context of child sexual abuse, few states have determined that statute of limitations vests substative rights in the accused.[83] However, the "substantive vested rights" analysis is important to understanding the "time-barred" approach, and the argument for more expansive retroactive application of enlarged statutes of limitations. One case which illustrates the substantive versus procedural rights analysis, and the vague-

74. This note is expressly limited to criminal prosecutions for child sex abuse. The statute of limitations is characterized differently within the civil context such that factors including minority or incapacity may apply so as to prevent the running of the statute of limitations until the child attains majority.

75. Those jurisdictions are: Alaska, California, Colorado, Massachusetts, Texas and Washington. A majority of the states have addressed the same issue within the general criminal statute of limitations context. As explained within this note, the state courts have reached diverse results using varied analysis. *See, e.g.*, State v. Paradise, 189 Conn. 356, 456 A.2d 305 (1983) (absent clear legislative intent requiring retroactive application, criminal statute of limitations applied prospectively; court did not determine whether the statute of limitations is procedural or substantive); Rubin v. State, 390 So. 2d 322, 324 (Fla. 1980) (statute of limitations is a substantive right, and so statute of limitations in effect at time of offense is controlling).

76. *Cf.* State v. Creekpaum, 732 P.2d 557 (Alaska Ct. App. 1987), *rev'd*, 753 P.2d 1139 (Alaska 1988) (statute of limitations vests a substantive right; therefore, retroactive application of enlarged period prohibited); Archer v. State, 557 S.W.2d 244 (Tex. Crim. App. 1979) (statute may be applied to all offenses not time-barred); State v. Hodgson, 108 Wash. 2d 662, 740 P.2d 848 (1987) (statute of limitations is procedural; thus, judicial presumption of retroactivity requires retrospective application of revised statute).

77. U.S. Const. art. I, § 10, cl. 1.

78. Weaver v. Graham, 450 U.S. 24, 29 (1981).

79. 3 U.S. (1 Dall.) 386 (1798).

80. *Id.* at 390.

81. Beazell v. Ohio, 269 U.S. 167, 170-71 (1925).

82. 3 U.S.(1 Dall.) 386 (1798).

83. *See, e.g.*, People v. Sweet, 207 Cal. App. 3d 78, 84, 254 Cal. Rptr. 567, 571 (1989). Additionally, both Florida and Alabama have held that the statute of limitations is substantive within the general criminal context.

ness and uncertainty involved in the definition of an *ex post facto* law, is *State v. Creekpaum*.[84] In *Creekpaum* the Alaska Court of Appeals held that a criminal statute of limitations vests a substantive right in the defendant;[85] the Alaska Supreme Court, in overturning the decision, held that the statute of limitations is procedural, and as such, extension prior to the original period's expiration does not violate either the United States or the Alaska Constitution.[86]

The Alaska Court of Appeals determined that to be classified as substantive for purposes of *ex post facto* analysis, a change in the law must merely adversely affect the defendant, and operate so as to place the defendant "at a disadvantage in relation to the substance of the offense charged or the penalties prescribed for that offense."[87] The Alaska Court of Appeals found *Weaver v. Graham*[88] dispositive. In *Weaver*, the United States Supreme Court stated that although the "substantive vested rights" theory[89] is useful for due process analysis, the theory is irrelevant to the question of whether a change is substantive or procedural for *ex post facto* purposes.[90] Critical to *ex post facto* analysis is

> the lack of fair notice and governmental restraint when the legislature increases punishment beyond what is prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.[91]

The court of appeals found that retrospective application of the enlarged limitations period disadvantaged the offender affected by the change and was more onerous than the law in effect at the time of the offense. Thus, the Alaska Court of Appeals held that the *ex post facto* clauses of the federal and Alaska Constitutions prohibit retrospective change in a criminal statute of limitations.[92]

84. 732 P.2d 557 (Alaska Ct. App. 1987), *rev'd* 753 P.2d 1139 (Alaska 1988).

85. 732 P.2d at 569.

86. 753 P.2d at 1144.

87. *Id.* at 560. *See* Thompson v. Utah, 170 U.S. 343 (1898) ("[A] statute is *ex post facto* which . . . in its relation to the offense or its consequences, alters the situation of the accused to his disadvantage.").

88. 450 U.S. 24 (1981).

89. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

90. *Weaver*, 450 U.S. at 29-30.

91. *Id.* at 30-31.

92. State v. Creekpaum, 732 P.2d 557, 568 (Alaska Ct. App. 1987).

After determining that the constitutional prohibition was not limited to retroactive changes in the elements of or punishment for a crime,[93] the court of appeals addressed the issue of whether the criminal statute of limitations vests a substantive right upon the accused.[94] Preliminarily, the court opined that the legislature may not revive an expired statute of limitations.[95] The court then reviewed historical precedents, noting that Alaskan courts had previously held that a civil statute of limitations was substantive, not procedural.[96] Additionally, criminal statutes of limitations had been held to be substantive, but only within other decisional contexts and not for purposes of *ex post facto* analysis.[97] The line dividing "substance and procedure shifts as the context changes . . . [and] implies different variables depending upon the particular problem for which it is used."[98] The *Creekpaum* court recognized that the distinction between a procedural and substantive change "cannot be reduced to a simple formula," but must be determined on a "case-by-case basis."[99] The *Creekpaum* court rejected the argument that the statute of limitations is a mere limitation upon the remedy,[100] instead finding that because the statute of limitations limits the circumstances under which guilt can be found and is intended to preserve the accuracy and basic integrity of the adjudicatory process in criminal procedure, the statute operates as a substantive right for purposes of *ex post facto* analysis.[101] Thus, without directly addressing the issue of legislative intent, the court forbade retroactive application of legislatively enlarged criminal statutes of limitations.[102]

93. *Creekpaum*, 732 P.2d at 563-64.

94. *Id.* at 564.

95. *Id.* at 560-61. *See also* Falter v. United States, 23 F.2d 420 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

> Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or if it does, the stake forgives it.

Id. at 425-26.

96. *Creekpaum*, 732 P.2d at 566. *See* Nolan v. Sea Airmotive, Inc., 627 P.2d 1035 (Alaska 1981).

97. *See* State v. Frech Funeral Home, 185 N.J. Super 385, 448 A.2d 1037 (1982).

98. Hanna v. Plumer, 380 U.S. 460, 471 (1965). A court may seek to ascertain the differences between substance and procedure in the following contexts: conflict of laws, retrospective application of statutes and law-making. Busik v. Levine, 63 N.J. 351, 364-65, 307 A.2d 571, 578-79 (1973).

99. *Creekpaum*, 732 P.2d at 562.

100. *Id.* at 567.

101. *Id.* at 568.

102. *Id.*

The appellate court premised its decision to classify the statute of limitations as substantive largely upon the belief that, because the enactment of the statute serves notice to the accused of the period for which he must be prepared to defend his act, "basic fairness militates against requiring the accused to defend his acts once the period . . . has expired."[103] Although the decision is laudable for its effort to preserve the rights of the criminally accused, the court failed to consider or address the legislature's intent or the child victim's right to legal redress.

On appeal, the Alaska Supreme Court reversed, holding that criminal statutes of limitations are procedural[104] and as such, extension of the statute prior to the original period's expiration does not violate the United States or Alaska Constitutions.[105] Like both lower courts, the Alaska Supreme Court found *Weaver v. Graham*[106] dispositive.[107] In *Weaver*, the petitioner challenged, on *ex post facto* grounds, a change in Florida's statutory formula for the accrual of good time reductions in prisoners' sentences. The change made accrual of good time reductions more difficult, thus increasing the quantum of punishment suffered by each inmate. The Supreme Court held that the statute violated the *ex post facto* prohibition because it "makes more onerous the punishment for crimes committed before its enactment."[108]

Creekpaum argued that the *Weaver* decision introduced a new analytic approach to *ex post facto* analysis.[109] In place of the vested rights approach,[110] the court should focus upon only two criteria: (1) whether the law was retrospective, and (2) whether the change disadvantaged the offender affected by the change.[111] The Alaska Supreme Court rejected Creekpaum's argument, noting that the *Weaver* decision did not nullify existing *ex post facto* precedent.[112] Instead, the *Creekpaum* court found that the holding in *Weaver* fell within the traditional prohibition announced in *Calder v. Bull*[113] because "it focused on the change in the

103. *Id.* The court further stated that the statute of limitations defines "the outer limit of delay, beyond which prosecution will not be tolerated, even where the government has exercised good faith in attempting to file . . . and when the accused is incapable of identifying prejudice . . . from the delay." *Id.*

104. State v. Creekpaum, 753 P.2d 1139, 1144 n.13.

105. *Id.* at 1144.

106. 450 U.S. 24 (1981).

107. *Creekpaum*, 753 P.2d at 1140.

108. 450 U.S. at 36.

109. 753 P.2d at 1141.

110. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

111. *Creekpaum*, 753 P.2d at 1141.

112. *Id.*

113. 3 U.S. (1 Dall.) 386, 390 (1798).

quantum of punishment Weaver suffered as a result of the new law."[114]

The *Creekpaum* court then applied a two-step test. First the court noted that the revised statute of limitations was explicitly retroactive.[115] Second, the court rejected Creekpaum's argument that the new law was more onerous simply because Creekpaum remained liable for prosecution when he would have been immune under the old statute.[116] The court determined that the extension of the statute of limitations was a mere procedural change[117] and, applying the *Calder v. Bull* test,[118] found that retroactive application did not violate the *ex post facto* clause because the change neither made conduct criminal which was innocent when undertaken, aggravated a crime, permitted more severe punishment than permissible when the crime was committed, nor altered the rules of evidence to permit conviction on different or lesser testimony than permissible when the crime was committed.[119]

B. Analysis of Court's Interpretation and Retroactive Application of Enlarged Statues of Limitation

If the enlarged statute of limitations survives a facial *ex post facto* analysis (i.e., the statute does not vest the defendant with a substantive right), the issue becomes whether the enlarged statute of limitations should be retroactively applied, and if so, whether the application is limited solely to offenses not time-barred as of the statute's effective date. The determinative question is whether prosecution is legally permissible as of the new statute's effective date.

Typically, courts' analysis rests upon what has become a fundamental precept of criminal law, that is, the legislature may not extend the statute of limitations so as to revive an offense already time-barred.[120] However, unless prospective application is expressly mandated, a statute which extends the limitations period applies to all offenses not time-barred as of the statute's effective date, "so that a prosecution may be commenced at any time within the newly established period, although the old period of limitations has then expired."[121] Thus, the principal consideration is

114. *Creekpaum*, 753 P.2d at 1142.

115. *Id.*

116. *Id.*

117. *Id.* at 1144, n.13.

118. 3 U.S. (1 Dall.) 386, 390 (1798).

119. *Creekpaum*, 753 P.2d at 1143.

120. *See* Falter v. United States, 23 F.2d 420, 425-26 (2d Cir.) *cert. denied* 277 U.S. 590 (1928) Sobick v. Superior Ct., 28 Cal. App. 3d 846, 850, 106 Cal. Rptr. 516, 519 (1972).

121. Archer v. State, 577 S.W.2d 244. *See* Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943). Thus, the principal consideration is whether the accused had acquired a vested right to avoid prosecution as of the new statute's effective date.

whether the accused had acquired a vested right to avoid prosecution as of the new statute's effective date.[122] Traditionally, the new statute will be applied only where the accused does not own a vested right to avoid prosecution.[123] However, legislative intent, the doctrine of strict construction, and judicial presumptions may limit the statute's application. Generally, courts refuse to apply the statute to those defendants against whom the right to prosecute has expired prior to legislative extension, regardless of legislative intent.[124]

In discerning legislative intent as to the statute's retroactive application, courts use three different approaches. In the first approach, the revised statute applies prospectively in the absence of manifest legislative intent to the contrary.[125] In the second approach, the revised statute applies retrospectively in the absence of manifest legislative intent to the contrary.[126] Finally, where legislative intent is unclear, the courts apply the statute either prospectively or retrospectively, depending upon judicial presumptions and the judiciary's perception of legislative intent.[127]

In the first approach, the revised statute applies prospectively in the absence of manifest legislative intent to the contrary. The bare determination that there is no *ex post facto* barrier to retroactive application does not, without clear legislative intent, permit retroactive application.[128] Clear legislative intent is necessary because, as a general rule, changes

122. *See, e.g.*, Archer v. State, 577 S.W.2d 244 (Tex. Crim. App. 1979); Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943).

123. *Sobiek*, 28 Cal. App. 3d at 850, 106 Cal. Rptr. at 519.

124. The majority opinion did not address Legislative intent in either Texas case. In People v. Smith, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985), the court addressed the issue of legislative intent, citing People v. Smith, 161 Cal. App. 3d 1053, 208 Cal. Rptr. 318 (1984) for the proposition that the revised statute may be retroactively applied without express legislative intent. This proposition is premised on the existence of established precedents permitting application of extended limitations periods to crimes committed before the enactments and a legislative awareness of the court's existing judicial precedents. Thus, the judiciary may infer that the legislature enacted the statute with the knowledge and purpose that the revised statute would apply to all cases not time-barred. A presumption of prospectivity "is to be applied only after considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." *Smith*, 171 Cal. App. 3d at 1003, 217 Cal. Rptr. at 637.

125. *See, e.g.*, People v. Whitesell, 729 P.2d 985 (Colo. 1986); People v. Midgley, 714 P.2d 902 (Colo. 1986); People v. Holland, 708 P.2d 119 (Colo. 1985).

126. *See, e.g.*, State v. Hodgson, 44 Wash. App. 592, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part, remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

127. *See, e.g.*, Commonwealth v. Pellegrino, 402 Mass. 1003, 524 N.E.2d 835 (1988); Tigges v. Commonwealth, 402 Mass. 1003, 524 N.E.2d 834 (1988); Commonwealth v. Bargeron, 402 Mass. 589, 524 N.E.2d 829 (1988).

128. *Holland*, 708 P.2d at 120. *See also* United States v. Richardson, 512 F.2d 105 (3d Cir. 1975); State v. Paradise, 189 Conn. 346, 456 A.2d 305 (Conn. 1983).

In criminal statutes operate prospectively.[129] This presumption of prospectivity is premised upon several maxims fundamental to criminal law. A cardinal rule of statutory interpretation requires criminal statutes to be strictly construed in favor of the accused[130] and against the government.[131] Second, criminal limitations statutes are interpreted liberally in favor of repose.[132] However, despite the existence of these two maxims, it is commonly held that the words of a statute should be given their fair meaning,[133] and the statute interpreted in relation to the entire enactment purpose.[134]

A desire to protect the rights of the accused against disadvantageous procedural changes which could result in abuse or attainder may underlie the presumption for prospectivity.[135] Today, however, statutes of limitations are more likely to be liberally rather than strictly construed,[136] and as a result, the presumption for prospectivity should carry less weight. Where there is a presumption of prospective application, the court may apply the presumption in the absence of clear legislative intent to the contrary.

By rotely applying a presumption for prospective application, this approach fails to address the victim's right of legal redress. Although the presumption for prospectivity may have valid application where both

129. *See* State v. Jones, 132 Conn. 682, 685, 47 A.2d 185, 187 (1946); Yates v. General Motors Acceptance Corp., 356 Mass. 529, 531, 254 N.E.2d 785, 786 (1969).

130. *Holland*, 708 P.2d at 120. *See also* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94-95 (1820)

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. . . . The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

See 1 C. TORCIA, *supra* note 54, § 12.

131. United States v. Emmons, 410 U.S. 396, 411 (1973) ("this being a criminal statute, it must be strictly construd, and any abiguity must be resolved in favor of lenity.").

132. United States v. Scharton, 285 U.S. 518, 522 (1932); Waters v. United States, 328 F.2d 729, 742 (10th Cir. 1965).

133. Singer v. United States, 323 U.S. 338 (1945).

134. 1 C. TORCIA, *supra* note 54, § 12.

135. *See* Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 464-65 (1982). The author suggests that retroactive changes in the statute of limitations are impermissible because the changes carry a risk of abuse and attainder and also because the changes are "unlikely to meet the special burden of justification applicable to all retroactive laws affecting personal liberties." *Id.*

136. E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 349 (1940).

victim and accused are of majority, and are equally competent to protect their own rights, this presumption overcompensates for the accused's perceived disadvantages within the criminal justice system and awards the accused a decided advantage at the expense of the minor victim. This is because prospective application guards against disadvantageous procedural changes which operate to the detriment of the accused, but prevents the victim, an individual who is often unaware of his rights or powerless to protect them, from exercising his right to redress.[137]

The second approach mandates retroactive application of the revised statute in the absence of manifest legislative intent to the contrary.[138] In *State v. Hodgson*,[139] the Washington Court of Appeals, although recognizing that penal statutes are to be strictly construed in favor of the accused, stated that the strict construction doctrine should not be rotely applied, but instead, the judiciary should examine the rationale behind the doctrine to determine proper classification and application of the revised limitations statute.[140] The strict construction doctrine applies to penal statutes because "it is unjust to convict a person without clear notice to him that (1) his contemplated conduct is unlawful, and (2) certain penalties will attach to that conduct."[141] The effect of strict construction is to raise a judicial presumption of prospectivity.[142] However, where a statute relates to practice, procedures or remedies and does not affect a substantive or vested right, Washington courts reverse the presumption, and apply a general rule whereby procedural statutes are presumed to apply retroactively.[143] Therefore, to determine which presumption is applicable, a court must determine whether the statute of limitations operates as a substantive right or merely performs a procedural function.[144] The *Hodgson* court, however, rejected a strict substantive-procedural classification, finding that labeling the statute of limitations as one or the other tends to obscure rather than clarify the law.[145] The court therefore undertook to classify the statute of limitations based upon definition and function rather than mere label.[146]

137. *See supra* notes 24-56 and accompanying text.

138. *See, e.g.*, State v. Hodgson, 44 Wash. App. 592, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part, and remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

139. *Id.*

140. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

141. *Id. See* Commonwealth v. Broughton, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978).

142. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

143. *Id. See* Johnston v. Beneficial Management Corp., 85 Wash. 2d 637, 641, 538 P.2d 510, 514 (1975).

144. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

145. *Id.*

146. *Id.*

Emphasizing the fact that statutes of limitations are subject to the will of the legislature,[147] the *Hodgson* court found that retroactive application did not impair vested or substantial rights, provided however, that the offense was not time-barred as of the statute's effective date.[148] This is so because "the statute is a mere regulation of the remedy, subject to legislative control, and does not become a vested right until the offense becomes time-barred."[149]

Because the statute of limitations approximates a procedural remedy rather than a substantive right, the *Hodgson* court determined that retroactive application did not violate the *ex post facto* clause. Applying the equivalent of the *Calder v. Bull* test,[150] the court permitted retroactive application because increasing the limitation period neither aggravated the crime, increased the punishment nor permitted the accused to be convicted under rules permitting "lesser" testimony.[151] In the absence of contrary legislative intent, the presumption of retroactivity applies to the revised limitations statute.[152] Thus, because the statute of limitations is not substantive, the *ex post facto* clause permits retroactive application of the enlarged limitations period in accordance with the judicial presumption of retroactive application.

The *Hodgson* court recognized the policy considerations underlying the legislature's extension of the limitations period.[153] Although failing to cite the policy considerations as a factor in the decision permitting retroactive application, the court at least recognized the legislature's intentions in extending the statute.[154] Thus, although not premising a decision for retroactive application upon policy considerations, the court

147. *Id.* The court characterized statutes of limitations as "matters of legislative grace . . . [and] a surrendering by the sovereign of its right to prosecute." *Id.*

148. *Id.* Therefore, until the right to a dismissal is absolutely vested, the legislature may change or repeal the limitations period. *Id. See also* Waters v. United States, 328 F.2d 739, 743 (10th Cir. 1964); Clements v. United States, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

149. *Hodgson*, 108 Wash. 2d at 668, 740 P.2d at 851.

150. *See supra* text accompanying note 80; Calder v. Bull, 3 U.S. (1 Dall.) 386, 390 (1798).

151. *Hodgson*, 108 Wash. 2d at 669, 740 P.2d at 852.

152. *Id.*

153. *Id.* at 665, 740 P.2d at 850. The court, citing the legislature's final reports, noted that the limitations period was extended based upon experience showing that victims of child abuse, due to fear, lack of understanding or manipulation by the offender, often fail to report the abuse within the shorter limitations period. Although failing to cite the policy considerations as a factor in the decision permitting retroactive application, the court at least recognized the legislature's intentions in extending the statute.

154. *Id.* at 666, 740 P.2d at 850.

nonetheless adopted a position which maximizes the protection of the child abuse victim.

In the final approach, the legislature's intent is not manifestly expressed, and as a result, the court resorts to judicial presumptions and the judiciary's perception of legislative intent to determine the revised statute's application.

The mere fact that the legislature extends the statute of limitations may support a presumption for retroactive application.[155] Where the legislature fails to clearly express an intention as to the application of the revised statute, a court may look to the various steps in the enactment process to resolve any ambiguity.[156] In *Commonwealth v. Bargeron*, the Massachusetts Supreme Court applied a two-step test to determine whether the revised limitations statute could be retroactively applied.[157] Noting that retroactive statutes are not *per se* unconstitutional,[158] the court applied the *Calder v. Bull* test,[159] determining that extension of the statute merely extends the time in which the government may prosecute, and as such, extension did not violate the *ex post facto* prohibition.[160] The court noted the absence of any express language evidencing the legislature's intent for retroactive application.[161] The court noted however, that the omission did not foreclose retrospective application.[162] Retroactive statutes are unconstitutional only when, on a balancing of opposing considerations, the statute is unreasonable.[163] A court may consider "the precise evil which is targeted in legislation under review."[164] The intent of the legislature, ascertained "from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the

155. *See, e.g.*, Commonwealth v. Bargeron, 402 Mass. 589, 524 N.E.2d 829 (1988).

156. Commonwealth v. Collett, 387 Mass. 424, 433, 439 N.E.2d 1223, 1229 (1982).

157. *Bargeron*, 402 Mass. at 590, 524 N.E.2d at 830. Although the defendant was not charged with sexual abuse of a minor, the court's reasoning was applied to two other cases decided on the same date, both of which involved child sex abuse charges and application of the revised limitations period.

158. League v. Texas, 184 U.S. 156, 161 (1902).

159. *See supra* text accompanying note 80; Calder v. Bull, 3 U.S. (1 Dall.) 386, 390 (1798).

160. *Bargeron*, 402 Mass. at 591, 524 N.E.2d at 830.

161. *Id.* at 592-93, 524 N.E.2d at 831.

162. *Id.* at 592, 524 N.E.2d at 831. *See* Commonwealth v. Greenberg, 339 Mass. 557, 578-79, 160 N.E.2d 181, 195 (1959).

163. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20 (1976); American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., 374 Mass. 181, 189-90, 372 N.E.2d 520, 525 (1978).

164. *Bargeron*, 402 Mass. at 593, 524 N.E.2d at 832. *See* Commonwealth v. Collett, 387 Mass. 424, 432, 439 N.E.2d 1223, 1228-29 (1982).

purpose of its framers may be effectuated,"[165] determines the reasonableness of retroactive application and the legislature's intent. Thus, the court in *Bargeron* held there was no constitutional or statutory barrier to retroactive application of the revised statute.[166]

The court in *Bargeron* concluded that the mere extension of the limitations period for child sex abuse offenses furnished adequate indication of the legislature's intention to permit retroactive application of the revised statute.[167] The court reasoned that the Massachusetts legislature, recognizing the delays associated with a child's report of sexual abuse, may have sought to accommodate such delays by extending the limitations period.[168] The court, lauding the legislature for addressing the child sexual abuse issue, determined that "it is not reasonable to assume that the Legislature intended to delay the application of the new . . . statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment."[169] Thus, the court reasoned that retroactive application best reflected the legislature's intentions in passing the revised statute. Moreover, the court buttressed the decision in favor of retroactive application by noting that the statute of limitations is procedural, and as such, the judicial presumption of retroactivity which applies to non-substantive rights permits retroactive application.[170] Thus, although the legislature omitted language requiring retroactive application, the court found sufficient basis to permit retrospective application through the use of a judicial presumption for retroactivity, and the mere act of the legislature extending the limitations period.

IV. The Proposal: A Uniform Approach to the Interpretation and Application of a Revised Limitations Statute

Where the legislature acts to extend the criminal statute of limitations for child sex abuse offenses, strong policy considerations compel a presumption of retroactivity, absent manifest legislative intent to the contrary. This Note proposes that courts adopt an approach which realistically balances the needs of both offender and victim in light of the victim's inability to effectively protect his or her legal rights. Further, this Note suggests that retroactive application of an enlarged statute of limitations does not violate the *ex post facto* prohibition, even if applied

165. Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606, 608 (1934).

166. *Bargeron*, 402 Mass. at 594, 524 N.E.2d at 832.

167. *Id.* at 591-94, 524 N.E.2d at 831-32.

168. *Id.* at 593, 524 N.E.2d at 831-32.

169. *Id.* at 594, 524 N.E.2d at 832.

170. *Id.*

to offenses "time-barred" at the extension date. The difficulty of child victims in obtaining legal redress, the need to afford the child victim a day in court, and the need to prevent offenders from escaping prosecution, collectively compel the application of a judicial presumption of retroactivity. Moreover, the mere fact that the legislature has addressed the issue by extending the statute of limitations may be construed as intending retroactive application.[171]

A. Uniform Approach: A Presumption of Retroactivity

Retroactive application of a legislatively enlarged criminal limitations period does not violate the constitutional prohibition against *ex post facto* laws. The majority of jurisdictions addressing the issue held that, for purposes of *ex post facto* analysis, the statute of limitations is procedural.[172] The statute of limitations, in criminal contexts, is an act of legislative grace[173] and a surrendering of the sovereign's right to prosecute.[174] At common law, criminal limitations periods were nonexistent.[175] The statute of limitations is clearly a reflection of public will and a matter of grace at least until such time as the limitations period expires.[176] In *Chase Securities Corp. v. Donaldson*,[177] the Supreme Court expounded upon the origin and application of statutes of limitations, stating that:

> [s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the [a]voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.[178]

171. *See Bargeron*, 402 Mass. 589, 524 N.E.2d 829 (1988). "[I]t is not reasonable to assume that the Legislature intended to delay the application of the new ten-year statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment." *Id.* at 593, 524 N.E.2d at 832.

172. *See, e.g.*, United States ex rel. Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir.), *cert. denied*, 460 U.S. 1037 (1982); Clements v. United States, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928); State v. Ferrie, 243 La. 416, 144 So. 2d 380 (1962); State v. Merolla, 686 P.2d 244 (Nev. 1984); Rose v. State, 716 S.W.2d 162, 163 (Tex.App. 1986). *But see, e.g.*, Stoner v. State, 418 So. 2d 171, 178 (Ala. Crim. App. 1982) (statute of limitations in criminal context vests substantive right); Rubin v. State, 390 So. 2d 322 (Fla. 1980) (statute of limitations vests substantive right in criminal context).

173. State v. Hodgson, 108 Wash. 2d 662, 667, 740 P.2d 848, 851 (1987).

174. *Id.*

175. 1 C. TORCIA, *supra* note 54, § 90.

176. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

177. 325 U.S. 304 (1945).

However, mere categorization of the statute of limitations as substantive or procedural sidesteps the central question of the enlarged limitations period's effect.[179] Instead, courts should look to the nature and function of criminal statutes of limitations.[180] *Ex post facto* laws, as pronounced in *Calder v. Bull*,[181] are those laws which (1) make an act criminal which was innocent when done; (2) aggravate a crime or make it greater than when committed; (3) increase the punishment; or (4) alter the rules of evidence and require lesser or different evidence to convict than that required at the time of the offense.[182] The statute of limitations' extension performs none of these impermissibles. The statute's extension merely extends the time in which prosecution is permissible. As such, the legislature presumably could free an offense of any limitations period or could provide for successive extensions of finite periods.[183] However, statutes should not be given a construction which destroys or impairs a vested right.[184] Obviously, when the legislature extends the statutory period prior to the expiration of the original period, the accused has not obtained a vested right to be free from prosecution. If expressly directed, the legislature may even apply the extended lim-

178. *Id.* at 314 (citation omitted).

179. *Hodgson*, 108 Wash. 2d 662, 667, 740 P.2d 848, 851 (1987). *See also* State v. Frech Funeral Home, 185 N.J. Super 385, 389-90, 448 A.2d 1037, 1039 (quoting Busik v. Levine, 63 N.J. 351, 364, 307 A.2d 571, 578 (1973) ("it is simplistic to assume that all law is divided neatly between 'substance' and 'procedure.' A rule of procedure may have an impact upon the substantive result and be no less a rule of procedure on that account. . . .").

180. *Hodgson*, 108 Wash. 2d at 667, 740 P.2d at 851.

181. 3 U.S. (1 Dall.) 386 (1798).

182. *Id.* at 390.

183. People v. Smith, 171 Cal. App. 3d 997, 1003, 217 Cal. Rptr. 634, 637 (1985).

184. E. CRAWFORD, *supra* note 136, § 278.

itations period to revive "time-barred" claims.[185] The extension therefore, does not divest the accused of a vested right. Thus, neither the *Calder ex post facto* test, nor the vested rights theory prohibit retroactive application of the enlarged period.

The strict construction doctrine is frequently utilized as a judicial procedure, limiting retroactive application unless clearly required by express language or necessary implication.[186] Strict construction of penal statutes is favored because the legislature owes the citizenry a duty to clearly state those acts for the commission of which a citizen may lose his life or liberty.[187] Although the citizenry may rely upon existing elemental definitions or proof requirements,[188] the accused cannot reasonably develop a reliance or expectation as to the time limit for prosecution. Even if developed, is there any societal interest to be served by protecting the reliance? When the accused has committed all of the elements of an offense, the statute of limitations functions only to restrain prosecution within legislatively prescribed temporal limits. Logic rejects the argument that altering the statute of limitations affects the expectations of the citizenry as to the lawfulness of their conduct. At most, only the perpetrator develops a reliance upon the statute of limitations, purposefully evading detection until the legislatively prescribed period expires. Numerous jurisdictions recognize this phenomena and by statute, prevent the tolling of the limitations period during the period when the accused is out of state or beyond the sovereign's jurisdiction.[189]

The statute of limitations serves as a buffer, preventing the expenditure of judicial resources where logically, evidentiary items such as testimony and documents, have disappeared, grown stale, or been destroyed, and can no longer perform the necessary evidentiary function.[190] Thus, at worst, extension or elimination of the limitations bar results in reduced judicial efficiency by forcing the court to determine the validity of a prosecution, rather than rotely applying the limitations period to bar the same. Granted, the accused must be protected from the retroactive application of a definitional alteration of the criminal

185. *See infra* notes 195-246 and accompanying text.

186. Kopczynski v. County of Camden, 2 N.J. 419, 424, 66 A.2d 882, 884 (1949) "[w]ords in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot otherwise be satisfied."); N. SINGER, SUTHERLAND STAT. CONSTRUCTION § 41.04 (4th Ed. 1986).

187. N. SINGER, *supra* note 186, § 59.03.

188. For a discussion of the citizen's reliance interest and the need to protect such interests, *see* Note, *Retroactive Application Of Statutes: Protection Of Reliance Interests*, 40 ME. L. REV. 183 (1988).

189. 1 C. TORCIA, *supra* note 54, § 94.

190. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979).

elements.[191] However, retroactive application of the enlarged statutory period does not prevent the citizenry from making everyday decisions with reasonable certainty, and does not alter the definition of unlawful conduct.

The strict construction doctrine provides that penal statutes should not apply retroactively without clear notice that one's contemplated conduct is unlawful and that certain penalties will attach.[192] The strict construction doctrine is not an impediment to retroactive application of a legislatively enlarged statute of limitations because retroactive application of the enlarged period neither affects the definition nor the penalty for the crime.[193] Moreover, retroactive application does not breach *ex post facto* prohibitions because extending the period prior to prosecution neither aggravates the crime, increases the punishment nor alters the rules of legal testimony necessary for conviction.[194] Thus, there are no constitutional or doctrinal barriers to retroactive application of a legislatively-enlarged limitations period.

B. Reviving Time-Barred Claims

Courts which permit retroactive application of an enlarged criminal limitations period deny application to offenses "time-barred" at the extension.[195] However, revival of a time-barred offense does not offend *ex post facto* prohibitions. The *ex post facto* prohibition has long been confined to the criminal context[196] but has never been defined with great clarity. Instead, vague notions of "justice and fair play"[197] are used to support judicial restraints on perceived *ex post facto* legislation. Courts suggest that a right, if either "substantial" or "vested," may not be altered after the fact.[198]

Nineteenth century treatise writers like Judge Cooley first coined the notion of "substantial rights."[199] Cooley opined that legislatures may

191. Alteration of the definitional elements of the crime is a classic example of *ex post facto* legislation and would be prohibited.

192. Commonwealth v. Broughton, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978).

193. State v. Hodgson, 44 Wash. App. 592, 603, 722 P.2d 1336, 1342 (1986) *aff'd in part, rev'd in part,* and *remanded in part,* 108 Wash. 2d 662, 740 P.2d 848 (1987).

194. *See* United States ex rel. Massarella v. Elrod, 682 F.2d 688 (7th Cir. 1982), *cert. denied,* 460 U.S. 1037 (1983).

195. *See, e.g.*, People v. Smith, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985); State v. Hodgson, 108 Wash. 2d 662, 740 P.2d 848 (1987).

196. *See* Note *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1492 n.4 (1975) [hereinafter *Ex Post Facto Limitations*].

197. *See* Falter v. United States, 23 F.2d 420, 425-26 (2d. Cir.), *cert. denied,* U.S. 590 (1928).

198. *See, e.g.*, Kring v. Missouri, 107 U.S. 221, 232 (1882).

199. *See* T. COOLEY, CONSTITUTIONAL LIMITATIONS 272 (1868).

prescribe different forms of criminal procedure but may not dispense with any substantial protections which existing criminal law affords the accused.[200] This vague notion of a substantial right "vested" in the defendant, unlawfully taken away by legislative change, formed the foundation for the Supreme Court's decision in *Kring v. Missouri*.[201] *Ex post facto* analysis and the propriety of retroactive application require consideration of three factors: reliance, legislative function, and potential for legislative abuse.[202] *Ex post facto* legislation is objectionable because purportedly, citizens rely upon the law currently in effect to shape their conduct. Certainly, this premise is supportable with respect to the elements of a crime. However, few alleged criminals know the law, much less rely on it.[203] Certainly, ignorance of the law will not excuse conduct in violation of current statutes.[204] Reliance should be protected only if reasonable. If an individual commits a crime, the mere passage of time should not endow the individual with a vested right to escape punishment for the alleged wrong. An alleged defendant can not reasonably rely upon the statute of limitations to shelter his wrongful conduct, and society owes him no such guarantee.

Ex post facto laws are also undesirable because they fail to serve their primary purpose, deterrence.[205] This concept of *ex post facto* laws assumes that criminal legislation is promulgated primarily for deterrent effect. However, statutes of limitations are mere procedural limitations and purport to serve no deterrent purpose. The statute of limitations has no measurable impact on allegedly criminal behavior, neither encouraging nor deterring such conduct.

Finally, *ex post facto* laws are objectionable because they represent a potential for legislative abuse.[206] No legislative vindictiveness exists where the legislature extends the statute of limitations, unless directed principally to one individual. Unlike the enactment of legislation directed specifically toward a single individual or group, extension of child sexual abuse limitation periods neither suggests nor represents an abuse of legislative process.

In the civil context, courts have upheld the legislature's power to revive time-barred actions.[207] In *Chase Securities Corp. v. Donaldson*,[208]

200. *Id.*
201. 107 U.S. 221, 232 (1882).
202. *Ex Post Facto Limitations*, *supra* note 196, at 1497-1501.
203. *Id.* at 1497.
204. *See, e.g.*, United States v. Casson, 434 F.2d 415, 422 (D.C. Cir. 1970).
205. *Ex Post Facto Limitations*, *supra* note 196, at 1498.
206. *Id.* at 1500-01.
207. *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); Campbell v. Holt, 115 U.S. 620 (1885); Liebig v. Superior Court, 209 Cal. App. 3d 828, 257 Cal. Rptr. 574 (1989).
208. 325 U.S. 304 (1945).

the Supreme Court ruled that revival of a personal cause of action, where the lapse of time did not vest the party with title to real or personal property, did not offend the fourteenth amendment.[209] Statutes of limitations are arbitrary, and their shelter has never been recognized as a fundamental right.[210] Furthermore, statutes of limitations are measures of legislative grace, subject to legislative control.[211] "[S]tatutes of limitation go to matters of remedy, not to destruction of fundamental rights."[212]

In *Campbell v. Holt*,[213] the progeny of *Chase Securities*, the Supreme Court found that the right to defeat a debt by the statute of limitations was not a vested right, and the legislature's determination that time shall be no bar did not violate any right.[214] Man has no "*property* in the bar of the statute as a defense to his promise to pay."[215] "It is no natural right, . . . but the creation of conventional law."[216] No right is destroyed when the law restores a remedy which has been lost.[217]

Similarly, logic suggests that revival of the statute of limitations in the criminal context violates no constitutional barriers. The majority of jurisdictions have found the statute of limitations to be procedural, not substantive.[218] However, courts have suggested that the defendant acquires a right not to be prosecuted when the statute expires.[219] Supposedly, the defendant's full liberty has been restored in a manner analogous to the acquisition of property through adverse possession.[220] The distinction between extension and revival in the criminal context can only be justified on the premise that only when a right to prosecute is revived does an act which could not have been punished without the statute become punishable.[221] Such reasoning begs the question and only tortures an initially weak definition of the *ex post facto* prohibition.[222]

If the statute of limitations were classified as substantive, a prohibition against revival would mold a consistent, though improper, train

209. *Id.* at 311-12.
210. *Id.* at 314.
211. *Id.*
212. *Id.*
213. 115 U.S. 620 (1885).
214. *Id.* at 628.
215. *Id.* at 629.
216. *Id.* The court noted that the phrase "vested rights" is not found in the Constitution. *Id.* at 628. The Court's opinion suggests that the *ex post facto* prohibition was designed principally to protect constitutionally guaranteed rights. *Id.* at 629.
217. *Id.*
218. *See supra* note 172.
219. *See supra* notes 120 through 170 and accompanying text.
220. *See Ex Post Facto Limitations*, *supra* note 196, at 1512 n.78.
221. *Id.*
222. *Id.*

of logic. If the statute of limitations is initially substantive, then the *ex post facto* prohibition should prevent retroactive application, and revival is impossible from the onset. However, as noted, classification of the statute of limitations as substantive is arbitrary and decidedly improper.

The majority of jurisdictions classify the statute of limitations as procedural.[223] However, magically, courts hold that, upon expiration of the right to prosecute, the statute of limitations vests the defendant with a substantive right. How can a purely procedural device suddenly bestow upon the defendant a substantive right? An example will expose the inconsistent and illogical nature of the reasoning. Assume the existence of a two year statute of limitations. X commits a crime on December 30, 1984. Y commits a crime on January 1, 1985. On December 31, 1986, the legislature abolishes the statute of limitations and decrees retroactive application. The time-barred theory would hold that X could not be prosecuted while Y could.[224] Why should X have a substantive right to avoid prosecution while Y does not, when within a two day time span, both committed the same offense? Either the statute of limitations is procedural or substantive, but it is no chameleon! Weak justifications couched in terms of offending "our instinctive feelings of justice and fair play"[225] explain little and do not justify the transformation.

If the courts are attempting to protect the defendant's reliance on the statute of limitations which existed at the time the crime was committed, then the *ex post facto* prohibition should prohibit not only revival, but extension as well. In *Kring v. Missouri*,[226] the Supreme Court concluded that the *ex post facto* prohibition should apply to all changes enhancing the position of the state in criminal trials at the expense of the defendant.[227] However, in *Thompson v. Utah*,[228] the Supreme Court narrowed the application of the *Kring*, concluding that changes in criminal procedure could be, but are not necessarily, *ex post facto*.[229] The Court held that the defendant had a right to a twelve person jury trial at the time of his offense and that right could not be taken from him at a second trial.[230] The logical implication of the decision is that rights vest

223. *See supra* note 172.

224. The substantive rights theory would hold that the revised statute could not apply retroactively.

225. *See* Falter v. United States, 23 F.2d 420, 426 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

226. 107 U.S. 221 (1882).

227. *Id.* at 232.

228. 170 U.S. 343 (1898).

229. *Id.* at 352.

230. *Id.*

in the defendant upon the commission of the offense. However, subsequent Supreme Court decisions suggest that the decision in *Thompson* did not limit the power of the legislature to make changes in "non-constitutional" procedural rights.[231] The determination whether a non-constitutional right could be a "substantial right" was left unresolved.[232]

If, as suggested by the *Thompson* decision, the *ex post facto* prohibition is designed to protect constitutional rights and not non-constitutional rights,[233] then clearly the defendant's right to avoid prosecution cannot rise to the level of a constitutionally guaranteed right. Assuming the *ex post facto* prohibition is designed to protect the defendant's reliance interest, the defendant is in effect alleging he acted on the premise that the prosecution would face certain obstacles which were subsequently removed. Thus, the interest the defendant wants elevated to the level of a constitutionally guaranteed right is a dubious interest in avoiding prosecution after committing a criminal offense.[234]

Revival of a cause of action is an extreme exercise of legislative power[235] and should be done only in rare circumstances. Some procedural rules should not be applied retroactively.[236] Ideally, a court should balance the state's public policy and interest in prosecution against the defendant's right to a technical defense. Rather than a prophylactic rule against retroactive application, revival should be permitted unless the rule was widely relied upon, the revised rule cannot serve its purpose if retroactively applied, or a vindictive legislative motive pervades.[237]

In *Liebig v. Superior Court of Napa County*,[238] the California Court of Appeals permitted the revival of plaintiff's time-barred tort action for sexual molestation against her grandfather.[239] Holding that "vested

231. *See, e.g.*, Beazell v. Ohio, 269 U.S. 167 (1925) (upholding change permitting judicial discretion in granting separate trials); Mallett v. North Carolina, 181 U.S. 589 (1901) (upheld statute permitting state to appeal grant of new trial); Thompson v. Missouri, 171 U.S. 380 (1898) (defendant had no vested right in rule of evidence prior to passage of Missouri statute).

232. *Beazell*, 269 U.S. at 171. The court noted that "[j]ust what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Id.*

233. For example, the prohibition may protect constitutionally guaranteed rights such as the right to a jury trial in a criminal proceeding.

234. *Ex Post Facto Limitations*, *supra* note 149, at 1513.

235. People v. Robinson, 140 Ill. App. 3d 29, _____, 487 N.E.2d 1264, 1266 (1986); Hopkins v. Lincoln Trust Co., 233 N.Y. 213, 213, 135 N.E. 267, 267 (1922).

236. For example, those rules upon which the defendant may reasonably rely, and which directly shape his conduct. For example, the interspousal testimonial privilege.

237. *See Ex Post Facto Limitations*, *supra* note 149, at 1513-16.

238. 208 Cal. App. 3d 828, 257 Cal. Rptr. 574 (1989).

239. *Id.* at _____, 257 Cal. Rptr. at 578.

rights'' are not immune from retroactive laws where an important state interest is at stake, the court found that maximizing, for as expansive a period of time as possible, the sexual abuse claims of minor plaintiffs was an overriding state interest.[240] Similarly, in the criminal context, the state's interest in prosecuting and punishing child sexual abusers overrides defendant's interest in freedom from prosecution and permits the revival of time-barred actions. In *Chase Securities Corp. v. Donaldson*,[241] the Supreme Court noted that a multitude of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seemed small.[242] Thus, where the state interest is great, the legislature may revive a time-barred action. However, revival should not be presumed and should only be permitted where the legislature expressly prescribes such application.

Courts frequently rely on the Fourteenth Amendment of the United States Constitution[243] to forbid revival of a time barred claim.[244] However, the Supreme Court in both *Campbell v. Holt*,[245] and *Chase Securities Corp. v. Donaldson*[246] determined that revival of an action not vesting a real or personal property right does not offend the fourteenth amendment. How can an alleged defendant obtain a vested right to be free from prosecution when he commits an act criminal at the time of performance? To justify this conclusion for the reason that the defendant's act could not have been punished but for the statute ignores logic, escapes reason and is but an exercise in semantic circumlocution. The state's interest in prosecuting child sex abusers overrides any "vested substantial right" the defendant may have acquired.

240. *Id.*

241. 325 U.S. 304 (1945).

242. *Id.* at 315.

243. The amendment provides in pertinent part that, "nor shall any State deprive any person of life, liberty, or property, without due process of law. . ." U.S. CONST. amend. XIV, § 1.

244. *See, e.g.*, Board of Education v. Blodgett, 155 Ill. 441, 40 N.E. 1025 (1895); Sanchez v. Access. Associates, 179 Ill. App. 3d 961, 535 N.E.2d 27 (1989); Markley v. Kavanagh, 140 Ill. App. 3d 737, 489 N.E.2d 384 (1986).

245. 115 U.S. 620 (1885).

246. 325 U.S. 304 (1945).

V. CONCLUSION

Children have been described as the largest indigent class on earth.[247] Children are uniquely unable to protect their own rights.[248] Given this inability to protect their own rights, it is imperative that we, as a society, endeavor to protect those who are unable to protect themselves. It is the mark of a civilized society. Statutes of limitations safeguard the accused against stale claims by discouraging victims from sleeping on their rights. Although child sex abuse victims may have a moral obligation to report the offense in a timely manner, the public derives no benefit by shielding the offender from prosecution while simultaneously penalizing the victim for his or her inability to report the offense. The offender should not be permitted to control his destiny by allowing hir to manipulate the victim, impeding reporting and preventing prosecution. Certainly, neither logic nor public policy require that society maintain a helpless, silent vigil, permitting the child sexual abuser to avoid prosecution by unlawfully detaining his victim, thus preventing the victim's report and the state's prosecution of the offense. Yet, stringent application of the statute of limitations inflicts a similar injustice upon the child sex abuse victim.

The child victim, subject to unique reporting impediments, deserves an opportunity for legal redress. Child sexual abusers must be deterred and punished. Retroactive application of legislatively enlarged statutes of limitations accomplishes each of these desirable objectives. The mere extension of the limitations period, when mated with legislative purpose, supports a presumption for retroactive application. Given the minor's decided disadvantage in knowledge, power and resources, fairness demands that the child victim be given every opportunity for legal redress. Thus, absent manifest legislative intent to the contrary, the needs of society and the child sexual abuse victim are best served by retroactive application of the enlarged limitations period, and where expressly de creed, the revised limitations period may be applied to revive a time-barred claim.

THOMAS G. BURROUGHS

247. Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 OKLA. CITY U.L. REV. 561, 565 (1989).

248. For example, many states provide that children under the age of ten presumptively incompetent to testify. States also vary as to the threshold below whic child is deemed automatically incompetent to testify. *See e.g.*, Kellum v. State, 396 A.2 166 (Del. 1978) (3 years old); State v. Thrasher, 223 Kan. 1016, 666 P.2d 772 (1983) (4 years old).

#2

Kansas Children's Service League

Testimony Before the Senate
Judiciary Committee
HB 2690
March 22, 1994

Kansas Children's Service League is a statewide agency whose mission is to promote the well-being of children by strengthening the quality of their family life through the provision of prevention, early intervention, treatment, advocacy and placement services.

KCSL encourages your support for HB 2690 because we believe it represents a needed improvement in current Kansas statutes dealing with sexual abuse of children. Although the issues raised by the bill are complex, we think extending the statute of limitations offers child victims an option some may require.

Debate over the merits of the proposed action has tended to focus almost exclusively upon whether or not memories of victimization can be repressed and then later recalled. A preoccupation with this issue fails to give sufficient weight to other compelling reasons why child victims of sexual abuse choose not to share their secret, including the fact that many are quite literally "scared silent."

At the request of one of our local child abuse prevention coalitions, KCSL pulled together a brief overview of current opinions regarding memories of childhood sexual abuse. I'm attaching that document for your reference. Given the divergence of views, a useful benchmark is found in the "Statement on Memories of Sexual Abuse", issued December 12, 1993 by the American Psychiatric Association:

> "Scientific knowledge is not yet precise enough to predict how a certain experience or factor will influence memory in a given person." (p.2)

If we accept this assessment, a public policy which accommodates a range of victim experience deserves special consideration. KCSL encourages you to recommend HB 2690 favorably for passage.

Presented by: James McHenry, Ph.D.
Associate Ex. Director/Prevention Services

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Date: March 7, 1994
To: KCSL Friends and Affiliates
From: James McHenry, Ph.D.
Re: Information on Memories of Sexual Abuse

Recently a chartered KCSL affiliate asked that the KCSL Child Abuse Prevention Division share its perspective regarding memories of sexual abuse. Over the past year, both the print and electronic media have given a lot of play to what has been termed the "false memory syndrome." The public is understandably confused and concerned regarding this issue.

I'd like to approach this complex subject by quoting two passages from the Statement on Memories of Sexual Abuse issued Dec. 12, 1993 by the American Psychiatric Association:

"We are especially concerned that the public confusion and dismay over this issue and the possibility of false accusations not discredit the reports of patients who have indeed been traumatized by actual previous abuse." (p. 1)

"Scientific knowledge is not yet precise enough to predict how a certain experience or factor will influence a memory in a given person." (p. 2)

These statements reflect a degree of humility I've often found lacking in public debate on the subject of memories. I think they are useful points of reference.

You will not be surprised to learn that responsible academicians are not in agreement on the subject of repressed memories. Some, such as Professor David Holmes of the University of Kansas, claim that the notion of repression itself has never been scientifically established. A similar point of view is advanced by Professor Elizabeth F. Loftus of the University of Washington, who contends that some therapists may use the practice of suggestion to implant false memories. She asserts that "fabricated memories of abuse not only destroy families and damage reputations of innocent people, but divert the course of therapy from the patient's real problems."

Judith Herman, M.D. and Mary R. Harvey, Ph.D., both on the faculty of the Harvard Medical School, present another point of view by arguing that "partial or even complete amnesia for childhood trauma is well documented." Drs. Herman and Harvey contend that delayed recall often occurs when the survivor is in her twenties or thirties. "A common precipitant," they write, "is a change in an intimate relationship. Memories may surface when the survivor begins a sexual relationship, gets married, or has a child, or when this child reaches the age at which the survivor was first abused."

Dr. Susan Voorhees, a Child Psychologist with the Menninger Clinic, drew upon her experience in testimony before the Kansas House Judiciary Committee, February 17, 1994. Speaking as a professional who has worked directly with child victims and their families, Dr. Voorhees noted there are many reasons beside repressed memory that could explain why children do not divulge sexual abuse inflicted upon them. In her words, "Children learn to accommodate things in their lives that they cannot change. There are many children who have learned that adults do not care for them, the "system" will not protect them and they are on their own to survive as best they can. Often this means finding a way to tolerate the intolerable."

Dr. Voorhees concluded by stating, "It is important to remember that not all memories of abuse are recaptured in therapy. Sometimes the victims need the safety and distance of their own adulthood and emancipation to speak about their experiences and to be heard. Sometimes the victims need the experiences of adulthood, which recapitulate the experiences of abuse, to understand the developmental deviation and to put words, names and actions to things they could not understand as children."

I have been greatly assisted by the perspective of Dr. Alan S. Brown of Southern Methodist University. Dr. Brown is one of the nation's leading researchers on the subject of memory, and he takes a middle position in the debate regarding the reliability of repressed memories. Although he acknowledges that some people are highly vulnerable to suggestion, a recent study of memory under anesthesia conducted by Dr. Brown and several of his colleagues presents evidence consistent with the existence of repression. The study's outcome "suggests the conditioned suppression of information experienced during anesthesia, establishing a possible experimental analogue of clinical repression....The present outcome ostensibly resembles the clinical phenomenon of repression in which ego-threatening communications are actively blocked from access to consciousness." (See Brown, Best, Mitchell and Haggard, "Memory under anesthesia: Evidence for response suppression," Bulletin of the Psychonomic Society 1992, 30 (3), 244-246).

Dr. Brown states that some women appear to have an ability to block out entire segments within traumatic events. He agrees with those who contend that subsequent life events may serve to unlock or trigger memories heretofore repressed.

KCSL has assembled a resource file in our child abuse prevention office; if you wish additional information, please contact Mary Worthington at 913/354-7738. We have also requested assistance from the National Committee to Prevent Child Abuse.

#3

KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
Donna L. Whiteman, Secretary

Senate Judiciary Committee
Testimony on House Bill 2690

March 22, 1994

****
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."
****

TITLE

An Act concerning criminal procedure; related to the discovery of a crime occurring; amending K.S.A. 1993 Supp. 21-3106 and repealing the existing section.

Mr. Chairman, on behalf of the Secretary of SRS, I am pleased to provide you with this testimony in support of House Bill 2690 which amends criminal procedure concerning time limits for commencing prosecution of specified sex crimes against children. Although the bill does not directly affect the operation or budget of the Department, it profoundly affects the lives of children, many of whom receive services from the Department.

BACKGROUND

The law now places a five-year statute of limitations on sex crimes against children. The "clock" starts on the day following the commission of a single incident crime or the day following the last incident if there have been multiple offenses over time.

Children are usually powerless to end the abuse and may so separate themselves from the abuse they have no memory of the crime in order to survive emotionally or physically. Sometimes the child is well into adult life before the memory of the crime returns, if ever. Other children may have a vivid memory of what has happened to them but are powerless to escape their victimization because of fear, or attachment and dependency on their abuser, or because no one believes their disclosure of abuse. Regardless whether or when the child, now an adult, remembers sexual abuse has serious consequences. Disruptions in the victim's ability to develop healthy relationships, to marry wisely or to parent adequately are common. The Department sees the consequences of this damage in some of the dependent, or abused, or abusing adults and children we serve.

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The cruel irony is when children become an adult and able to ask redress for the unspeakable crimes they have endured, they are often barred from doing so for no better reason than they have not been molested recently enough or they just recalled a repressed memory too late to prosecute. The Department receives several calls each year from adults who want to see a parent or former youth leader prosecuted for abuse they experienced as a child. Frequently, they are in counseling and need the conviction of their tormentor as part of a healing process. Sometimes they report the perpetrator still has access to children and they are fearful abuse may be continuing but there is no current complaint and they are told "nothing can be done." These persons are incredulous and angry to find themselves still powerless as adults to redress a wrong or even to protect others from what they have endured.

EFFECT OF PASSAGE

House Bill 2690 provides some remedy for these situations. The proposed bill allows prosecution within five years from the date the victim becomes 18 years of age. This allows persons who know they were victims of a sex crime as a child or who recall the abuse by age 23 to seek prosecution of the perpetrator.

It would be preferable for the statutes to allow prosecution of a sexual crime against a child whenever it is discovered. It is not uncommon for victims to recall childhood abuse in their 30's and 40's. Often it is when they have their own children of the same age as when they were victimized or as a result of therapy for problems that are unexplainable until the abuse is discovered. Because of this, a growing number of states have permitted prosecution of child sexual abusers within a fixed time from recollection of abuse at whatever age it is discovered. Many have come to the view a sexual abuser of children should never feel safe from prosecution for such a crime.

RECOMMENDATION

The Department of Social and Rehabilitation Services recommends passage of House Bill 2690. We suggest the bill be further amended to provide prosecution within a fixed time from when the child becomes an adult or following discovery of childhood sexual abuse without regard to the age of the adult.

Carolyn Risley Hill, Commissioner
Youth and Adult Services
Department of Social and
Rehabilitation Services

(913) 296-3284

#4

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FOR MORE INFORMATION CONTACT:
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Date: March 22, 1994

Senator Moran and Members of the Senate Judiciary Committee, I am Canda Byrne, a Psychiatric Clinical Nurse Specialist representing The Kansas State Nurses Association. I am here to support HB 2690.

As you know survivors of abuse may go for years, even decades, without remembering the traumatic experiences, however exhibiting symptom of Posttraumatic Stress Disorder. In severe, prolonged and repeated trauma, there is little doubt in the clinical literature that overwhelming emotion can play havoc with the memory. Amnesia following trauma is not uncommon.

The controversy about delayed memories of child abuse has sparked research on amnesia for childhood trauma. Judith Herman and Emily Schatzow (1987) conducted an investigation of the extent to which traumatic memories are remembered. They found the full spectrum of recall in 53 patients with histories of sexual abuse. 36% of the women had full recall; they remembered the abuse in detail. 36% had some recall but not full recall. The remaining participants, 28%, had severely limited memory. Participants were more likely to remember the abuse if it had begun or continued well into adolescence. Patients were most likely to completely block off the abuse if it began in early childhood and ended before adolescence or if the abuse involved frankly violent or sadistic treatment.

A more recent study and larger sample of 450 persons reporting histories of sexual abuse found that over 59% experienced amnesia for the abuse for at least some period of time prior to age 18 (Brier and Conte, 1993). More amnesia was associated with more severe abuse (ie. earlier in life, more prolonged, and more violent). Another recent study reported a period of amnesia for 85% of persons who had been sexually abused (Westerlund, 1992).

If a child is abused and the memories lost to them for a time, Should that perpetrator go unpunished. Perhaps, but I would hope that with the passage of HB 2690 the victim would have the opportunity to make that decision. Many victims of sexual abuse have also been victims of the legal system.

Thank you for this opportunity to express support for HB 2690. I will stand for questions.

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#5

SENATE BILL No. 797
By Committee on Judiciary

2-16

AN ACT concerning professional licenses; relating to suspension for contempt in child support proceedings; amending K.S.A. 20-1204a and repealing the existing section.

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

New Section 1. (a) As used in this section:

(1) ``Licensing body'' means an official, agency, board or other entity of the state which authorizes individuals to practice a profession or conduct a particular business in this state and issues a license, certificate, permit or other authorization to an individual so authorized; and

(2) ``licensee'' means an individual who is or may be authorized to practice a profession or conduct a particular business in this state.

(b) If a licensing body receives an order from a court pursuant to K.S.A. 20-1204a and amendments thereto directing the licensing body to comply with the requirements of this section, the licensing body shall, within 30 days after receiving the court order, notify the licensee of the licensing body's intent to suspend or to withhold issuance or renewal of the licensee's authorization to practice a profession or conduct a particular business in this state and of the licensee's rights and duties under this section. If the licensing body does not receive sufficient information with the court order to identify the correct licensee, the 30 days shall commence when sufficient identifying information is received.

(c) If a licensee is notified pursuant to subsection (b), the licensing body shall issue a temporary license, authorizing the individual to practice a profession or conduct a particular business in this state, to any licensee who is otherwise eligible. The temporary license shall be valid for a period of six months from the date the licensee's prior authorization was suspended or was not issued or renewed. A temporary license issued under this section shall not be extended, except that the licensing body may extend the temporary license up to 30 days to prevent extreme hardship for a person being served by the licensee.

(d) If an authorization to practice a profession or conduct a particular business in this state is suspended, denied or not renewed

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pursuant to this section, any funds paid by the licensee shall not be refunded by the licensing body.

(e) If a temporary license has been issued pursuant to subsection (c), the licensee shall obtain a release from the court which directed the licensing body to comply with this section as a condition for the issuance or renewal of the licensee's authorization to practice a profession or conduct a particular business in this state. The licensing body may impose other conditions. The licensing body may require the licensee to furnish the release before the temporary license expires.

(f) As between the licensing body and the court which issued the order directing the licensing body to comply with this section, the court shall have exclusive jurisidiction over all issues related to the support obligation of the licensee.

Sec. 2. K.S.A. 20-1204a is hereby amended to read as follows: 20-1204a. (a) When an order in a civil action has been entered, the court that rendered the same may order a person alleged to be guilty of indirect contempt of such order to appear and show cause why such person should not be held in contempt if there is filed a motion requesting an order to appear and show cause which is accompanied by an affidavit specifically setting forth the facts constituting the alleged violation.

(b) Except as provided in subsection (e), the order to appear and show cause shall be served upon the party allegedly in contempt by the sheriff or some other person appointed by the court for such purpose. Such order shall state the time and place where the person is to appear and shall be accompanied by a copy of the affidavit provided for in subsection (a). The court shall hear the matter at the time specified in the order, and upon proper showing, may extend the time so as to give the accused a reasonable opportunity to purge himself or herself of the contempt. If the court determines that a person is guilty of contempt such person shall be punished as the court shall direct.

(c) If, after proper service of the order to appear and show cause, the person served shall not appear in court as ordered, or if the court finds at a hearing held on motion of a party to the civil action that the person allegedly in contempt is secreting himself or herself to avoid the process of the court, the court may issue a bench warrant commanding that the person be brought before the court to answer for contempt. When such person is brought before the court, the court shall proceed as provided in subsection (b). The court may make such orders concerning the release of the person pending the hearing as the court deems proper.

(d) The provisions of this section shall apply to both criminal and civil contempts, but in the case of a criminal contempt the court on its own motion may cause the motion and affidavit provided for in subsection (a) to be filed.

(e) In cases involving an alleged violation of a restraining order issued pursuant to paragraph (2) of subsection (a) of K.S.A. ~~1978 Supp.~~ 60-1607, and any amendments thereto, if the affidavit filed pursuant to subsection (a) alleges physical abuse in violation of the court's order, the court immediately may issue a bench warrant and proceed as provided in subsection (c).

(f) If a person is found guilty of contempt in a child support enforcement proceeding and the evidence shows that the person is or may be authorized to practice a profession or conduct a particular business by a licensing body as defined in section 1, the court, in addition to any other remedies, may direct the licensing body to comply with the requirements of section 1. ***If the person found guilty of contempt under this subsection is an licensed attorney, the court may file a complaint with the disciplinary administrator if the licensing agency is the Kansas Supreme Court, or the appropriate bar counsel's office if the licensee practices in another state.***

Sec. 3. K.S.A. 20-1204a is hereby repealed.

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

Session of 1994

Substitute for HOUSE BILL No. 2583

By Committee on Judiciary

2-28

AN ACT concerning parents and children; relating to establishment of parentage and child support; amending K.S.A. 38-1110, 38-1114, 38-1115, 38-1117, 38-1118, 38-1119, 38-1121, 38-1125, 38-1128, 39-755 and 65-2409a and repealing the existing sections; also repealing K.S.A. 65-2409.

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

New Section 1. As used in sections 1 through 3, except where the context otherwise requires:

(a) "Birthing hospital" means a hospital or facility as defined by rules and regulations of the secretary of social and rehabilitation services.

(b) "IV-D program" means a program for providing services pursuant to part D of title IV of the federal social security act (42 U.S.C. Sec. 651 *et seq.*) and acts amendatory thereof or supplemental thereto.

(c) "Unwed mother" means a mother who was not married at the time of conception, at the time of birth or at any time between conception and birth.

New Sec. 2. (a) There is hereby established in this state a hospital based program for voluntary acknowledgment of paternity pursuant to K.S.A. 65-2409a, and amendments thereto, for newborn children of unwed mothers. Birthing hospitals shall participate in the program. Other hospitals and persons may participate in the program by agreement with the secretary of social and rehabilitation services.

(b) The secretary of social and rehabilitation services shall provide information and instructions to birthing hospitals for the hospital based program for voluntary acknowledgment of paternity. The secretary of social and rehabilitation services may adopt rules and regulations establishing procedures for birthing hospitals under the program.

New Sec. 3. (a) The state registrar of vital statistics, in conjunction with the secretary of social and rehabilitation services, shall review and, as needed, revise acknowledgment of paternity forms for use under K.S.A. 38-1130 and 65-2409a, and amendments

(c) Subject to appropriations, the secretary of social and rehabilitation service is authorized to establish in this state a physicians office based program for voluntary acknowledgment of paternity pursuant to K.S.A. 65-2409a, and amendments thereto, for newborn children of unwed mothers. The secretary shall provide information and instructions to physicians office's for the program and may adopt rules and regulations establishing procedures for physicians office's under the program.

#7

SUBSTITUTE FOR HB 2430
PROBATE ELECTIVE SHARE TO SURVIVING SPOUSE

What Bill Does:

Changes current law on the right of a surviving spouse to "elect" against, or take a share of, the estate of his or her deceased spouse. Current law - survivor can claim:

1. Homestead allowance (residence and acreage)
2. "Statutory" allowance ($1,500 to $25,000 in cash or property)
3. Elective share (50% of the deceased spouse's estate.)

Sub. HB 2430 affects only #2 and #3.

Problems with current law (#3 above only):

A. A devious spouse can defeat the elective share of his/her surviving spouse by simply setting up all assets in such a way that he/she has no "estate" upon death. For example, the devious spouse places assets in joint tenancy with a person other than his/her spouse. Upon death the surviving joint tenant receives the property and the surviving spouse gets 50% of nothing because the property isn't in the deceased spouse's estate.

B. In a second marriage situation, spouses often title some property jointly but intend other property to pass to their children by the prior marriage. Currently, the surviving spouse gets the joint property and 50% of the deceased spouse's property (75% or more of the total property in some cases).

How are these problems addressed in Sub HB 2430?

A. The deceased spouse's "estate" is replaced with the concept of an "augmented estate". The "augmented estate" consists of all property that both spouses own. (Joint Tenancy, POD, Life Ins.) The survivor can elect his/her share from this pot. A devious spouse cannot defeat the rights of his/her spouse. (or at least it is more difficult).

B. The surviving spouse no longer gets an automatic 50% (which can actually range from 50% of nothing to over 75% of all property) but instead gets a "sliding scale" share from a minimum share of $50,000, to 3% of the augmented estate for 1-2 years of marriage, to a maximum of 50% for 15 years of marriage or more.

What does this not do?

It does not change the right of the surviving spouse and children to inherit property in the absence of a will or other disposition. The elective share of a surviving spouse is (and always has been) an alternative to the provisions the deceased spouse made in his/her will, trust, etc.

Susie Salmon
3-22-94
attachment 7-1

#8
3-22-94

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DANIEL M. ZIMMERMAN

November 14, 1988

The Honorable Paul E. "Bud" Burke
State Capitol
Topeka, Kansas 66612

Dear Bud:

I enclose a proposed amendment to K.S.A. 59-603, which is the statute in the probate code that permits a surviving spouse to elect to take an intestate share rather than what is provided in a decedent spouse's will. The common understanding of this statute has been that it permits a surviving spouse to take one-half of the decedent spouse's estate by electing to take against the will. Read literally, however, the effect of the statute is that, if the decedent spouse had no children, the surviving spouse may elect to take the entire estate since that would be the result in an intestate situation.

This result is inconsistent with the provisions of K.S.A. 59-602(2) because that statute permits a spouse to will away one-half of his or her property from the other spouse. I think the language that I have suggested would clarify this issue.

Please call if you have questions.

Very truly yours,

SPEER, AUSTIN, HOLLIDAY,
RUDDICK & TAYLOR

L. Franklin Taylor

LFT/kj
Enclosures

cc: The Hon. Sam K. Bruner
Mr. Jeff Ellis

Senate Judiciary
3-22-94
attachment 8-1

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December 4, 1988

The Honorable Paul E. "Bud" Burke
State Capitol
Topeka, KS 66612

Dear Bud:

I previously provided a proposed amendment to K.S.A. 59-603 to clarify legislative intent with respect to the right of a surviving spouse to take an intestate share rather than what is provided in a decedent spouse's will. A second related issue arises in the recent Supreme Court case of Newman v. George, 243 Kan. 183, decided June 3, 1988.

In the Newman case the Court held that one spouse could not place property in a lifetime revocable trust to defeat the rights of the other spouse. In order to be consistent with what I understand to be legislative intent in this area, limits on this type of transfer should also apply only to one half of the estate.

I enclose a proposed amendment to K.S.A. 59-602. I have discussed both amendments with Judge Sam Bruner and I understand that these issues will be considered by the Kansas Judicial Council at its meeting on December 9.

Please let me know if I can provide anything further.

Very truly yours,

SPEER, AUSTIN, HOLLIDAY,
RUDDICK & TAYLOR

L. Franklin Taylor

LFT/lys
Enclosure
cc: The Hon. Sam K. Bruner

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December 5, 1989

Mr. Randy M. Hearrell
Kansas Judicial Council
Kansas Judicial Center
301 W. 10th Street
Topeka, Kansas 66612-1507

Dear Mr. Hearrell:

I have your letter of November 21, 1989, concerning proposed amendments to K.S.A. 59-602 and 59-603. I believe that both amendments are appropriate for passage by the legislature. If I can provide further information, please contact me.

Please note my change in office address as reflected on this letterhead for your future correspondence.

Very truly yours,

ARMSTRONG, TEASDALE, SCHLAFLY,
DAVIS & DICUS

L. Franklin Taylor

LFT/emh
cc: James D. Waugh
The Honorable Sam K. Bruner

S-3

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(Revised 01/94)

59-602. Limitation on testamentary power; right of election. (1) Any devise or other disposition of real estate located in this state taking effect in possession or enjoyment at death, and any bequest or other disposition of any personal property by a resident of this state taking effect in possession or enjoyment at death, without regard to the time when the will or other instrument containing such devise, bequest or other such disposition shall have been made, to any foreign country, subdivision thereof, or city, body politic, or corporation, located therein or existing under the laws thereof, or in trust or otherwise to any trustee or agent thereof, except devises, bequests or other such dispositions to institutions created and existing exclusively for religious, educational, or charitable purposes, is hereby prohibited. Any such devise, bequest or other such disposition shall be void.

(2) Either spouse, by will, or other disposition subject to a surviving spouse's right of election, may transfer away from the other, half of such spouse's property, subject to the rights of homestead and allowances secured by statute. Neither spouse, by will, or other disposition subject to a surviving spouse's right of election, shall transfer away from the other, more than half of such spouse's property, subject to such rights and allowances, unless the other shall consent, in writing, executed in the presence of two or more competent witnesses to the will, if any, and shall have consented to any and all other dispositions subject to a surviving spouse's right of election as provided by law, or shall elect to take under the testator's will and all other dispositions subject to a surviving spouse's right of election as provided by K.S.A. 59-603, and amendments thereto.

(3) The right of election provided in this section shall only apply to dispositions that the surviving spouse did not consent to.

History: L. 1939, ch. 180, § 38; L. 1992, ch. 79, § 1; July 1.

KANSAS JUDICIAL COUNCIL COMMENTS

1992 H.B. 2756 amended K.S.A. 59-602 and 59-603 to provide uniform treatment where a surviving spouse's right of election is made against a will, revocable trust or other disposition of property taking effect upon death which the court determines is subject to an elective right.

Ackers v. First National Bank of Topeka, 192 Kan. 319 (1963), as modified on rehearing at 192 Kan. 471 (1964), established the rule that one spouse may not deprive the other of the right to a distributive share of any property owned with right of disposition and control at the time of death whether the vehicle for transfer at death was will or a revocable trust. *Newman v. George*, 243 Kan. 183 (1988) ruled that a surviving spouse electing against an intestate decedent without issue, who left property in a revocable trust to which the surviving spouse did not consent, may take all of the property under the Kansas law of intestate succession. *McCarty v. State Bank of Fredonia*, 14 Kan.App.2d 552 (1990) treated an individual retirement account (IRA) as a revocable inter vivos trust subject to the rights of a spouse not consenting to the disposition which was declared void and invalid. The court held that the one-half not subject to right of election passed by the terms of the decedent's will and not by the IRA designation. *Snod[illegible] v. Lyndon State Bank*, Kan.App.2d 546 (1991) did not allow a surviving spouse to elect against payable on death accounts because the legislature, in the P.O.D. statutes (K.S.A. 9-1215, 9-1216, 17-5828, 17-5829, 17-2263 and 17-2264) specifically stated chapter 59 did not apply.

Will substitutes (revocable inter vivos trusts) and other nontestamentary dispositions of property are in much more common usage in our society today. 1992 H.B. 2756 permits the predeceasing spouse to dispose of one-half of his or her property without restriction, but allows the nonconsenting surviving spouse a right of election to take the other one-half of property which a court determines is subject to the right of election. 1992 H.B. 2756 recognizes that a surviving spouse's right of election applies to an inter vivos revocable trust disposition but does not attempt to establish, or limit, which other dispositions a court may determine are subject to the nonconsenting surviving spouse's right of election.

59-603. Election of spouse; failure to make, effect; place of filing election. (a) The surviving spouse, who shall not have consented in the lifetime of the decedent to the testator's will and any and all other dispositions subject to a surviving spouse's right of election as provided by law, may make an election whether such surviving spouse will take under the will and such other dispositions subject to a surviving spouse's right of election or take what such surviving spouse would be entitled to by the laws of intestate succession were such surviving spouse the surviving spouse of a decedent who leaves a spouse and child; but such surviving spouse shall not be entitled to both. If the survivor consents to the will and all other dispositions subject to a surviving spouse's right of election or fails to make an election, as provided by law, the survivor shall take under the testator's will and all other dispositions subject to a surviving spouse's right of election. The will or other dispositions shall be effective except as to the elected share.

(b) The election shall be filed in the district court in the case in which the decedent's estate, testate or intestate, is being administered. The court shall have the jurisdiction and venue to order ½ of the dispositions, subject to the surviving spouse's right of election, be set aside to the surviving spouse to the extent necessary, pro rata, from among the dispositions subject to the surviving spouse's right of election unless the dispositions otherwise provide the source of payment.

(c) The right of election provided in this section shall only apply to dispositions that the surviving spouse did not consent to.

History: L. 1939, ch. 180, § 39; L. 1951, ch. 335, § 1; L. 1992, ch. 79, § 2; July 1.

National Association of Women Lawyers
American Bar Center • 750 North Lake Shore Drive • Chicago, Illinois 60611
(312) 988-6186
PLEASE REPLY TO:
404 262 4524

Professor Lawrence J. Waggoner
University of Michigan Law School
Ann Arbor, MI 48109-1215

August 14, 1990

Dear Professor Waggoner:

As we discussed by telephone recently, the Executive Board of the National Association of Women Lawyers unanimously endorsed the revision of the Uniform Probate Code on August 2 in Chicago and so did the NAWL Assembly on August 3, 1990. It approved efforts to improve the matrimonial share of the surviving spouse.

Yours sincerely,

Gail McK. Beckman

(Dr) Gail McKnight Beckman

Resolution

Whereas the National Conference of Commissioners on Uniform State Laws has undertaken the revision of the Uniform Probate Code which alters the format for ascertaining the matrimonial share of a surviving spouse.

Whereas the National Association of Women Lawyers has established a liaison with the National Conference of Commissioners on Uniform State Laws with regard to this revision.

The National Association of Women Lawyers endorses the revision of the Uniform Probate Code.

8-6

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ROBERT H. COBEAN
CHAD M. RENN

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September 21, 1993

IN RE: ELECTIVE SHARE OF SURVIVING SPOUSE

Randy Hearrell, Research Director
Kansas Judicial Council
Kansas Judicial Center
301 West Tenth Street, Suite 262
Topeka, Kansas 66612

Dear Randy:

Thanks for your invitation to attend the September 23 morning session of the Probate Law Advisory Committee and the afternoon session with the Legislative Committee, both considering proposed legislation dealing with the "elective share of a surviving spouse." My schedule is such that I will be unable to attend.

However, I have reviewed the proposed legislation and offer the following comments.

Law is in constant change to meet the needs of a changing society. Probate law is no exception. Society, in regard to "elective shares of a surviving spouse" is in a process of material change, not only in Kansas, but nationwide. The Uniform Probate Code Committee, recognizing these social changes, has proposed amendments to the Uniform Probate Code. The Kansas Probate Law Advisory Committee has considered the same social changes, has considered the U.P.C. recommendations and is now proposing appropriate changes applicable to the Kansas Probate Code, as follows:

1. The increased use of revocable living trusts, joint tenancies, P.O.D. accounts, and other methods transferring property outside probate has brought about the recent case law recognizing need for such changes.

2. The current suggested amendments to the Uniform Probate Code seek to follow the recent case law and to codify the U.P.C. by what is called the "Augmented Estate." This has been studied by the Judicial Council Advisory Committee and tailored to fit the needs of Kansas.

3. Our changing society now includes increasing multiple marriages and certainly brings in question the wisdom of the long held formula of the elective-share amount. This change in society is addressed by the elective-share amount based on the length of the marriage of the surviving spouse to the decedent.

Change in legislation for the sake of change is never justified. Change to meet the needs of a changing society is progress.

In my opinion, the above mentioned proposed changes in the probate law of Kansas are logical and are progress.

I wish I could have been present on the 23rd.

Sincerely yours,

Robert H. Cobean

RHC:kj

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May 3, 1993

Roy U. Jordan
Lawyer
P.O. Box 136
Emporia, Kansas 66801

RE: Elective Share Statutes

Dear Roy:

You were kind enough to send to me a copy of your letter of April 26, 1993, to Randy Hearrell, the Research Director of the Kansas Judicial Council, so I thought that as a member of the Probate Law Advisory Committee of the Kansas Judicial Council I would drop you a note to let you know some of the background of the augmented estate.

As you know, the Kansas statute on the elective share of a spouse is K.S.A. 59-603. Paraphrased, the statute entitles a surviving spouse to take by election against the decedent's spouse will and receive the intestate share. As a general rule, this works out to be one-half of the deceased spouse's share. Historically, as I recall from law school, the statute was intended to prevent a decedent from disinheriting a spouse and to ensure that the surviving spouse would receive about one-half of a decedent's estate. As you also know, the statute has been recently amended.

In my opinion, and I think in the opinion of the Probate Law Advisory Committee, this statute is antiquated and no longer serves the people of the State of Kansas. The statute probably worked fairly well during the early years of this century when the bulk of a person's estate was individually owned by one of the spouses and when it consisted of easily traceable real estate. However, as we have become an urban state in which very few of our residents own real estate more than a city lot on which is situated a residence, the statute, at least in my opinion, is unfair and unjust in modern Kansas society.

I think four factors have occurred during this century that have made the statute antiquated and undesirable as follows:

1. People are afraid of attorneys fees for probate. For years many lawyers have charged percentage fees to handle estates which has led to exorbitant attorneys fees; people have understandably tried to organize their affairs to avoid

#8

December 27, 1993

TO: Members, Kansas Legislature

FROM: Ron Smith
General Counsel
Kansas Bar Association

SUBJ: Elective Share Reform

The House Judiciary Committee heard testimony in August, 1993, on HB 2430, which is legislation commonly known as "elective share" reform. The Committee recommended a substitute bill be introduced to the 1994 legislature. Rep. Carmody chairs the subcommittee of Judiciary on this legislation.

This paper tries to explain this complex issue in an understandable way. Hopefully we can answer here some questions you may have before House floor debate.

The bill is the 1993 Uniform Elective Share Provision recommended and approved by the Probate Advisory Committee of the Kansas Judicial Council, the Kansas Judicial Council and the KBA Board of Governors. If you have questions, some of the Topeka-based lawyers on the Judicial Council are:

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Other members of the Probate Advisory Committee include Willard Thompson, Wichita, Jack Dalton, Dodge City, Doyle Beamgard, Atwood, Judge Sam Bruner, Olathe, Jack Euler, Troy, Cheryl Boushka, Overland Park, Professor Richard Morse, Manhattan, Phillip Tidenour, Cimmarron. Thank you.

cc: Policy Paper

Elective Share Reform

A Position Paper
From The
Kansas Bar Association

December, 1993

What is Elective Share?

Kansas probate laws govern the transfer of property after death, whether the deceased dies testate (with a valid will) or intestate (without a valid will). The laws make certain provisions for surviving spouses which take precedence over a will or other nonprobate transfer. For example, currently the surviving spouse will get the homestead, family allowance and some social security benefits. In addition, Kansas law allows an additional one-half of the deceased's "probate estate" plus any other nonprobate transfer to the spouse, such as insurance, retirement beneficiary designations and property titled in joint tenancy with the spouse.

Since these laws take precedence over wills, the elective share protects against an attempt to disinherit the surviving spouse.[1]

The elective share concept was conceived in the days when divorce was uncommon and most marriages lasted decades. Further, in those days most of the wealth was in real estate. Our society is living longer and many persons have multiple marriages, often with children from an earlier marriage. Much of the wealth is now in property other than real estate -- stocks, bonds, cash, business ventures, etc. A variety of new testamentary devices, often called "nonprobate transfers," such as trusts or payable on death accounts (POD) also contribute to the problem.

Because the original elective share was premised on the values of a different era, injustices can result. In some cases, the current elective share provision may provide little or no protection for the spouse, while in other cases it allows an electing spouse to needlessly override the deceased's legitimate desire to benefit others through valid estate planning.

The redesigned elective share protects both spouses, not just women.

Sub HB 2430.
How Does It Work?

Our divorce and probate laws originally grew from feudal common law where a wife's property was her husband's at marriage and women had no rights to own property or equal rights in the rearing of children. At common law marriage was not an economic partnership; it was a fiefdom. The original elective

[1]Happily, this happens relatively few times. Most of the time spouses die without a will, or the surviving spouse has been provided for adequately in the will.

share concept in probate law was an exception to this fiefdom and was designed to protect against arbitrary attempts to disinherit the surviving spouse, primarily the wife.

The main purpose of the Redesigned Elective-Share system is to bring spousal elective rights into harmony with the more modern view of marriage as an economic partnership. The "economic partnership" view is that each spouse makes an important contribution to the marriage relationship, whether it is paid employment outside the home, or homemaking and raising the children. As such, each spouse's mutual efforts in the marriage entitles each spouse to an interest in 'marital' property (real estate or personal property acquired during the marriage).

The economic partnership theory of marriage is already reflected in Kansas law when a judge divides property during a divorce. Broad discretion is given to the trial judges to assign property owned by either spouse regardless of how the property is titled, after considering all circumstances and recognizing the value of the contributions of both homemakers and spouses working outside of the home, and the length of the marriage. The judge also takes into consideration the future needs of the parties.

The redesigned elective share provision adopts this equitable distribution theory present in our divorce law and applies it to probate law.

How Redesigned Elective Share Works. When a long-term marriage ends in death of one spouse,[2] the redesigned elective share partnership theory declares each spouse the owner of one-half of the property earned during the marriage. The following examples illustrate the differences between current Kansas elective share law and redesigned elective share rights under a partnership theory of marriage, after satisfaction of the homestead allowances, expenses, and creditors.

> 1. Husband and Wife have been married 40 years. H dies and for some reason leaves nothing to W under his will. The parties had accumulated assets worth $800,000, and all assets were titled in H's name. Under both current Kansas law and the partnership theory, W would be entitled to $400,000 from H's estate.

[2]Long term is defined in the proposed bill as fifteen years in length.

2. Assume same facts as in 1, except that the parties had only been married two years and $400,000 of assets were titled in H's name and $400,000 were titled in W's name. Under current Kansas elective-share provisions, W could still claim one-half of H's estate of $400,000, or $200,000, resulting in a windfall $600,000 for W. W gets 75% of the estate, not 50%. Other heirs are displaced.

Under the new partnership theory in Sub. for HB 2430, in a two-year marriage few of the assets would be considered partnership or marital assets. Most of the property would be the separate property each brought into the marriage. If 12 percent (three percent per year per partner) of the property is considered marital property, each would own six percent, three percent of their own and three percent of the other's property. Setting off W's marital claim to H's property against H's similar marital claim against W's property, neither would have a right to elect against the estate of the other. Since W has $400,000 of all the property already titled in her own name, she keeps that property.

As we see above, under current Kansas law by making the elective share a set percentage (50%) of the deceased's estate regardless of the length of the marriage or the survivor's separate wealth or need, particularly unfortunate results may occur in many short-term, late-in-life second marriages, or in marriages where the deceased has adequately provided for the survivor but the survivor wants more, or where the surviving spouse is needy and the deceased has used nonprobate transfers to pass property to others.

The Redesigned Elective Share[3] essentially creates three classes of property at the death of one spouse: his property, her property and "our" property. The "his and her" property is property each brought to the marriage. The "our" property is "marital" property acquired during the marriage. The Redesigned Elective Share implements the partnership theory by calculating the amount of "marital" property in the marriage and the contribution of each of the spouses to it.

As to the "his and her" property brought to the marriage, the redesigned elective share transfers portions of that property from the "his and her" category to the "marital" category by percentages for each year of the marriage. *After 15 years of marriage, all property brought to the marriage (his and her) is*

[3]1994 Sub. for HB 2430.

considered marital property ("ours") and on the death of one spouse each spouse is entitled to one-half. Once property becomes 'marital' property it makes no difference how or when the assets of husband and wife were acquired or how they are presently titled. There is no need to segregate any property acquired prior to marriage, or by gift or inheritance during marriage.

The Redesigned Elective Share has three fundamental features. These features include:

> (1) the elective-share percentage, which increases as the duration of the marriage increases;
>
> (2) the concept of the augmented or enhanced estate against which the redesigned elective share can be claimed; and,
>
> (3) satisfaction of the redesigned elective share from the combined assets of the couple, using the survivor's assets and assets which pass to the survivor before using the deceased's estate.

Elective-Share Percentage. The first feature is the elective share percentage. The percentage is determined depending upon the duration of marriage. For the first year of marriage, there is no elective share percentage, and all assets of the couple brought to the marriage or titled in each person's name remain separate property.

Marriage Year 1. During the first year, the spouse is only entitled to homestead, allowances and, for the needy survivor, a supplemental amount.

Years 2-10. After the first year and during years two through ten, three percent per year of the couple's individually-owned property is considered to be part of each spouse's elective share.

Years 11-15. For years eleven through fifteen of the marriage, four percent per year of the couple's individually-owned property is considered to be part of each spouse's elective share.

Year 15+ After fifteen years, each spouse has the right to elect up to a maximum of 50 percent of the combined assets of the couple.

The Augmented Estate. Under current law, the elective share is applied against the deceased's "probate estate." Through nonprobate transfers, a deceased's probate estate can be quite small.

Under the redesigned elective share, the applicable percentage is applied to the "augmented estate" of the deceased. The augmented estate includes the

value of the *combined* estates of husband and wife (the property each owns individually) and consists of the aggregate value of the following four components:

1. The deceased's net probate estate, which is the probate estate less homestead, allowances, expenses and claims. Homestead and allowances are excluded because, as under the current Kansas system, the spouse is entitled to homestead and allowances in addition to the elective share.

2. The deceased's "reclaimable estate," which generally includes property over which the deceased had control, such as payable on death accounts or other nonprobate transfers (*e.g.* irrevocable trusts, joint tenancy property) with retained powers, or 'deathbed' transfers. *This may sound complex but attorneys in this area are used to dealing with the concept of an augmented estate because these provisions resemble the "estate" on which the federal estate tax is calculated.* The reclaimable estate includes:

(a) property over which the deceased held a general power of appointment at death (property in which he or she held a life estate);

(b) the deceased's equitably owned interest in property held with the right of survivorship immediately prior to death, or transferred within two years prior to death;

(c) proceeds of all life insurance, and,

(d) property given by the deceased to any person other than the spouse at any time during the marriage, if the transfer meets certain conditions (*e.g.*, did the deceased retain a right of use or enjoy the income from the property or make a major gift within two years of death?).

3. the value of the nonprobate transfer of property which the surviving spouse receives because of the deceased's death, *excluding* homestead, allowances, or property obtained by inheritance.[4] The traditional nonprobate transfers of property passing to the spouse are included in this third component, such items as proceeds of insurance, accidental death benefits, and benefits payable under a retirement plan. Federal Social Security payments are excluded.

[4]The spouse is entitled to the homestead or family allowances regardless of the elective share. This concept does not change under the redesigned elective share.

4. the value of property owned by the surviving spouse at the deceased's death, and the surviving spouse's own property. Insurance owned by the surviving spouse is included at its actual value and not at the face amount of the policy.

Sources for Satisfying the Redesigned Elective Share Amount. We now know how much the surviving spouse is supposed to get. In our first example on pages 4 and 5, the spouse is entitled to one half of $800,000. Once we've determined this amount, the question under the redesigned elective share amount then is which source of funds or property pays or accounts for the share?

First we try to satisfy the amount from the property the surviving spouse owns outright and the property already received from, or willed to the surviving spouse by, the deceased. If the value of this property *equals or exceeds* the elective share amount, the surviving spouse keeps it all. The law presumes the deceased's estate plan is being implemented.

If there is still a deficiency, step two is to use other assets left to other beneficiaries at death through probate and nonprobate transfers of property. These beneficiaries are liable to the surviving spouse on a *pro rata* basis for their share of any deficiency.[5] The deceased's intent is carried out to the extent it is not inconsistent with the elective rights of the surviving spouse.

Examples Illustrating Redesigned Elective Share. The three features of the Redesigned Elective Share system are illustrated as follows:

(a) H1 and W had been married over 30 years and H1 died at age 66 survived by W, age 64. The couple's combined assets equal $800,000, after homestead, statutory allowances and claims and expenses of administration. Because W is a Jayhawk fan, H1 (who bleeds purple) left a will which totally disinherited W and gave his property to Kansas State. *Under the Redesigned Elective-Share system,* W's elective-share percentage would have reached the 50 percent maximum rate in determining the amount of W's claim to the couple's assets. W is entitled to homestead, allowances and at least $400,000 regardless of how the $800,000 of assets were titled.

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[5]Assume under the redesigned elective share surviving spouse was entitled to $500,000 in property from a $1 million combined estate, and owned $400,000 outright. Spouse's "deficiency" is $100,000. Heirs A, B and C are to be given the remainder of the estate. "A" gets 30% of the remainder, "B" gets 20% and "C" gets 50%. From "A"'s allocated property, he or she pays over $30,000, "B" pays over $20,000 and "C" pays over $50,000.

Under *current* Kansas law, after homestead and other allowances are paid, three different results might result:

(1) if all of the assets were in H1's name, W would have a claim against H1's estate for $400,000.

(2) If H1 owned $500,000 of the combined assets and W owned $300,000 of them, then W's claim against H1's *estate* (which was going to KSU) would be $250,000, and KSU would have their amounts reduced in order to bring W's total to $550,000, 69% of the total.

(3) If the assets are titled equally in husband and wife, W can still elect against the husband's estate, netting $600,000 of all the property -- 75%.

The best that can be said for the current elective share system is the fairer the deceased has been in providing for the spouse, the less fair the surviving spouse needs to be with the other heirs. If there are hard feelings between the surviving spouse and the other heirs (perhaps children from a previous marriage), current law allows injustice to result.

(b) Assume two years after the death of H1, W marries H2. At the time of their marriage they were in their late sixties, and each has children from a first marriage. After six years of marriage W dies and is survived by H2. The combined value of W's and H2's assets equal $800,000, $400,000 titled in W's name and $400,000 titled in H2's name. The elective-share percentage for a couple married more than six years but less than seven is 18 percent of their augmented estate of $800,000, or $144,000, after homestead, statutory allowances, claims and expenses. But H2 will not have any claim against W's estate. A portion of H2's own assets must first be applied in satisfying his elective-share amount. Of H2's $400,000 estate, 18 percent is H2's 'marital' property, and 18 percent is considered to be W's marital property. (The same would be true of W's estate if she survived H2.) To determine that H2 has as much as, or more than, his elective share he is considered to have a right to keep the entire 36% of his property, thus fully satisfying his elective-share amount of $144,000 (36 percent of $400,000). Since H2 already owns more than $144,000, no deficiency exists and H2 has no claim against W's estate.

Supplemental Elective Share Amounts. Finally, if all else fails the bill allows the judge authority to award a "supplemental Elective Share Amount." This is premised on the survivor's actual need. If the basic elective-share amount, which is calculated on the duration of the marriage and the value of the assets owned by

the couple, is insufficient to support the surviving spouse, the supplemental elective-share amount implements a support theory for the surviving spouse which is not related to the length of marriage. The theory is that there is a duty of support of a spouse founded upon marital status which arises at the time of marriage, if the survivor needs it and the deceased's estate can afford it. The supplemental elective-share amount is set at $50,000, in addition to the homestead, exempt property and allowances.

> In the atypical May-December marriage where the husband dies in the first year after making no provisions for the new wife, there is no prenuptial agreement and all the property is titled in his name, and where the property, by will, is to go elsewhere, the elective share does not kick in and there is little the wife can do about the previous will and its allocations of wealth. However, the probate code does allow the wife the homestead, family allowances and the supplemental elective share amount, set at $50,000. Wife would also be allowed social security payments as a widow. The supplemental amount plus other allowances and social security is designed to keep surviving spouses out of poverty without disturbing previous estate planning.

Conclusion

The current elective share does not achieve its purposes and the situation will get worse as the use of nonprobate transfers (Trusts, POD Accounts, etc.) increases. The augmented estate under the 1994 Sub. for HB 2430 serves three fundamental functions. It combines the assets of husband and wife under a marital partnership theory. It aids greatly in preventing "fraud on the spouse's share." And it denies the unjust election by the surviving spouse seeking a windfall by considering the survivor's assets and the length of the marriage.

The KBA and the Probate Advisory Committee of the Judicial Council believe this legislation is a good improvement in our probate code. The KBA urges your support of this bill.

STATEMENT

To Senate Judiciary Committee
March 22, 1994, 10:00 AM

Topic: HB 2430 - Elective Share of Surviving Spouse

Janet J. Kruh
Kansas AARP State Legislative Committee Member

Chairman Moran and Committee Members:

I am representing the Kansas Association of Retired Persons in supporting the passage of HB 2430 which relates to the "elective share of the surviving spouse." According to current Kansas probate law, it is possible for a surviving spouse to be denied an adequate income share from the spouse's estate. This situation would be corrected in HB 2430, so that Kansas probate law will better conform to present-day family structure.

HB 2430 is based on a partnership theory of marriage and protects the surviving spouse with basic financial support. The augmented estate definition recognizes that both partners have shared in its accumulation. The graduated scale in the bill takes into account the length of the marriage.

The protection theory of marriage includes the provision of an adequate living for the surviving spouse, regardless of the length of marriage. It ensures that the surviving spouse will have basic financial support and can live an independent life.

This bill is a product of the National Conference of Commissioners of Uniform State Law and has the endorsement of the national AARP. The Kansas Judicial Council has adapted this model law to the needs of Kansans. We urge your favorable consideration of this bill.

Thank you for the opportunity to make this presentation.

Senate Judiciary
3-22-94
Attachment 9-1

#10

WRITTEN TESTIMONY OF CHERYL COOK BOUSHKA
BEFORE THE HOUSE COMMITTEE ON JUDICIARY HEARING
ON SEPTEMBER 23, 1993

I. Background

My name is Cheryl Boushka. I am a partner with the law firm of Gage & Tucker in Overland Park, Kansas. My primary areas of practice are estate planning and probate. I am a Kansas lawyer and practice extensively in the probate courts in the state of Kansas. I am also a Missouri lawyer and practice regularly before the probate courts in the state of Missouri.

I am a member of the Probate Law Advisory Committee of the Kansas Judicial Council, a member of the Executive Committee of the Kansas Bar Association's Real Property, Probate and Trust Law Section, a member of the Probate Law Committee of the Kansas City Metropolitan Bar Association, a member of the Federal Estate Planning Symposium Committee, a member of the Eastern Kansas Estate Planning Council and a member of the Kansas City Estate Planning Society. In addition, I am a member of the Johnson County Bar Association serving on its probate/bench bar committee and a member of the Kansas, Missouri and American Bar Associations.

Senate Judiciary
3-22-94
Attachment 10-1

II. Brief Overview

As a lawyer practicing extensively in the areas of estate planning and probate, I am here to voice my support for the proposed legislation before you today. The three main reasons for my support are:

1. Kansas law is difficult to define.

2. The augmented estate concept works.

3. Kansans will be better served by a system like the one before you because it provides a specific framework from which personal planning can proceed.

III. General Testimony

Kansas Law: Without repeating the testimony you have heard here today, I believe it is accurate to say that Kansas law, as it has developed and been interpreted in specific cases, has become difficult to define and discuss with individual clients. Under Kansas law, what a surviving spouse is entitled to receive can differ from case to case depending on the status of the deceased spouse's estate planning matters (i.e. whether the deceased spouse dies testate or intestate or with or without a living trust in place).

Augmented Estate Concept: My testimony will differ from what you have heard here today. I don't just believe the augmented estate concept will work, I know it will because I

have experience working with an augmented estate concept. In 1980 Missouri made substantial revisions to its Probate Code. The changes in Missouri paralleled the philosophy of the Uniform Probate Code and most of its salient concepts stimulated the movement towards reform in Missouri. As a part of that reform, Missouri adopted an augmented estate concept.

The augmented estate provides a specific framework within which a surviving spouse can determine his or her rights. Because the framework is defined, more accurate legal advice and results can be obtained.

Kansans will be better served: You are here today on behalf of your constituents to evaluate the law and to support legislation which is in the best interests of those constituents and this state. This legislation provides clarity and, therefore, is in all of our best interests.

Although most people tend to think of the elective share issue as solely a post-death issue, evaluation of the elective share issue is also an antenuptial issue. In counseling individuals involved in potential premarital arrangements, an evaluation of potential elective share results is necessary. Currently, this can be difficult.

IV. Conclusion

The bill before you represents a tremendous effort. First, on behalf of the Uniform Law Commissioners in developing, redeveloping and redefining the Uniform Probate Code, an effort culminated in this updated format presented to you today and, second, the effort of a team of Kansans dedicated to providing quality probate legislation.

In conclusion, as a Kansan and as a probate law specialist, I support this legislation and I hope you will, too.