

MINUTES OF THE SENATE JUDICIARY COMMITTEE

The Chairman called the meeting to order at 9:33 A.M. on January 25, 2011, in Room 548-S of the Capitol.

All members were present

Committee staff present:

Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Tamera Lawrence, Office of Revisor of Statutes
Theresa Kiernan, Committee Assistant

Conferees appearing before the committee:

Professor Richard Levy, University of Kansas School of Law, Kansas Judicial Council
Professor Jim Concannon, Washburn University School of Law, Kansas Judicial Council

Others attending:

See attached list.

The Chairman opened the hearings on **SB 23 -- Jury trials for juvenile offenders.**

Tamara Lawrence, Staff Revisor, reviewed the bill. She deferred, to the Kansas Judicial Council, a question by Senator Vratil concerning the differences in the proposed trial procedure for juvenile offenders and the current trial procedure for adult offenders.

Professor Richard Levy testified in support of SB 23 (Attachment 1). He stated that **SB 23** was introduced in response to a Kansas Supreme Court Case, *in re L.M.* 186 P.3d 164 (Kan. 2008) in which the Court held that a juvenile offender has a right to a jury trial.

In response to Senator Vratil's earlier question concerning the differences in the proposed trial procedure for juvenile offenders and the current trial procedure for adult offenders, Professor Levy stated that under current law:

- Adult offenders must request a trial in the case of misdemeanor offenses
- Adult offenders must waive a trial in the case of felony offenses
- Adult offenders have the right to question jurors during voir dire

Professor Levy stated that under **SB 23**:

- Juveniles must request a trial in all cases (once requested, the offender has a right to a trial)
- Juveniles would not have the right to question jurors during voir dire (the offender's attorney would conduct all questioning during voir dire)

Professor Levy stated that all other differences were simply differences in wording. He added that **SB 23** does not address the issue relating to a jury at a juvenile's trial being composed of the juvenile offender's peers.

There was no testimony in opposition to **SB 23**.

The Chairman called the committee's attention to the fiscal note and prison bed impact statement for **SB 23**.

The Chairman closed the hearings on **SB 23**.

The Chairman opened the hearings on **SB 35 -- Attorney-client privilege and work-product protection.**

Tamera Lawrence, Staff Revisor, reviewed the bill.

Professor Jim Concannon testified in support of **SB 35**. Professor Concannon explained that Section 1 of the bill provides protection against the waiver of the attorney-client and work-product protection in certain circumstances; he provided a detailed explanation of Section 1 in his written testimony

CONTINUATION SHEET

The minutes of the Judiciary Committee at 10:30 a.m. on January 25, 2011, in Room 548-S of the Capitol.

(Attachment 2). He also noted that K.S.A. 60-426 and 60-3003 are amended to change the word “lawyer” to “attorney.”

Senator King noted that **SB 35** does not contain a “bright line” rule in relation to reasonable steps to be taken to prevent disclosure.

There was no testimony in opposition to **SB 35**.

The Chairman closed the hearings on **SB 35**.

The Chairman opened the hearings on **SB 38 — Children; permanency and priority of orders**.

Tamera Lawrence, Staff Revisor, reviewed the bill.

Professor Richard Levy testified in support of **SB 38** (Attachment 3). He stated that the bill was necessary to clarify that child in need of care orders and juvenile offender orders would take priority over similar orders in other domestic relations cases. This would ensure that the current practice would be followed in the future.

There was no testimony in opposition to **SB 38**.

The Chairman closed the hearings on **SB 38**.

Committee Action:

The Chairman called the committee’s attention to **SR 1807 -- Urging the Government of Turkey to respect the Ecumenical Patriarchate and to uphold religious rights**.

Senator Umbarger moved, Senator King seconded, that the resolution be amended as follows: In line 2, by striking “case” and inserting “cease”; in line 4, by striking the semicolon and inserting a comma; and the resolution be adopted as amended. The motion was adopted.

Meeting adjourned at 10:25 A.M. The next meeting is scheduled for January 26, 2011.

PLEASE CONTINUE TO ROUTE TO NEXT GUEST

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Tues Jan 25

NAME	REPRESENTING
Sean Miller	CAPITOL STRATEGIES
Travis Love	LITHE GOVT Relations
Jim Concanvood	Jud. Council Civil Code Comm
Nancy Strouse	Judicial Council
JERRY PILLA	WESTAR ENERGY
Natalie Gibson	Judicial Council
Rick Levy	Judicial Council (KU Law)
Amy Thornton	KDWP
Ed Krumpholtz	KACP / KSA / KPOA
Page Routhier	Hein Law Firm
Natalie Haag	Security Benefit
Susan Ahn	Legis
Jessica Clatterbuck	TFI Family Services
John Schaefer	SAF
Don Forns	WESTAR
Mike Casey	GBA
Patrick Vegeberg	KCDAA
Joe Mohr	KS BAR ASSN.
Kevin Barone	Cap Colb Corp



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TO: Senator Thomas C. Owens,
Chair, Senate Judiciary Committee

From: Professor Richard E. Levy, Juvenile Offender and Child in Need of Care
Committee, Kansas Judicial Council

Re: Testimony in support of 2011 Senate Bill 23

Date: January 25, 2011

TESTIMONY OF THE JUDICIAL COUNCIL JUVENILE OFFENDER/CHILD IN NEED OF CARE ADVISORY COMMITTEE ON 2011 SENATE BILL 23

This proposed legislation addresses the procedure for conducting jury trials in cases under the Kansas Juvenile Offender Code. The proposed legislation responds to *In re L.M.* 186 P.3d 164 (Kan. 2008), a Kansas Supreme Court decision which held that juveniles have a right to jury trials. The court reasoned that the juvenile justice system had taken on many of the attributes of the adult criminal justice system, such that the denial of the right to a jury trial could no longer be justified by the *parens patriae* character of the proceedings. In the 2010 legislative session, the Juvenile Offender / Child in Need of Care Advisory Committee (JO/CINC committee or committee) proposed legislation, SB 459, to address various issues that had arisen

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under the Code. Sections 1 and 2 of SB 459 addressed the issue of jury trials. Because of concerns expressed in the Kansas County District Attorney Association's written testimony opposing those sections of the bill, in June, 2010, the JO/CINC committee was formally asked to study the issue.

In its initial discussion of the issue, the committee considered the scope of its charge. There was some support on the committee to consider a more fundamental change to the structure of the juvenile offender process so as to restore the *parens patriae* elements of the juvenile justice system, perhaps creating a bifurcated structure in which some cases could proceed under a *parens patriae* model in which the rationale of *In re L.M.* would not apply. But the committee determined that its charge was a more limited one—to develop provisions implementing the right to a jury in adjudications under the Code. Given its understanding of its charge, the committee did not consider a fundamental restructuring of the code. For similar reasons, the committee did not address other aspects of the juvenile offender process that implicate other constitutional rights that might apply in juvenile offender adjudications under the logic of *In re L.M.*

The committee then assigned several members to develop a draft that would address the concerns expressed during the legislative process. Those concerns were twofold. First, the proposed legislation had included language indicating that trial was to the court, and required the juvenile to request a jury trial, which the KCDA considered to be inconsistent with *In re L.M.* Second, the proposed legislation did not address the procedures for conducting jury trials, giving judges insufficient guidance as to how to conduct a jury trial when one was requested in a juvenile offender proceeding.

The subcommittee debated on the best method to address these concerns. It considered that, in view of *In re L.M.*, the procedures for jury trials in juvenile offender cases should generally parallel the procedures for adult jury trials, except where the special character of the juvenile justice system warranted a difference in treatment. The subcommittee then discussed the best way to implement that principle. It considered various means of incorporating the relevant provisions of the adult criminal procedure code by reference, but determined that such an approach would not work. In order to avoid uncertainty about what provisions were incorporated (and prevent the wholesale adoption of the adult criminal procedure code), it would be necessary to specify those provisions that were incorporated (or those that were not). Such a series of statutory cross-references would be unwieldy and difficult to work with, in part because many provisions of the adult code reference both matters relevant to jury trials and other issues, which would need to be sorted out. In addition, many of the relevant provisions would require changes to adapt them to the Juvenile Offender Code.

Thus, the subcommittee determined that the better approach would be to identify the relevant provisions from the adult criminal code, incorporate them into the Juvenile Offender Code, and then work with the full committee to modify them as appropriate to the juvenile justice system. Using this approach, the subcommittee produced a working draft that combined the relevant provisions from the adult code into a new version of K.S.A. 38-2357 (which currently is a short provision giving the court discretion to order a jury trial upon motion). The subcommittee organized the provisions into subsections, removed language addressing matters relating to other procedural issues, and adjusted the terminology to conform the terminology of the Juvenile Offender Code.

This draft provided the basis for further discussion by the committee as a whole. To obtain input for this discussion, the draft was sent to the KCDA and all District Court Judges for comment. A few comments were received from district court judges but no response was received from the KCDA. The comments from judges expressed concern that juvenile jury trials were undesirable because they (further) undermined the *parens patriae* elements of the juvenile justice system. Some comments objected to the working draft's retention of the rule from the adult criminal procedure code under which jury trials would be automatically provided in felony cases unless it was waived. The comments encouraged the committee to look at the issue more fundamentally in order to minimize the formalization of the juvenile offender process. The committee was sympathetic to these views, but constrained by both *In re L.M.* and the nature of its charge. Nonetheless, in reviewing the working draft, the committee was especially cognizant of the differences between the adult criminal justice system and the juvenile justice system, and made some modifications to the adult procedures accordingly. The final product and a copy of the comments are attached.

The legislation proposes amendments to two provisions affected by *In re L.M.*, K.S.A. 38-2344(b) and K.S.A. 38-2357, and attempts to provide procedural direction for handling juvenile jury trials. The proposed amendments to K.S.A. 38-2344(b) are minor and simply include the right to a jury among those rights of which the juvenile is informed. The proposed amendments to K.S.A. 38-2357 are the core of the committee's proposals, and include provisions addressing (1) the scope and invocation of the right to a jury trial; (2) the size, composition, and selection of a jury panel; (3) the conduct of jurors and their opportunity to view the scene; and (4) the jury's decision, including submission of the case to the jury, deliberations, and the jury verdict. The legislation does not address many issues related to other constitutional rights that the

holding *In re L.M.* case raises, such as the right to speedy trial or preliminary hearings. The committee considered these issues to be beyond the scope of its charge and also concluded that it was premature to address these issues without further direction or clarification from the Kansas Supreme Court or further direction or assignment from the Judicial Council. Thus, in drafting the proposed legislation, the committee endeavored to avoid taking any action that would have implications beyond the right to a jury trial.

The committee's original recommendation in SB 249 was to provide for a right to a jury trial *on request* in both felony and misdemeanor cases, departing from the rule in adult criminal cases, in which a jury must be requested in misdemeanor cases, but is provided automatically in felony cases unless waived. One objection raised by the KCDAAs was that requiring a juvenile to request a jury trial in felony cases is not in line with the holding in *In re L.M.* After careful consideration of this issue and with respect to the KCDAAs, the committee disagrees, and renews its recommendation that juveniles be required to request a jury in all cases. The committee does not believe that requiring a juvenile to request a jury impairs the right to a jury trial in any way if the jury is provided as a matter of right when it is requested. The adult criminal procedure code follows this approach for misdemeanor cases, and there is no question of its validity. *In re L.M.* requires the state to comply with the juvenile's constitutional right to a jury trial; it does not require the state to apply identical rules in adult and juvenile cases.

The committee strongly believes that it is in keeping with the nature of juvenile offender adjudications that jury trials should be the exception and not the rule, in order to retain the traditional *parens patriae* dimension of juvenile offender proceedings when that is possible. Furthermore, providing that every juvenile automatically has a jury trial unless it is waived could result in an unnecessary burden on the courts, since jury trials are much more costly than bench

trials. So long as the right to a jury trial is clear and can be easily asserted, it is not an unreasonable or unconstitutional burden on that right to require that the juvenile request a jury in felony cases.



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MEMORANDUM

TO: Senate Judiciary Committee
FROM: Kansas Judicial Council
DATE: January 25, 2011
RE: Judicial Council Testimony on 2011 SB 35 Relating to Protection Against Waiver of Attorney-Client or Work-Product Privilege

SB 35 was drafted by the Judicial Council Civil Code Advisory Committee and is based on Federal Rule of Evidence 502, which was enacted on September 19, 2008 and governs whether disclosure of information protected by attorney-client or work-product privilege results in waiver of the privilege.

The substance of section 1 of SB 35 is summarized below in comments taken from the federal Advisory Committee Notes and adapted for Kansas. Enactment of SB 35 would provide the following protections against waiver of privilege or work product:

- ***Limitations on Scope of Waiver.*** Subsection (a) provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver is made necessary by the holder's intentional and misleading use of privileged or protected communications or information.
- ***Protections Against Inadvertent Disclosure.*** Subsection (b) provides that an inadvertent disclosure of privileged or protected communications or information, when made in a Kansas court proceeding or to a Kansas officer or agency, does not operate as a waiver in any other proceeding if the holder took reasonable steps to prevent such a disclosure and employed reasonably prompt measures to retrieve the mistakenly disclosed communications or information.

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- ***Effect on Disclosures Made in Non-Kansas Proceedings.*** Subdivision (c) provides that if there is a disclosure of privileged or protected communications or information in a non-Kansas proceeding, then admissibility in a subsequent Kansas proceeding is determined by the law that is most protective against waiver.

- ***Orders Protecting Privileged Communications Binding on Non-Parties.*** Subsection (d) provides that if a Kansas court enters an order providing that a disclosure of privileged or protected communications or information does not constitute a waiver, that order is enforceable against all persons and entities in any other proceeding. This provision allows parties in an action in which such an order is entered to limit their costs of pre-production privilege review.

- ***Agreements Protecting Privileged Communications Binding on Parties.*** Subsection (e) provides that parties in a Kansas proceeding can enter into a confidentiality agreement providing for mutual protection against waiver in that proceeding. While those agreements bind the signatory parties, they are not binding on non-parties unless incorporated into a court order.

For consistency, Sections 2 and 3 of SB 35 contain amendments to K.S.A. 60-426 and 60-3003 to change "lawyer" to "attorney."



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TO: Senator Thomas C. Owens,
Chair, Senate Judiciary Committee

From: Prof. Richard E. Levy, Juvenile Offender and Child in Need of Care
Committee, Kansas Judicial Council

Re: Testimony in support of 2011 Senate Bill 38

Date: January 25, 2011

TESTIMONY OF THE JUDICIAL COUNCIL JUVENILE OFFENDER/CHILD IN NEED OF CARE ADVISORY COMMITTEE ON 2011 SENATE BILL 38

In 2010 Senate Bill 460, the Kansas Judicial Council Juvenile Offender / Child in Need of Care Advisory Committee (JO/CINC committee) proposed a bill that provided that child in need of care orders or juvenile offender orders would take priority over similar orders in other domestic cases such as divorce, paternity, protection from abuse, and guardianship or conservatorship. This had been the practice generally, but it had not been clarified by statute. 2010 Senate Bill 460 was passed by the Legislature and enacted by the Governor. In August, 2010, it was brought to the JO/CINC committee's attention that the priority language throughout the bill was not consistent as was intended and this was causing some confusion. Therefore, the

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JO/CINC committee proposes 2011 Senate Bill 38 to provide clarification and consistency throughout the relevant statutes.