

Approved: July 13, 2012

(Date)

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Vice-Chairperson Patton at 3:30 PM Thursday, March 15, 2012 in 346-S of the Capitol.

All members were present except:

Mitch Holmes
Gene Suellentrop
Annie Kuether
Dan Collins
Jim Ward

Committee staff present:

Katherine McBride, Office of Revisor of Statutes
Jason Thompson, Office of Revisor of Statutes
Lauren Douglass, Kansas Legislative Research Department
Robert Allison-Gallimore, Kansas Legislative Research Department
Nancy Lister, Committee Assistant

Conferees appearing before the Committee:

Tim O'Sullivan, Kansas Bar Association

Others in attendance:

See attached.

Vice-Chairman Patton asked the Committee to turn their attention to **HCR 5006–State constitutional amendment concerning appropriations of money and expenditure of funds appropriated by law by the legislative branch**. Katherine McBride provided an overview of the resolution.

Representative Rubin moved, Representative Alford seconded, to recommend HCR 5006 favorably for passage.

Representative Rubin moved, Representative Holmes seconded, to amend HCR 5006 by deleting lines 17 and 18 by striking all the words after “law”.

Representative Ryckman asked why they would want to strike these two lines. Vice-Chairman offered the information was superfluous information.

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Representative Rubin moved, Representative Holmes seconded, to amend HCR 5006 by deleting lines 17 and 18 by striking all the words after "law". Motion carried.

Representative Rubin moved, Representative Holmes seconded, to recommend HCR 5006 favorably for passage as amended. Motion carried 9-6.

Vice-Chairman Patton opened the hearing on **SB 395–Relating to intestate succession.**

Chairman Kinzer arrived and interjected his thanks to Vice-Chairman Patton for taking over in his absence and for the Committee doing all the good work they have done during his illness. He apologized for having to be gone so long.

Katherine McBride provided an overview of the **SB 395** bill content.

Tim O’Sullivan testified in support of **SB 395** and provided some background on the law affected by the bill. The bill was proposed by the Kansas Bar Association (KBA) Real Property, Probate and Trust section, approved by the KBA Legislative Committee, and subsequently approved by the KBA Board of Governors. The statute K.S.A. 59-505 was enacted in 1939 and was retained in the law notwithstanding the passage of the Kansas Spousal Elective Share Act (the Act) in 1994. At the time of the passage of 59-505 and up to the time of the passage of the Act more than five decades later, the surviving spouse who was a resident of the state of Kansas at any time during the marriage was entitled to one-half of all probate property of a predeceased spouse. Mr. O’Sullivan recommended the passage of **SB 395**, which repeals K.S.A. 59-505, and cited various reasons for the change. (Attachment 1)

Chairman Kinzer acknowledged the Committee has written testimony in opposition to **SB 395** submitted by Phillip Ridenour, Attorney. (Attachment 2)

Chairman Kinzer closed the hearing on **SB 395** and opened the hearing on **SB 403–Relating to conversion of a trust into a unitrust.** He recognized Mr. O’Sullivan to explain the bill.

Tim O’Sullivan testified in support of **SB 403** and explained the basic bill, which is a procedural bill that was proposed to adjust problems with the statute K.S.A. 58-9-105. **SB 403** was proposed by the KBA Real Property, Probate, and Trust Section, and also approved by the KBA Legislative Committee and Board of Governors. Kansas was the second state to adopt the 1997 version of the Uniform Principal and Income Act (KUPIA). Essentially, if one has a trust that says it pays all income to a beneficiary- about 15 to 20 years ago, in the 90’s, when individuals had trusts that had publicly traded stocks, the average dividend rate was 1.4 percent.

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There was not much income generated, but the stocks kept going up in value 10 or 20 percent. This penalized the income beneficiary, and all the appreciation went to the remainder beneficiary. So, KUPIA was passed, which gave the right to the trustee to adjust the trusts between the income and principal beneficiaries so it was a fair return. Many states passed an amendment to the KUPIA to allow the trustee to elect a specific percentage between three and five percent. A trustee would send a note to the beneficiaries stating what a trustee was going to do- change the percentage from say, three to four percent, and if there were no objections, the change in percentage was made and that was what the income percentage would be. There were two glitches in the bill. A trustee did not have to go to court to make this election. What was left out was if you wanted to adjust between four and five and three percent, it did not say how it would be done. This would say it is done the same way it was elected- a trustee would send a note to the beneficiaries stating what the trustee is going to do and if there were no objections, the change in percentage was made. For those trustees who want to get rid of this procedure, they have to go back to court. The bottom line is this avoids trustees having to go to court and pay lawyer fees to make these adjustments. They can all do it procedurally. There are no substantive changes to the law, it just makes it easier to implement. (Attachment 3)

Chairman Kinzer closed the hearing on **SB 403** and opened the hearing on **SB 404-Relating to spendthrift trusts**. Chairman Kinzer recognized Mr. O'Sullivan and asked that he explain the bill.

Tim O'Sullivan testified in support of **SB 404** and explained the Uniform Trust Code (UTC) has been passed by about 23 states, and Kansas was the first to pass it back in 2002. One of the provisions of the UTC is designed to protect the trust assets from claims by creditors. It relates to having a spendthrift clause in a trust where creditors cannot attach it. The issue was, if the beneficiary is the trustee, and there is a creditor against that beneficiary, he is not going to attach the trust to get paid, but is going to compel the trustee to make a distribution to himself. In K.S.A. 58a-502 as it exists, currently under (d), which is the language that is being struck in the bill, it says a creditor cannot compel a trustee to make a distribution to the beneficiary if it is pursuant to a standard, like health, education, maintenance, and support. There was a concern by the Uniform Commissioners if the beneficiary was serving as sole trustee, a creditor could compel a distribution if the beneficiary was serving as a sole trustee, even if that distribution was pursuant to health, education, maintenance, or support. The Uniform Commissioners said this needs to be clarified, as that was not their intent. If that happened, these trusts that are out there where the beneficiaries were the sole trustees would all probably be taxable in their state, because if the creditors can reach it, it would be subject to state tax. So the idea here is to clarify it and say they cannot compel a distribution unless that beneficiary is serving as a sole trustee and is not an "ascertainable standard" relating to the beneficiary's health, education, support, and maintenance. An "ascertainable standard" is a standard that a court would enforce.

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A standard like happiness and comfort are unenforceable. The second thrust is if the beneficiary is serving as the sole trustee and it is not an “ascertainable standard,” the statute does not state what can be received, so there is going to be litigation. The KBA and the Real Property, Probate, and Trust Section thinks it is only fair if you have a trustee serving as a beneficiary and they can distribute what they want, the creditors ought to be able to reach all of that. (Attachment 4)

Chairman Kinzer closed the hearing on **SB 404**. He stated today and tomorrow is all the time we have to take action on bills. He does not know how many bills we can get through this afternoon, but there are three things he wants to do today that are more in the way of housekeeping, dealing with our children we passed out earlier this year that are floundering out there. We have the opportunity in a significant number of senate vehicles left to work to create some shells and put three of our house bills into those shells to give them further life during this session. We have some time issues on this, and that would be our number one priority. He also wants to work **SB 79**, **SB 262**, **SB 297** and **SB 293**. As far as the bills heard today, Chairman Kinzer advised the Committee may choose to work them today or tomorrow, but if there are bills we wish we had a little more time on to consider, we could make a small change to the bills and pass them out of Committee, which would mean they would be sent to a Conference Committee, which would provide the time to make any further changes that might be needed.

Chairman Kinzer stated he wants to call up **SB 142--Enacting the Kansas Adverse Medical Outcome Transparency Act** and make a motion to delete the contents of **SB 142**, thus creating a shell.

Chairman Kinzer moved, Representative Patton seconded, to delete the contents of SB 142. Motion carried.

Chairman Kinzer moved, Representative Patton seconded, to insert the language of HB 2260-Kansas preservation of religious freedom act into the shell of SB 142. Motion carried.

Chairman Kinzer moved, Representative Patton seconded, to recommend SB 142 be favorably passed as amended. Motion carried.

Chairman Kinzer moved, Representative Colloton seconded, to delete the contents of SB 62-Assessment of court costs under the Kansas standard asset seizure and forfeiture act. Motion carried.

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Representative Kinzer moved, Representative Patton seconded, that **HB 2523-Health care providers, facilities, persons; right to refuse to participate in abortion procedures; changes, as passed by the Committee, be inserted into SB 62. Motion carried.**

Chairman Kinzer moved, Representative Patton seconded, to recommend that **SB 62 be favorably passed as amended. Motion carried.**

Chairman Kinzer moved, Representative Patton seconded to delete the contents of **SB 160- Child support; collection of child support payments. Motion carried.**

Chairman Kinzer stated on **HB 2106**, the trespass bill, he is going to suggest a slight amendment when we insert it. He advised that **HB 2106** passed overwhelmingly by the House but is hung up in the Senate over the definition. Law enforcement wanted to make sure this would not apply to law enforcement that came on to a private person's property. At the end of Section (1) (a) we would add language, "or without lawful right or authority", but he'll make a motion to insert the contents as it passed out of the House first.

Chairman Kinzer moved, Representative Brookens seconded, to insert the contents of **HB 2106-concerning trespass and liability; exceptions, as passed by the House, into SB 160. Motion carried.**

Chairman Kinzer moved, Representative Brookens seconded, to amend **SB 160** by adding to the end of Section (1) (a) the language, "or without lawful right or authority". Motion carried.

Chairman Kinzer moved, Representative Brookens seconded, to recommend **SB 160** favorably for passage, as amended. Motion carried.

Chairman stated this is what passes for housekeeping, trying to keep some of our children alive.

Chairman Kinzer asked the Committee to consider final action on **SB 79-Requiring the debt setoff collection assistance fee to be an additional cost to all debts owed the court.**

Representative Rubin moved to recommend **SB 79** favorably for passage. Motion failed for a lack of a second.

Chairman Kinzer asked the Committee to consider final action **on SB 262-Grandparent custody, visitation and residency.** Katherine McBride provided an overview of the bill content.

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Representative Ward moved, Representative Hildebrand seconded, to recommend SB 262 favorably for passage.

Representative Rubin advised he opposed the bill, although he appreciates the motivation of the bill. How the consideration is going to be weighed makes no sense.

Representative Pauls agrees with some of the concerns of Representative Rubin, and as a result she had some amendments to make to the bill, which she wanted to explain. Her first amendment is on Line six, which says custody of a parent, where she add “unless the child is placed with the other parent”. Another amendment that might limit the number of grandparents the court is considering might say, a grandparent “ who requests custody”. The third amendment she would propose is to move the language on Page 7 back to “shall receive preference”, and that would have the effect of having the Court consider placement with a grandparent or grandparents as a preference that the court could then decide not to do in considering the best interests of a child, and that is currently in the law on Line 11.

Representative Pauls moved, Representative Ward seconded, to amend SB 262 on Line six, after the words “custody of a parent” add the words “unless the child is placed with the other parent.” Motion carried.

Representative Pauls moved, Representative Ward seconded, to amend SB 262 on Line six, after the words “a grandparent” add the words “ who requests custody”.

Representative Rubin asked what if both sets of grandparents ask to receive custody, how that would work- would both receive preference? Representative Pauls stated it is all governed by the courts. She thinks the court looks with preference based on the class-relatives –above other classes, but then considers best interests of the child.

Representative Hildebrand inquired if this would give preference of a grandparent over an aunt or uncle. Representative Pauls stated yes, it would, it follows the precedent of the code, in that grandparents have other status, for example, in a termination they are notified, they are automatic interested parties now, and there seems to be a policy thus far in the legislature to give some type of legal preference to grandparents.

Representative Ward stated in his experience what happens is if this preference were in effect, the court could then say, “No, I’m not giving the child to the grandparents but to the aunt and uncle.” Then the court would make findings why the preference was overridden and it is in the best interests of the child. All it will do is give grandparents a little bit of a leg up.

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Representative Pauls closed on her motion.

Representative Pauls moved, Representative Ward seconded, to amend SB 262 on Line six, after the words "a grandparent" add the words "who requests custody". Motion carried.

Representative Pauls moved, Representative Ward seconded, to amend SB 262 on Page 7 to strike the word "consideration" and replace it with "preference". Motion carried.

Representative Pauls moved, Representative Ward seconded, to recommend SB 262 favorably for passage, as amended.

Representative Brookens moved, Representative Ward seconded, to add a parallel provision, that if the court does not place a child with a grandparent and placement is made to the secretary, which would then be a contractor, that group should consider placing the child with the grandparent and the agency would have to list in its records why it didn't place the child with the grandparents.

Chairman Kinzer recognized this is a straightforward but conceptual motion, and if the motion passes, asked that Representative Brookens work with the revisors to draft the appropriate words.

Representative Patton inquired do we need to add to that motion so the grandparents have access to those records. Representative Ward stated in his experience, grandparents are interested parties and would have access to those kinds of records in Sedgwick County, but he was not sure if it would work that way throughout the state.

Representative Brookens moved, Representative Ward seconded, to amend SB 262 to add a parallel provision, that if the court does not place a child with a grandparent and placement is made to the secretary, which would then be a contractor, that group should consider placing the child with the grandparent, the agency would have to list in its records why it didn't place the child with the grandparents. Motion carried.

Representative Pauls moved, Representative Ward seconded, to recommend SB 262 favorably for passage, as amended. Motion carried.

Chairman Kinzer asked the Committee whether they wanted to press on in considering more bills, as opposed to doing more tomorrow. With no objections, Chairman Kinzer asked the Committee to consider final action on **SB 297—Removing the gifts from a spouse exception**

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from marital property in a divorce. Katherine McBride provided an overview of the bill content.

Chairman Kinzer asked the Committee's pleasure on **SB 297**, and receiving no motion from the Committee, he advised no further action would be taken on this bill.

Chairman Kinzer asked the Committee to consider final action on **SB 293—Filing of wills and admission to probate.** Katherine McBride provided an overview of the bill content.

Representative Brookens offered it was not long ago that the district court clerks promulgated the language. They had a duty to and they hated it. We abolished the way to receive and hold bills. This bill comes from the judicial court, but what do we do with this? In district court there is no fee and no affidavit to file. The district court personnel did not testify against this only because they did not know about this bill. Representative Brookens expressed this bill, if adopted, would be problematic, and he will not be making a motion.

Receiving no motion from the Committee, Chairman Kinzer advised no further action would be taken on **SB 293**.

Chairman Kinzer asked for an update on **HB 2742-Relating to the medical assistance recovery program** from Representative Brookens. Representative Brookens, who chaired the Subcommittee to further study this bill, shared the Committee met last week and discussed the issue of timing and whether they believed they could make it a good bill. They also looked at trying to see if there was a specific part of the bill that could be excised separately from the others and leaving the rest of the bill for another year. The Committee did not think there was time to do even that, as it would take several more meetings, and collectively, the consensus was there was no time to give the bill the consideration it needed and deserved. The recommendation is to ask the Chair to either recommend the bill to an interim committee or to the Judicial Council for review and to be brought back next year. Representative Brookens also talked with Representative Ryckman, who was more integrally involved with the concept and the construction of the bill. He was having second thoughts about this aspect, and he did inform him that he could make a minority opinion dissenting to the Subcommittee report. He suggested Representative Ryckman would need to give that statement in writing to Lauren Douglass.

Lauren Douglass summarized the statement from Representative Ryckman, saying his remarks were similar to how he testified in the hearing. He acknowledged there was a potential for significant savings to the state through the passage of the bill, and given the potential for the savings he would prefer that the committee act on the bill this session.

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Chairman Kinzer advised he would accept the report of the Subcommittee with the minority opinion report provision being noted. He thanked the Subcommittee for its work and advised the Subcommittee is discharged at this time. Chairman Kinzer asked staff to send to all Committee members a copy of the final Subcommittee and minority reports.

Chairman Kinzer stated he would consider taking up the three bills heard today. There are several choices, in that the Committee could take them up now, or, if any member objects because the bills were just heard, then they would not work them today. If the Committee decides collectively they do not want to work the bills today, then they will meet tomorrow at 3:30 p.m. to take up those bills. Chairman Kinzer advised, having no objection to taking up the bills now, but understanding that some Committee members may have to leave, and recognizing they still do have a quorum, they will press on now and consider the bills.

Chairman Kinzer asked the Committee to consider final action on **SB 395–Relating to intestate succession**.

Representative Pauls moved, Chairman Kinzer seconded, to recommend SB 395 favorably for passage.

Chairman Kinzer stated he wanted a little bit more time to consult with some of the practitioners and he would like this to go to Conference committee. He will speak with Chairman Owens and advise him we would like to conference on this bill. This would give us time to work on the bill.

Chairman Kinzer moved, Representative Hildebrand seconded, to amend SB 395 to make it effective upon publication of the Kansas Register. Motion carried.

Representative Brookens stated, after reading Philip Ridenour's testimony in opposition to the bill, he is truly on the same page as him. He does not wish for the bill to be repealed, as it is not doing any harm being there.

Representative Brookens moved, Representative Kelly seconded, to table SB 395. Motion carried.

Chairman Kinzer asked the Committee to consider final action on **SB 403–Relating to conversion of a trust into a unitrust**.

Representative Brookens moved, Representative Rubin seconded, to recommend SB 403 favorably for passage. Motion carried.

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Chairman Kinzer asked the Committee to consider final action on **SB 404-Relating to spendthrift trusts.**

Representative Brookens asked for more time to consider this bill. Chairman Kinzer stated if he is objecting to working the bill today, then the bill will not be worked today.

Chairman Kinzer stated he will announce from the well tomorrow whether they will meet at 3:30 p.m., to consider working **SB 404**. It is not his intention to work any other bills tomorrow. In case they ended up not meeting tomorrow, Chairman Kinzer thanked the Committee for all their good work on the bills this session.

The next meeting will be on call of the Chair and will be announced from the well tomorrow.

The meeting was adjourned at 5:13 p.m.