

MINUTES

SPECIAL COMMITTEE ON JUDICIARY

August 24-25, 2005
Room 514-S—Statehouse

Members Present

Senator John Vratil, Chairperson
Representative Mike O'Neal, Vice Chairperson
Senator Greta Goodwin
Senator Phil Journey
Senator Carolyn McGinn
Senator Kay O'Conner
Representative Paul Davis
Representative John Grange
Representative Mitch Holmes
Representative Patricia Kilpatrick
Representative Ann Mah
Representative Melody McCray-Miller
Representative Jason Watkins

Staff Present

Jerry Ann Donaldson, Kansas Legislative Research Department
Mike Heim, Kansas Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Helen Pedigo, Revisor of Statutes Office
Cindy O'Neal, Committee Secretary

Conferees

Michelle Clayton, National Conference of Commissioners on Uniform State Laws
Marilyn Nichols, Kansas Register of Deeds Association
Bill Meek, Register of Deeds, Sedgwick County
Ruth Rahe, Register of Deeds, Republic County
Charlotte Shawver, Register of Deeds, Riley County
Lee Taylor, President, Land and Title Association, Riley County
Melissa Wangemann, Secretary of State's Office
Representative Kathe Decker
Kyle Smith, Kansas Bureau of Investigation
John Eichkorn, Kansas Highway Patrol
Sal Intagliata, Kansas Association of Criminal Defense Lawyers
Judge Nancy Parrish, Executive Committee of the District Judges' Association

Judge Steve Leben, 10th Judicial District, Johnson County
Professor Linda Elrod, Washburn University School of Law
Ron Nelson, Attorney, Overland Park
Kevin O'Grady, Attorney, Overland Park
Nancy Strouse, Kansas Judicial Council

**Wednesday, August 24
Morning Session**

Topic No. 10—Uniform Real Property Electronic Recording Act

Michelle Clayton, National Conference of Commissioners on Uniform State Laws, explained that the Uniform Electronic Transactions Act (UETA), governs sales contracts, mortgage instruments, and promissory notes with electronic signatures. The law has been enacted in most states. However, there is some confusion as to whether UETA applies to the filing of real estate transactions in county register of deeds offices ([Attachment 1](#)).

The proposed Uniform Real Property Electronic Act (URPEA) authorizes a land records recorder to have the option of accepting electronic documents for recording, indexing, and storing documents. The uniform law was adopted by the Uniform Law Commissioners in 2004 and has been adopted by three states: Arizona, Delaware, and Texas, and is expected to be adopted by all states within three to five years.

URPEA does three things:

- Establishes that any requirement for originality, for a document or a writing manually signed before it may be recorded, is satisfied by an electronic document and signature;
- Establishes what standards a recording office must follow and what it must do to make the electronic recording effective if the office chooses to engage in e-recording; and
- Establishes a board in each state to set statewide standards.

Ms. Clayton noted that the Uniform Law Commission used the word "recorder" to identify the officer who has the authority under state law to accept documents for recording in the land records office. The word "recorder" is commonly used in most states to identify that officer. However, the word "recorder" is bracketed, so that states who use another word to describe that position can use it instead. She also pointed out that North Dakota notary laws allow for electronic recording transfers, and Kansas' notary law requires that it be a "wet seal." There need to be statutory changes to allow notaries to authorize e-recording filings.

Ms. Clayton explained several sections of URPEA.

- **Section 3—Validity of Electronic Documents** reinforces that e-recordings are as valid as paper recordings;

- **Section 4—Recording of Documents** allows the recorder the option to implement electronic recording; and
- **Section 5—Administration and Standards** optional language the Legislature will need to decide which it wants to include in the bill. It also sets up the Electronic Recording Commission which would create and implement standards for recorders to use in the state.

Marilyn Nichols, Shawnee County Register of Deeds, stated that the Kansas Register of Deeds Association does not have an official stance on the proposal, but is beginning to review it. She noted that each register of deeds has been collecting a technology fee at the rate of \$2.00 per page for nearly every document recorded in the past several years. The fee has been dedicated to the advancement of technological services in the register of deeds offices. She does not support the e-recording being mandated, because not all counties can afford to do so, but does support standards being set among those who will be using e-recording ([Attachment 2](#)).

Bill Meek, Sedgwick County Register of Deeds, said there were advantages of URPEA, but he does not want the state to rush into mandating it. Sedgwick County currently does e-recording, but only on assignments and releases of mortgages. He was concerned with the “race” to the courthouse when recording documents; whereas, if someone e-records at 2:00 a.m. and someone comes in and paper files at 8:00 a.m., whose “recording” would be considered filed first ([Attachment 3](#))?

Ruth Rahe, Republic County Register of Deeds, addressed the Committee with her concern about the makeup of the commission and who would appoint the members. She encouraged the Legislature to urge the commission to develop workable standards for all counties ([Attachment 4](#)).

Charlotte Shawver, Riley County Register of Deeds, informed the Committee that The Property Records Industry Association is writing and setting up implementation guidelines, but they have not been released yet.

Lee Taylor, President, Land and Title Association, Riley County, said her main concern was the question of the priority of when a record is received.

Melissa Wangemann, Office of the Secretary of State, suggested that the Legislature delete KSA 16-1611 subsection (c) of Section 3, because the electronic notarizations are covered in the Kansas codification of UETA ([Attachment 5](#)).

The Committee hearing on Topic Number 10 was closed. The Committee recessed for lunch.

Afternoon Session

Topic No. 9—Unlawful Drug Use (HB 2304)

Representative Kathe Decker explained that she was the sponsor for 2005 HB 2304. The bill would address *State v. Flinchpaugh*, in which Flinchpaugh was driving when involved in an automobile collision. As a result, the other driver died, and Flinchpaugh was taken to the hospital to have her injuries treated. While there, she consented to having her blood drawn. It was sent to

the Kansas Department of Health and Environment where it was tested and found to contain cocaine and benzoylecgonine. The state charged Flinchpaugh with possession of a controlled substance.

The Supreme Court ruled that discovery of a drug in a person's blood is circumstantial evidence tending to prove prior possession of a drug, and it is not sufficient evidence to establish guilt beyond a reasonable doubt. The absence of proof to evince knowledgeable possession is the key. The drug might have been injected involuntarily into the defendant's system. The prosecution did not establish that the defendant ever knowingly had control of the cocaine. It found that evidence of a controlled substance assimilated in one's blood does not establish possession of a controlled substance, nor is it adequate circumstantial evidence to show prior possession by that person (Attachment 6).

Representative Decker's goal is to catch those who abuse drugs early and place them into treatment programs, hopefully, stopping their use of drugs. She suggested that the state look at several prevention programs to see which ones work, and send offenders to those programs.

She suggested that while some are concerned with the impact on prison bed space. The Committee also should consider the cost to the state for providing medical care and the cost to clean up methamphetamine labs (Attachment 7).

Kyle Smith, Kansas Bureau of Investigation (KBI), agreed that it should seem logical that if it is illegal to have drugs in a person's pocket, it should be illegal to have drugs in a person's system (Attachment 8).

He listed the following concerns with the proposed bill.

- Possession is a low priority for most law enforcement and prosecution agencies. It is usually a secondary offense arising when drugs are found incidental to some other illegal activity.
- Jurisdiction is a required element of every crime and it would be hard to prove in which county the ingested drugs were taken.
- A great number of drug problems are from prescription drugs.
- Bed costs would be minimal but there may be substantial expenses involved in investigating these cases.
- Some levels of drugs in a person's system could be so small that current equipment utilized by the KBI would not be able to detect those amounts and therefore, would require newer equipment.

John Eichkorn, Kansas Highway Patrol, agreed that sometimes those people who have taken a controlled substance commit violent crimes while under the influence, and having a law that would make internal possession of a controlled substance illegal would help law enforcement agencies fight the war on drugs (Attachment 9).

He informed the Committee about law enforcement officers and school administrators who received training called Drug Recognition Expert Program. It teaches those individuals the skills to detect drugs in students who exhibit health concerns relating to drugs.

Sal Intagliata, Kansas Association of Criminal Defense Lawyers, expressed concerns with the unintended consequences of the bill:

- More prosecutions leading to more prison space impact will cost the state more money;
- An increase in jail expenses for misdemeanor crimes;
- An increase in costs of probation supervision; and
- An increase in testing for drugs.

He said the proposed bill was in conflict with SB 123, passed several years ago, which requires treatment for nonviolent offenders with drug problems and leaves bed space for serious, violent offenders. Under the proposed new bill, if an offender relapses and is followed by a positive drug test, the offender could be charged with a new felony and the new sentence would run consecutive to the offender's old sentence, thereby, increasing the offender's time in prison (Attachment 10).

Written testimony from Roger Werholtz, Kansas Secretary of Corrections, was provided to the Committee. It questioned whether the Department of Corrections would be required to report to prosecutors a positive drug test (Attachment 11).

The hearing on Topic 9 was closed.

The Committee meeting adjourned at 3:30 p.m.

Thursday, August 25 Morning Session

Topic No. 8—Residential Arrangements for Children (SB 61)

Judge Eric Yost from Sedgwick County, did not appear before the Committee. He provided written testimony stating that 2005 SB 61 would simply codify what currently is happening in child custody cases by requiring that when a judge orders shared residency, the child must spend equal or a near equal amount of time with each parent (Attachment 12).

Judge Nancy Parrish from Shawnee County stated that the Kansas District Judges Association is opposed to SB 61, because it conflicts with the current definition of shared residency in the 2003 Kansas Child Support Guidelines. Shared residency is recognized under the Guidelines and a shared residency formula is only used when the parents are sharing the expenses, as well as parenting time.

Two components must be met:

- Blocks of time must be equal or nearly equal; and

- Direct expenses of the child must be equal or nearly equal.

Judge Parrish stated that SB 61 refers to 45 percent of the child's time as the definition for equal or nearly equal, and excludes sleep-time and extracurricular time when calculating the child's time with each parent ([Attachment 13](#)).

She agreed with Judge Yost that judges currently are ordering shared residency, even though the term is not listed in statute.

She urged the Committee to consider two proposed amendments:

- Delete "or both" on line 28, page 4; and
- Leave in the first sentence in line 30, page 4 which reads: "Shared residency. The court may order a residential arrangement in which the child resides with both parents on an equal or near equal basis," and then strike the remainder of lines 32 through 35.

Judge Steve Leben of Johnson County said that a bill was not needed, because the current statute give judges the authority to order residency as long as it is in the best interest of the child. Once residency is established then the issue of child support is determined ([Attachment 14](#)).

Ron Nelson, Attorney, Overland Park, who was the person who helped write the current language on child residency that is in the statute, suggested that the statute needs to get away from using labels. Some parents simply want primary residential custody or shared custody, so they will be awarded more child support. He believes that labels just foster battles between the parents ([Attachment 15](#)).

Professor Linda Elrod, Washburn University School of Law, stated that shared residency results in one party being left with a disproportionate budget burden, because there is no way to enforce the shared expenses. She would consider extracurricular activities and sleep time as counted hours when determining equal or near equal time. Shared residency is really about the cost of child support. Sometimes one parent is left with so little money that the parent cannot afford to care for the child, much less pay for household expenses. There are some instances where judges have awarded shared residency and not lowered the child support. This is usually when both parents really want to spend time with the child and the parent paying child support can afford to do so ([Attachment 16](#)).

Kevin O'Grady, Attorney, Overland Park, is a practicing attorney in divorce cases. He commented that in 80 percent of cases, the parents work out parenting time and child support, but it is the other 20 percent that cause problems. The shared residency and the effect it has on child support is the largest issue. He suggested that the statute should not mention any types of custody, because judges already have the authority to award any type of residency.

Nancy Strouse, Kansas Judicial Council, informed the Committee that the Family Law Advisory Committee will be forwarding its recommendations on SB 61 to the full Judicial Council at the October meeting. She said the current statute allows judges to order any type of residency. She was very concerned with sleep and extracurricular hours being deleted ([Attachment 17](#)).

The hearing on Topic 8 was closed.

Chairman Vratil directed the Committee to make recommendations on the topics that the Committee discussed the last two days.

Topic No. 8—Residential Arrangements for Children (SB 61)

Most Committee members felt there was no real problem that needed to be fixed. They agreed that the courts should have the flexibility to award residential custody that is in the best interest of the child.

Representative O'Neal suggested that the Committee recommend taking out all the labels of residency.

Chairman Vratil directed staff to develop a Committee report that recommends a bill be introduced which would rewrite page 4, subsection 5 (a), (b), and (c), in order to give parents and courts the maximum ability to develop a parenting plan with regard to what is in the best interest of the child. He also directed staff to modify lines 20-22 to read as follows:

Entitled "Parenting Plan. A parenting plan shall be adopted based upon the best interest of the child. The parties shall submit to the court either an agreed parenting plan or, in the case of dispute, proposed parenting plans for the court's consideration" and delete the remainder of lines 25 & 26.

Representative O'Neal made the motion to adopt the Committee recommendation. Senator Goodwin seconded the motion. The motion carried.

Chairman Vratil directed the new bill to be introduced in the House.

Topic No. 9—Unlawful Drug Use

The Committee discussed the issue of unlawful drug use. It recognized the negative impact drugs have on society, but expressed concern that the proposed bill would go too far and have unintended consequences down the road. The Committee is concerned that there is not enough money to provide for treatment programs, jail, and prison space.

It was suggested that the Committee was "looking the other way" and that by not addressing the issue of drugs, the state was going to lose a generation of our youth.

Chairman Vratil recommended the report read that the Committee was frustrated with the growing drug problem and not being able to deal with it. The Committee appreciated Representative Decker bringing the subject to its attention; however, the Committee is concerned with the unintended consequences as reported by the KBI.

The Committee is mindful that HB 2304 was killed in the Senate during the 2005 Legislative Session and it does not recommend a new bill be introduced. However, it urges the state to devote more attention, time, and money to:

- Education of drug usage;
- Drug treatment programs; and

- Early childhood education, intervention, and drug prevention programs.

Topic No. 10—Uniform Real Property Electronic Recording Act

Written testimony was provided by John Peterson, Kansas Land Title Association, with suggestions on amendments to the Act (Attachment 18).

The Committee discussed the makeup of the Commission. It was agreed that the Commission should include registers of deeds. There was discussion regarding the appointment of members of the Commission.

A motion was made, seconded, and carried, as to the following make up of the Commission:

Total of 11 members:

- *Three registers of deeds (representing a small, medium, and large county) appointed by the Register of Deeds Association;*
- *One register of deeds representing the title industry, appointed by the Kansas Land Title Association;*
- *One register of deeds representing the Kansas Bar, appointed by the Kansas Bar Association*
- *One register of deeds representing the oil and gas industry, appointed by the Legislative Coordinating Council (LCC);*
- *One register of deeds representing the mortgage brokers, appointed by the LCC;*
- *One register of deeds representing the banking industry, appointed by the LCC;*
- *One register of deeds representing the surveyors or engineers, appointed by the LCC;*
- *One register of deeds representing the realty industry, appointed by the LCC; and*
- *One register of deeds representing the construction industry, appointed by the Governor.*

The Committee agreed by consensus to adopt the Secretary of State's recommendations to rewrite Section 3(c) to reference KSA 16-1611 on electronic notarization.

The Committee turned its discussion to the effective date. The Committee determined that the commission should be established upon publication in the *Kansas Register*, with the act taking effect July 1, 2007.

A motion was made and seconded that the Committee introduce the Uniform Real Property Electronic Act with the new makeup of the commission and the change in the effective date, including

the recommendations by the Secretary of State. The motion carried.

Chairman Vratil directed the new bill to be introduced in the Senate.

The Committee meeting adjourned. The next meeting was set for September 15 and 16, 2005.

Prepared by Cindy O'Neal
Edited by Mike Heim

Approved by Committee on:

September 16, 2005
(date)