Our Mission:
The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

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Our Primary Purpose is to Protect and Defend the Legal Profession

On June 10, I received the high honor of becoming the president of the Kansas Bar Association. My first job was to thank outgoing President Richard Hayse. It is difficult to imagine a more energetic, hard-working, and diplomatic president than Rich. He has certainly been a great ambassador for the bar. His presidency, however, was merely the latest in a long line of service. We all owe a great debt of thanks to Rich Hayse. If you see him, let him know how much you appreciate all the work he has done.

I wish more of you were acquainted with the great staff we have at the KBA. Our Executive Director Jeff Alderman has assembled a first-rate team to care for the bar association’s work. Every member of the staff is able and willing to help you with any questions or concerns you may have about bar association business. This is your association, and you should not hesitate to call or drop by the offices.

My year as president will be greatly enhanced by the officers serving with me. Linda Parks of Wichita fills the position of president-elect. This follows her tremendous fundraising effort in the “Raising the Bar” campaign. Ernie Ballweg of Overland Park is our new vice president. Ernie has been involved with the bar association for many years and brings a wealth of knowledge and expertise to this position. Rejoining the board as secretary/treasurer is Tom Wright of Topeka. Tom is a great lawyer and has a good sense of the political goings on in Topeka. We are fortunate to have his leadership. In short, I have a great team to work with. I truly believe you will be well served by your new officers and the Board of Governors.

This year I would like the association to focus on three areas:

1. We want to help the Kansas lawyer make a living and help our fellow lawyers to be profitable. In this regard, the KBA is undertaking two ambitious initiatives. First, the Casemaker online legal research program will be introduced this fall. This basic member benefit will allow typical practitioners to do about 90 percent of their Internet research for free.

   Second, the KBA will hire a person to assist its members with law office management issues. If that sounds a bit vague, it is, because we haven’t gotten it off the ground yet. The idea is that the KBA will have an in-house person to help you make decisions about staff salaries, equipment, management techniques, software marketing, and similar issues. Our vision is for the association to proactively reach out to help you manage your practices.

2. This year the KBA will continue the work of improving CLE opportunities and updating the various handbooks available to you through your association. In other words, we want to provide good CLE, at a reasonable price, tailored to help you in your practice. Our CLE Director Deana Mead is doing a great job.

3. Finally, the KBA will work to make being a member an enjoyable experience. In short, we want our members to have fun. There is nothing wrong with fun; in fact, many of us have fond memories of our association based on the good times we have had with other members. We will be working this year to make sure that the annual meeting and the various seminars and social events sponsored by the KBA are worthwhile and enjoyable.

I see the primary purpose of the KBA as simply to protect and defend the legal profession. The law is a noble profession and should be defended. As members of this noble profession, it is our job to set the example and keep the faith. It is a fact that no community in Kansas or the United States would be as strong or as free if not for the lawyers who have served in legislative branches, served on school boards, chaired fundraising drives, defended unpopular causes, and so freely given of themselves. Part of our job will be to get the word out about the pro bono work you are doing and the lawyers who work hard for their communities.

I am proud to be a lawyer, and I apologize to no one for my profession. I am proud to be a member of this great organization, and I am proud to stand with you.

David J. Rebein can be reached by e-mail at drebein@rebeinbangerter.com or by phone at (620) 227-8126.

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O’Malley’s Tale of Malin More

By Terence O’Malley, Fidelity Security Life Insurance

One fine Kansas City morning in 1963, my folks had a tiff over family finances and agreed to reduce spending. That night my dad came skipping home from an investment club meeting to announce he had just purchased — sight unseen — a “farm” in Ireland (my mother gleaned she was off the hook from her new spending limit).

A life-long Kansas Citian grew weary of refereeing long-distance disputes among his relatives in Ireland over the use of his property, and here was my dad, a willing, if naive buyer.

“Do ya have the saying ‘pig in a poke’ in America,” asked local farmer Daniel Cunningham of my folks when they first visited their “farm” in Ireland, in 1964. “That’s what ya got here,” said Cunningham, no doubt highly amused at this yankee doctor’s $500 investment in two disconnected acres in the “forgotten county” of Donegal.

“True, it was not exactly a hot tourist destination. In fact, the road leading to the hamlet of Malin More had an authentic 19th century quality to it, i.e. a stone-paved passage well-suited for donkeys. One had to progress from Donegal Town through the picturesque seaport of Killybegs and the charming town of Kilcar to reach wee Malin More, which to this day has but one business, a woolen and linen shop (not even a pub to boast of). Most citizens of Ireland (and half those living in Donegal) could not tell you where Malin More is. When you get there, you’re not sure you have arrived; it is just an outcrop of cottages.

The Atlantic Ocean wind blows incessantly and being in the northwest corner of the country, the weather is maddening, alternating within minutes between being sunny and cloudy, wet and dry. The supersized snowflakes actually splash upon landing. It is an intense environment, sparsely populated with sheep outnumbering people.

But then as you ramble past the few cottages toward the O’Malley farm, you are transformed into a believer. For there, as far as you can see, is a majestic coastline with 150-foot cliffs pounded by the raging North Atlantic. On a distant bluff sits an ancient watchtower used as an early warning system against Scandinavian invaders. The air is clean, and the massive pastures leading to the ocean below inspire adventure and a longing to explore. Despite fierce waves hurled against the massive cliffs, the place is eerily quiet. Simply put: it is God’s country.

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The Phil Lewis Medal of Distinction recognizes individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

John E. Shamberg of Prairie Village is a veteran Kansas trial lawyer whose legal career has extended over a period of more than 60 years. He has devoted the greater part of his practice to the representation of persons sustaining severe personal injury or property damage as the result of negligent acts committed by others.

Shamberg has engaged in some groundbreaking cases during his legal career, including the case that abolished governmental immunity in Kansas. As a result the state and its subdivisions are now required to answer in damages to those who sustain injury as a result of the state’s negligence. He also participated in a wide range of cases involving defective consumer products, the use of which resulted in injury. He successfully handled cases involving serious injury to small children who accidentally ingested a drain cleaner product and, through these efforts, forced the manufacturers to reduce the toxic nature of the product and to package their product in childproof containers. He was also lead counsel in the litigation of claims for the victims of the 1981 collapse of the Kansas City Hyatt Regency Hotel skywalks.

Throughout his long professional career, his main concern has been the area of litigation representing the rights of the disadvantaged and the underprivileged.

Although born in Fremont, Neb., Shamberg was raised in Hutchinson, where he attended the public school system. He graduated from Washburn University with his bachelor’s degree and then his LL.B. from Washburn University School of Law in 1937. When former Kansas Gov. Walter A. Huxman was appointed a judge of the 10th U.S. Circuit Court of Appeals in 1939, he selected Shamberg as his first law clerk — a position he held until he was drafted into the Army in 1942.

Shamberg served four years during World War II, and he attained the rank of major. He was awarded the Bronze Star medal for his service in the Pacific Theater. He was also awarded the World War II Victory, Air, Philippine Liberation, Asiatic-Pacific Service, and American Service medals and the Philippine Liberation Ribbon.

In 1949 he resumed the practice of law in Kansas City, Kan. He is the co-founder and senior member of Shamberg, Johnson & Bergman Chtd., which has offices in Kansas City, Mo., and Overland Park. Shamberg served as personal counsel to Gov. Robert B. Docking in the 1970s.

Shamberg is a lifetime member of the Kansas Bar Association, where he served on the Board of Governors from 1969 to 1972 and 1980 to 1990 and was also a KBA Delegate to the American Bar Association from 1970 to 1972 and 1980 to 1990. He also served on the board of governors of the Kansas Trial Lawyers Association and the Association of Trial Lawyers of America. He was president of the Washburn Law School Association, where he headed a campaign to raise funds to build a new Washburn Law School Center after the former law school building was destroyed by the June 8, 1966, tornado; a fellow of the International Academy of Trial Lawyers; and a member of the Kansas City Metropolitan, Johnson County, and Wyandotte County bar associations. He was a member of the Kansas Supreme Court Nominating Commission from 1985 to 1993.

Throughout his legal career Shamberg has received numerous awards, including the 1970 Washburn Law School Association Distinguished Service Award; the 1989 KBA Distinguished Service Award; the 1989 Arthur G. Hodgson Distinguished Service Award and the 2005 Humanitarian Award from the KTLA; the 1997 Dean of the Trial Bar Award from the KCMBA, he was the first Kansas-based lawyer to receive the award; and the 2000 Justinian Award from the Johnson County Bar Association. He was listed in “The Best Lawyers in America” from when it was first published in 1983 to 2000. In 1984, Washburn Law conferred Shamberg an honorary Doctor of Law degree.
The Distinguished Service Award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

Daniel J. “Dan” Sevart was recognized posthumously with the 2006 KBA Distinguished Service Award for his dedicated service to the legal profession and his state and his long-standing support of the community.

Sevart was a native Kansan, growing up on a farm near Oswego. After graduating from Oswego High School in 1962, Sevart received his Associate of Arts degree from Labette County Community College in 1964. He attended Wichita State University from 1964 to 1965 and served in the U.S. Air Force from 1965 to 1972, where he was promoted to staff sergeant and received the Vietnam Service Medal.

After leaving the Air Force, he earned his B.A. in English with departmental honors in 1973 and his J.D. (dean’s honor roll) in 1975 from Washburn University.

From 1972 to 1975, Sevart worked as a property officer at Shawnee County Community Assistance and Action Inc. After graduating from law school, he was an associate (1976-1978) and then partner (1978-1982) at Render and Kamas in Wichita. From 1982 to 1983 he was a partner in the firm of Schartz and Sevart, Wichita, and in 1983 he and his wife, Shoko, opened the law firm of Sevart and Sevart in Wichita, which focused on mediation, personal injury, and employment litigation.

Sevart was a member of the American, Kansas, and Wichita bar associations and served as president of the KBA from 2003 to 2004 and president of the WBA from 1993 to 1994.

He was a Fellow of the Kansas Bar Foundation and served on the boards of the Kansas Trial Lawyers Association, Wichita Bar Foundation, Wichita Neighborhood Justice Center, the Kansas Lawyer Service Corporation, and Washburn University Alumni Association. Sevart also served on the Wichita Municipal Court Nominating Commission, the Judicial Selection Panel for the 18th Judicial District, and the Kansas Governmental Ethics Commission (1996-2005). He was also a member of the National Conference of Bar Presidents and the Association of Trial Lawyers of America.

Sevart supported numerous charitable and nonprofit organizations, including serving on the board of directors of the Wichita Symphony Society, Opera Kansas Inc., WSU Dance Partners, and the Friends of the Chinese National Symphony Orchestra. He was a member of the National Endowment for the Arts and had served as the general counsel for the Greater Wichita Convention and Visitors Bureau since 1984.

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O’Malley’s Tale
(Continued from Page 5)

My folks learned they also owned a house, sort of. A circa 18th century stone dwelling with two small out buildings on the lower parcel. The thatched roof was collapsed, exposing two great rooms with a fireplace between them. I first visited this property at age 13 and began to understand what 19th-century Irish life must have been like and what it meant to be Irish.

On my folks’ first visit in 1964, farmer Daniel Cunningham, along with his wife, shared tea with my parents. Mrs. Cunningham was from the McNellis clan and Daniel Cunningham had been using the two McNellis fields for years. “Can I feed my sheep on your property,” he inquired of my Dad. “Would ya mind if I grew some vegetables,” he added. Heck, he lived there; we were ensconced in Kansas City. My Pop saw no reason to deprive him of subsistence. And when he told my Dad he earned the equivalent of about $700 a year, there was no way my father could refuse this gentle man’s request.

That was the status quo for the next 40 years. My parents, their seven children, and grandparents visited the property at various times, usually doing nothing more than roaming the land during short excursions. There were often sheep on the grounds and once there was a potato patch, but other than that, nothing much seemed to change. The stone house stood amazingly strong all those years.

Aside from paying a one-time lifetime tax of about $500, my parents invested nary a pence into the place. They essentially left it alone and, as the Irish would say, everything was “grand” — or so we thought.

For the last 10 to 15 years, Ireland’s economy has been known as the Celtic Tiger. Telecommunications and Internet applications have transformed Ireland into a stunningly modern country with brightly painted homes, newly paved roads, and many modern buildings. Ireland is so progressive it recently banned smoking in pubs.

Nevertheless, my siblings and I ponied up $250 each to retain a solicitor and barrister in Ireland and charged them with filing an ejectment action to clear Dad’s title to the property. My Dad agreed to join the fight, and together he and I flew to Dublin and drove to Donegal.

It took two years to obtain a special setting trial date. Our lawyers retained an agricultural expert to testify that no crops had been grown on the premises in at least 10 years, thus minimizing the Cunningham’s claim to having “used” the property. Other than that, there was no investigation whatsoever. No depositions, interrogatories, request for production of documents, or any other type of routine litigation information digging. It would be trial by ambush, Perry Mason style, with neither side being entirely sure what the other side would say.

In America each party to a lawsuit pays for its own expenses. But Ireland follows the English rule allowing that the losing side
pay the expenses of the prevailing party. So not only did we face the prospect of losing the property, but we could also wind up paying unknown attorney fees on top of it. No doubt that leverage inspired children Cunningham to contest the O’Malley ownership.

The day of trial finally arrived, March 24, 2004. This date was somewhat auspicious for me personally because 15 years prior while I was a press secretary to the governor of Alaska, the Exxon Valdez went aground spilling 10 million gallons of oil into Prince William Sound, a life-transforming event for me.

My Dad and I were the first to arrive at the small stone court-house in Donegal Town. I had walked and driven by it many times never realizing it was a courthouse, such was the deprecat- ing character of the building. It really could have been a court- room in any small county in America, if not for the Irish seal depicting a harp on the wall behind the judge’s chair and the Irish flag staffed in the courtroom.

Soon the courthouse began filling up. Our anxiety rose when the Cunningham’s barrister arrived in his horsehair wig and flowing robe, evincing a sense of purpose — to take our prop- erty. I decided to humanize him by asking him to pose for his photograph.

Soon our barrister in his wig and robe arrived, and we sud- denly felt encouraged that maybe this sojourn was not a waste after all. But more and more townspeople continued to fill the observer benches, as well as more wigs and robes, and soon the place was abuzz with corner conferences, unpacking of briefcas- es, setting up dictation machines, whispered conversations, and general pre-trial chaos.

Finally, the main wig and robe arrived, that is the judge and as soon as he sat down he asked the Cunningham’s barrister who all these people in the courtroom were, and he was informed they were residents of Malin More there to testify that they had never seen any O’Malleys on the property at issue.

“Aghhh, we’ll be havin’ none of that,” said the judge. “Tell them to go home.” What a nice man, I thought. No use muddying up the issues with a bunch of personal testimonials. Funny though, nobody left. I think they stayed because, well, this was good grist for tale-spinning for years to come and one might as well be a first-hand accountant when embellishing the tale.

My father was a dream witness, the type lawyers pray for as clients. He warmed the court’s heart as he explained how and why he let the Cunninghams use the property those many years. His credibility was unimpeachable as he spoke of meeting the young Cunningham daughter (now suing for his land) who had been studying German when he first visited in 1964. She admitted to studying German but had no explanation as to how Dad could know such trivia — she claimed to have never met him before.

Patrick Cunningham, son of Daniel, testified, “I’m here to tell ya, I’ve never once met this Dr. O’Malley, and he never gave me permission to use his land.” To which our barrister retorted, “So it’s your practice then to use other people’s land without permission, is that it?”

The whole trial took about 45 minutes and the judge gavelled down in our favor and deemed the land to be O’Malley property. The court then went on to try three more personal injury law- suits that afternoon, astonishingly fast justice.

But after we won, the fun began because the Cunninghams were an indefatigable clan and were not going to be denied. In fact, they really did us a favor. They paid for Dad and me to go to Ireland, and they bought our property for nearly double what it was worth in 1998. All in all, quite the pig in a poke. Sláinte (to your good health). ■
Working for the community...

The Kansas Bar Foundation would like to take this opportunity to thank the following financial institutions for their support of the Interest on Lawyers’ Trust Account (IOLTA) program. The following financial institutions have current IOLTA accounts. Please thank your financial institution for their support of this important program.

American State Bank & Trust, Great Bend
Bank of America (all branches), Kansas City, Mo.
Bank of Blue Valley, Overland Park
Bank Midwest, Kansas City, Mo.
Bank of Commerce, Chanute
Bank of Prairie Village, Prairie Village
Bank of the West, Omaha, Neb.
BankWest of Kansas, Goodland
Brotherhood Bank & Trust, Kansas City, Kan.
Capital City Bank, Topeka
Central National Bank, Gypsum
Central National Bank, Junction City
Central National Bank, Lawrence
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Citizens Bank of Kansas, Kingman
Citizens State Bank, Gridley
Citizens State Bank, Hays
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Commerce Bank NA, Pittsburg
Community Bank, Wichita
Community Bank of the Midwest, Great Bend
Community National Bank, Chanute
Community National Bank, Tonganoxie
Community Savings Association Bank, Topeka
Community State Bank, Coffeyville
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Country Club Bank, Prairie Village
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First Commerce Bank, Marysville
First Community Bank, Fairway
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First National Bank, Cimarron
First National Bank, Goodland
First National Bank, Hays
First National Bank, Hutchinson
First National Bank, Independence
First National Bank, Junction City
First National Bank, Leavenworth
First National Bank, Liberal
First National Bank, Olathe
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First National Bank, Phillipsburg
First National Bank, Syracuse
First Option Bank, Osawatomie
First State Bank, Junction City
First State Bank & Trust, Larned
First State Bank & Trust, Tonganoxie
Fowler State Bank, Fowler
Gardner National Bank, Gardner
Girard National Bank, Girard
Great Western Bank, Omaha
Guaranty State Bank & Trust Co., Beloit
Halstead Bank, Halstead
Heartland Bank, Leawood
Heritage Bank, Topeka
Hillcrest Bank, Overland Park
Hoskinson National Bank, Hays
Home State Bank, Erie
Intrust Bank, Wichita
Kansas State Bank, Manhattan
Kanza Bank, Kingman
Kaw Valley State Bank, Topeka
Landmark National Bank, Manhattan
Landmark National Bank, Paola
Landmark National Bank, Topeka
Legacy Bank, Colwich
Lyon County State Bank, Emporia
M & I Bank, Sun Prairie, Wis.
Metcalf Bank, Overland Park
Mid American Bank & Trust, Leavenworth
Midland National Bank, Newton
Midwest Community Bank, Lincoln
Missouri Bank & Trust, Kansas City, Mo.
Morrill & Janes Bank, Merriam
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Peoples Bank & Trust, McPherson
Prairie State Bank, Goddard
Silver Lake Bank, Topeka
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Southwest National Bank, Wichita
St. John National Bank, St. John
State Bank, Hoxie
State Exchange Bank, Mankato
Sunflower Bank, Salina
TeamBank NA, Iola
The Bank, Arwood
The Bank, Oberlin
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The Community Bank, Liberal
The Farmers State Bank, Oakley
The Olpe State Bank, Olpe
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Union State Bank, Uniontown
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Valleym Bank, Roeland Park
Valley View Bank, Overland Park
Versus Bank, El Dorado
Vision Bank, Topeka
Western National Bank, Lenexa
Western State Bank, Garden City
Yates Center Bank, Yates Center
Access to Justice

Can it be an actuality, or is it just aspiration?

By Katherine L. Kirk

When determining how to support access to justice, we cannot ignore the invisible part of that phrase. For what is access to justice if it isn't equal? And if it isn't equal, what can we do as members of the bar to help people gain access? How do we, as members of the bar, support equal access without depleting our own energy or impairing our practice?

Can equal access to the justice system become an actuality? What is the role of the Kansas Bar Association in helping attain the aspiration? These are some of the questions the Access to Justice Committee is contemplating along with its future role in the KBA. The Board of Governors recently approved a name change for the former Legal Aid and Referral Committee at the committee’s request. Many of us who have served on the committee for a number of years have considered our role one of encouraging equal access to the justice system. We felt that we had a broader scope and vision than the original committee name contemplated. In helping to determine our priorities for the upcoming year, we are considering the latest publication of the Kansas Legal Needs Assessment (KLNA).¹

The KLNA was the first assessment to address statewide civil legal needs for low-income Kansans and was specifically intended to guide future policy decisions.

Not surprisingly, the key finding was that lack of funding for new or existing programs is the greatest barrier to providing legal services to low income Kansans. This includes a lack of funding for the judiciary as well as legal services and public education. The gem in the KLNA that has not been a point of focus in the past is that if we can increase public knowledge and awareness of existing resources, many situations may be resolved without formal legal assistance. To that end, the Access to Justice Committee is attempting to gather and disseminate resources to the public in addition to its other projects.

On the following page is an initial list compiled by Kansas Legal Services. It is “copy” friendly and one of the least expensive and simplest ways you can support equal access to justice. Copy this list for people you cannot take on as a client. If you have the chance, volunteer to be a speaker and hand it out at a local organization meeting. Put it at your church information desk. If you can’t help, maybe someone else can.

“Although most Americans, including most lawyers, now endorse legal assistance in principle, their enthusiasm remains selective in practice.”² But the practical problem with this aspiration is that aspirations don’t always provide political support for funding. Neither do they spur some members of our profession to contribute financially or through time. So what can we do to support equal access to justice in a way that fits with our personal and professional goals? Let me count the ways! First, go to the KBA’s Public Resources link on the association’s Web site at www.ksbar.org. There you will find multiple ways to help:

• Volunteer for pro bono work;
• If you are an approved mediator, volunteer to be part of the Fee Dispute Program;
• Become part of the Volunteer Nonprofit Board Participation Program;
• Assist with Project Call-Up; or
• Hit the link to be part of the KLS Lawyer Referral Program.

Not only is work in any of these programs satisfying, but it also enhances the positive perception of our profession. Even if you participate in these programs, you are not bound to work every time you are asked. Just as in regular practice, if you do not have the time or the expertise for a particular matter, you may defer. If you do nothing else, go to the Web site and become informed about these programs. They can become part of your resource list.

There are other ways to support equal access to justice that you may not have considered. Almost every committee at the KBA discusses access to justice even if not in those words. Pick your interest and support it through your service to the bar — all you have to do is call!

If you don’t have an IOLTA account, get one — it’s painless and free! IOLTA money is used for a variety of grants promoting access to justice. Become a Fellow of the Kansas Bar Foundation. It too, provides grants to improve the justice system and public awareness in Kansas.

If you are political, support adequate funding of the courts through legislative work. Educate your neighbors to the need. Speak about the system positively, but point out its needs. Do pro bono work when you are able, whether it is through the KBA or on your own.

Access to justice should be equal, but that is still an aspiration. Here in Kansas we have done a fine job of organizing programs and services, but we are not meeting the needs of Kansans. Consider new ways to enhance the system, expand your services, and help us work toward equal access to justice.

FOOTNOTES

1. Fosse, Paden & White, 2004 Kansas Legal Needs Assessment, compiled by the University of Kansas Department of Sociology and Kansas Legal Services.

About the Author

Katherine L. Kirk, Lawrence, practices in family law, professional malpractice, personal injury, employment, education, and disability issues. She is also a consultant, arbitrator, mediator/facilitator, conciliator, and domestic case manager.

She received her B.S. from the University of Kansas, 1971; M.S. from Creighton University, 1980; and J.D. from Washburn University School of Law, 1993.
Legal Resources for Kansans

Kansas Legal Services – (800) 723-6953
This is a toll-free intake line for access to all KLS programs and offices. Priority cases include domestic violence victims, adults and children seeking federal disability benefits, family law matters, and general civil legal advice. Income restrictions may apply. Some services by private attorneys on a pro bono or reduced-fee basis. More information is available at www.kansaslegalservices.org.

Access to Justice Advice Line (Referrals from court personnel only) – (800) 675-5860
The advice line is intended to assist court clerks in serving pro se (self-represented) litigants. Income restrictions apply. The advice line is funded through the Office of Judicial Administration.

Elder Law Hotline – (888) 35-ELDER or (888) 353-5337
Legal advice and representation for Kansans over age 60. Telephone advice services are provided through Senior Law Projects (KLS) or volunteer attorneys.

Foster Care Helpline – (877) 298-2674 or (785) 234-8345
The helpline provides access to legal advice for foster parents and children in foster care. Also connects people with the Guardian Ad Litem Support Center, which provides advice and litigation support to court-appointed counsel in child welfare cases and is funded through the Office of Judicial Administration.

Kansas Bar Association Lawyer Referral Service and Lawyer Advice Line – (800) 928-3111
Refers people interested in hiring attorneys. KLS’ Lawyer Advice Line provides legal advice to callers for a per minute charge.

Midland Mediation Services – (316) 265-7697 or (785) 232-5348
This provides access to low- or no-cost mediation services to resolve family law or civil rights and employment matters.

Migrant Legal Services – (800) 362-9009 (Western Kansas) or (800) 479-6520 (Kansas City area)
This provides special access for migrant communities in Kansas. Services include wage claims, domestic violence, public benefits, education issues, and other concerns.

Other Legal Resources

Douglas County Legal Aid Society – (785) 864-5564
Legal advice for variety of case types, provided by supervised University of Kansas law students. Free for those meeting financial guidelines.

Federal Trade Commission – (877) FTC-HELP or (877) 382-4357
This resource is for identity theft issues. Materials are available at www.ftc.gov.

Kansas Agricultural Mediation Service (KAMS) – (800) 321-3276
KAMS provides services for financially distressed Kansas farmers, including financial and legal consultation in support of lender mediation issues. Legal and employment services are provided by Kansas Legal Services.

Kansas Attorney General Consumer Protection Division – (800) 432-2310
This division investigates complaints of deceptive, unconscionable, and anti-competitive business practices. Complaints must be in writing. Forms are available at www.ksag.org.

Kansas Crisis Hotline – (888) END-ABUSE or (888) 363-2287
This hotline is a toll-free, 24-hour, statewide domestic violence hotline. The hotline links victims of violence and sexual assault to crisis programs across Kansas. Services are confidential and include crisis intervention and referral to shelters and programs.

Kansas Human Rights Commission – (785) 296-3206
The commission investigates complaints of discrimination in employment, housing, or public accommodations. Complaints must be in writing. Forms are available at www.khrc.net.

Washburn Law Clinic – (785) 670-1191
Legal representation provided in Shawnee County by specially licensed law students, under supervision of clinic faculty attorneys.
Looking Ahead to the New Bar Year

By Paul T. Davis, KBA Young Lawyers Section president

Most Kansas lawyers are probably unaware that a new bar year is upon us. At the recent Annual Meeting of the Kansas Bar Association new officers were installed, including a new president of the Young Lawyers Section (YLS). As Dave Rebein of Dodge City assumed the presidency of the KBA, I am fortunate to be able to serve as the 2006-2007 president of the YLS.

As I look forward to the next eleven months, I want to thank those who served as officers in the YLS during 2005-2006. Most especially, I want to express my appreciation to Chris Masoner for the tremendous job he did as YLS president. I have very big shoes to fill. Chris devoted countless hours to improving the Young Lawyers Section during a year when he changed jobs, moved from Lawrence to Johnson County, and broke his leg. This is truly a remarkable accomplishment.

I am pleased to report that we have a very active group of young lawyers in Kansas. When I got involved with the KBA YLS in 1999, we would often have to do a lot of recruiting to fill all the officer positions. This year, very little recruitment was necessary because we had a significant number of people who proactively expressed their interest in assuming an officer position.

The hallmark of the YLS has been the mock trial competition that we have conducted for many years. Every spring, high school students from all across Kansas learn about what it is like to be a lawyer and to prepare for and conduct a trial. I have no doubt that many Kansas lawyers were partially driven toward a career in the law by participating in the mock trial competition.

Putting on this competition is a significant undertaking. Dozens of volunteer lawyers are needed to serve as judges, and many others are required just to communicate with the high schools. I have served as a judge several times and have always found it to be a very rewarding experience. The high school students really put a great deal of time into their trials. Quite frankly, I’ve found that the knowledge of the rules of evidence that some students possess is maybe even greater than many lawyers.

Chelsey Langland of Topeka will be serving as the mock trial coordinator for the YLS this year. I hope that when Chelsey or another member of YLS contacts you to serve as a judge or volunteer for the mock trial competition, you will gladly participate. It is a great way to give something back to the profession and to help pique the interest of high school students in a career in the law.

Amy Fellows Cline has done a superb job with the mock trial program for the past two years. We are fortunate that Amy will be continuing her service with the KBA YLS as president-elect for this coming year.

In a few days, the KBA YLS officers will have a retreat to plan our activities for the coming months. We hope to take on another public service project or two, in addition to the mock trial competition. In an age where the perception of lawyers has taken a beating, young lawyers need to do their part to enhance the image of our profession. Through my involvement with the American Bar Association Young Lawyers Division, I have been exposed to a number of public service projects that have made a difference in how people perceive our profession.

It is especially important to reach out to students and show them that the law is an honorable profession, which contributes significantly to society’s betterment.

Another of our goals this year is to help young lawyers build a better connection to the profession as a whole. Many young lawyers who have families find it difficult to network within the bar and therefore feel disconnected. We have had a mentoring program for many years that helps to connect young lawyers with more senior members of the bar. My hope is to build that program this year so that even more young lawyers have the opportunity to get better acquainted with other members of the bar.

Perhaps most importantly, we want to help cultivate the future leaders of the Kansas Bar Association. Many members of the KBA Board of Governors got their start in bar involvement with the young lawyers section. I was extremely pleased to see one of our former presidents, Eric Kraft, get elected to the KBA Board of Governors this year. There is no doubt that Eric wouldn’t have decided to run for a seat on the Board of Governors if it hadn’t been for his involvement in the YLS.

I hope, we can cultivate future KBA presidents, members of the Board of Governors, and active bar association members by demonstrating to young lawyers in Kansas that bar involvement is personally rewarding and helps us to give back to a profession that has given us so much. I look forward to another great bar year for the KBA Young Lawyers Section!

Paul T. Davis is a partner with the firm of Meyer & Davis LLC, Lawrence. He may be reached by phone at (785) 843-7674 or by e-mail at pauldavis@sunflower.com.
The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for April, May, and June. Your commitment and invaluable contribution is truly appreciated.

**2006 Outstanding Speakers Recognition**

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for April, May, and June. Your commitment and invaluable contribution is truly appreciated.

**Professor James M. Concannon III**, Kansas Court of Appeals, Topeka

**Tamara L. Davis**, Tamara L. Davis

**Sue Dickey**, Kansas Lawyers Assistance Program, Olathe

**Professor Martin B. Dickinson**, University of Kansas School of Law, Lawrence

**Patrick H. Donahue**, Midland Professional Association, Lawrence

**David M. Eisenberg**, Baker Stetch Cowden & Rice L.L.C., Kansas City, Mo.

**James L. Eisenbrandt**, Berkowitz Oliver Williams Shaw & Eisenbrandt L.P., Prairie Village

**Charles T. Engel**, Engel & Geier P.A., Topeka

**Steven R. Fabert**, Fisher, Patterson, Sayler & Smith L.P., Topeka

**Roger D. Fincher**, Bryan Lykins Hejtmank & Fincher, Topeka

**Nola Tedesco Foulston**, District Attorney for the 18th Judicial District of Kansas, Wichita

**Webster L. Golden**, Stevens & Brand, LLP, Lawrence

**Stephanie E. Goodenow**, Goodenow & Moore L.L.C., Leawood

**Anthony L. Gossrmond**, King Hershey P.C., Kansas City, Mo.

**Ruth E. Graham**, Attorney at Law, Topeka

**Stacey J. Gunya**, Dwyer Dykes & Thurston L.C., Overland Park

**Patricia E. Hamilton**, Wright, Henson, Dwyer Dykes & White P.C., Topeka


**Hon. Michael B. Buser**, Kansas Court of Appeals, Topeka

**Hon. Stephen D. Hill**, Kansas Supreme Court, Topeka

**James L. Eisenbrandt**, Berkowitz Oliver Williams Shaw & Eisenbrandt L.L.P., Prairie Village

**Toby J. Crouse**, Shook, Hardy & Bacon L.L.P., Overland Park

**Robert M. Collins**, Collins & Collins, Wichita

**Robert W. Cokendall**, Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita

**Toby J. Crouse**, Shook, Hardy & Bacon L.L.P., Overland Park

**Hon. Robert E. Davis**, Kansas Supreme Court, Topeka

**Hon. Janice Miller Karlin**, U.S. Bankruptcy Court, Topeka

**Hon. Anne M. Kindling**, Goodell, Stratton, Edmonds & Palmer L.L.P., Topeka

**Professor J. M. Kondev**, Stinson Morrison Hecker L.L.P., Kansas City, Mo.

**Eric G. Kraft**, Duggan Shadwick Doerr & Kurlbaum P.C., Overland Park

**Hon. Edward M. Larson (Ret.)**, Kansas Supreme Court, Topeka

**Nathan D. Leadstrom**, Goodell, Stratton, Edmonds & Palmer L.L.P., Topeka

**L. J. Leatherman**, Palmer, Leatherman, & White L.L.P., Topeka

**Charles D. “Chuck” Lee**, Martinell Swaree & Shaffer L.L.P., Hutchinson

**Hon. Marla J. Luckert**, Kansas Supreme Court, Topeka

**James Scott MacBeth**, Hinkle Elkouri Law Firm L.L.C., Wichita

**Kay Madden Slough**, Connealy, Irwin & Madden L.L.C., Kansas City, Mo.

**T. Bradley Manson**, Manson & Karbank, Overland Park

**Christopher J. Masonner**, Blackwell Sanders Peper Martin L.L.P., Kansas City, Mo.

**Hon. Patrick D. McAnany**, Kansas Court of Appeals, Topeka

**Michelle L. Miller**, Alderson, Alderson, Weiler, Conklin, Burghart, & Crow L.C., Topeka

**Tim J. Moore**, Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita

**Tiffany Muller**, Kansas Equality Coalition, Topeka

**Thomas V. Murray**, Lathrop & Gage L.C., Overland Park

**Bruce A. Ney**, SBC Management Services Inc., Topeka

**Patrick Nichols**, Associates in Dispute Resolution L.L.C., Topeka

**K. Kirk Nystrom**, Attorney at Law, Topeka

**Shannon C. Oury**, Stevens & Brand L.L.P., Lawrence

**Carolyn L. Payne**, Cavanaugh, Smith & Lemon P.A., Topeka

**Dan C. Peare**, Hinkle Elkouri Law Firm L.L.C., Wichita

**Professor John C. Peck**, University of Kansas School of Law, Lawrence

**Ryan M. Peck**, Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita

(Continued on Page 18)
Recognition of 2005 Journal Authors

The Kansas Bar Association and its Journal Board of Editors would like to extend a special thank you to the following authors who gave their time and expertise in writing substantive legal articles for the Journal of the Kansas Bar Association. Your commitment and contribution is greatly appreciated.

Kevin J. Breer, Polsinelli Shalton Welte Suelthaus P.C., Overland Park, “The Economic Loss Rule in Kansas and its Impact on Construction Cases” (June)

James W. Clark, Kansas Bar Association, Topeka, “2005 Legislative Wrap Up” (July/August)

Amy Fellows Cline, Tripplet, Woolf & Garretson LLC, Wichita, “The Untapped Potential of the Kansas Consumer Protection Act” (April)

Martin Dickinson, University of Kansas School of Law, Lawrence, “The Kansas Estate Tax Problem” (November/December)

Scott R. Ediger, Kansas Corporation Commission, Topeka, “Elect or Instruct: Preventing Evidence of Multiple Acts from Threatening Juror Unanimity in Criminal Trial” (May)

Jack Focht, Foulston Siefkin LLP, Wichita, “Representing the Impaired Lawyer” (September)

Kathleen Harvey, Overland Park, “Immigration Law Update for Employment, Corporation, and Business Lawyers” (October)

Michael R. Heim, Kansas Legislative Research Department, Topeka, “Home Rule: A Primer” (January)

Mark D. Hinderks, Stinson Morrison Hecker LLP, Overland Park, “On the Proper State of Things: Multijurisdictional Practice for the Kansas Practitioner” (February)

Wyatt A. Hoch, Foulston Siefkin LLP, Wichita, “The Kansas Residential Construction Defect Act: A Schematic Blueprint for Repairs” (March)

Michael H. Hoeflich, University of Kansas School of Law, Lawrence, “Legal Ethics and Depression” (September)

Matthew H. Hoy, Stevens & Brand LLP, Lawrence, “Powerful Powers Under the Kansas Power of Attorney Act” (June)

Alfred Hupp, Lathrop & Gage L.C., Kansas City, Mo., “Immigration Law Update for Employment, Corporation, and Business Lawyers” (October)


Eric G. Kraft, Duggan, Shadwick, Doerr & Kurlbaum P.C., Overland Park, “Testing the Waters of the Kansas Mechanic’s Lien” (May)

Mira Mdivani, Mdivani Law Firm LLC, Overland Park, “Immigration Law Update for Employment, Corporation, and Business Lawyers” (October)

James P. Pottorf Jr., University of Kansas, Lawrence, “The Servicemembers Civil Relief Act: A Modern Replacement for the SSCRA” (October)

Justin D. Pulikkan, Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo., “The Economic Loss Rule in Kansas and its Impact on Construction Cases” (June)

Teresa L. Sittenauer, Fisher, Patterson, Sayler & Smith LLP, Topeka, “Use it or Lose it — Giving Notice of Tort Claims to Municipalities Under K.S.A. 12-105b[d]” (March)


The National Center for State Courts has asked for assistance in completing a survey of jury practices in all states for a new project, the National Program to Increase Citizen Participation in Jury Service. This is a multiphase project designed to promote public awareness and understanding of the jury system and to support state and local courts in their efforts to improve the jury system. It will result in the first-ever encyclopedia of jury trial practices in every general jurisdiction state court in the nation.

To ensure that Kansas is accurately portrayed in the areas of jury system management and jury trial procedures, Chief Justice Kay McFarland asks that you take a few minutes to complete the “Judge and Lawyer Survey,” which you can access online at http://www.ncsconline.org/d_research/practitionersurvey/. It is preferred that surveys be completed online. If you have any problems with that process, feel free to e-mail your questions to Kathleen Porter, Office of Judicial Administration, at porterk@kscourts.org.

Those who have already taken the survey say it requires no more than 10 minutes to complete. Chief Justice McFarland thanks you in advance for your participation in this valuable project.
**Members in the News**

**CHANGING POSITIONS**

Kevin W. Babbit and Mark B. Rockwell have joined Knox, Johnson, Rockwell & Babbit Chtd., Lawrence, as members.  
Brian R. Johnson has been promoted to a member of the firm.  
Steven B. Becker has been named as a partner at Bryan Cave LLP, Kansas City, Mo.  
Gregory T. Benefiel has joined prosecution division of the Overland Park City Attorney’s Office.  
Erin Bond Knoska has joined BAR/BRI Group, Chicago.  
Richard A. Buck has joined the Reno County Public Defender’s Office.  
John R. Bullard has been named Cherryvale city attorney.  
Randy R. Debenham has joined Scott, Quinlan, Willard, Barnes & Keeshan, Topeka.  
Amy M. Decker, Kenneth R. Lang, and Scott R. Schillings have joined Hinkle Elkouri Law Firm LLC, Wichita, as members.  
Geron J. Bird has joined the firm as an associate.  
Monte R. Green has joined Ryan & Mullin LLC, Clay Center.  
Robert D. Grossman has joined Lathrop & Gage L.C., Kansas City, Mo.  
Bridget M. Guth has joined the office of the Missouri Secretary of State.  
W. Joseph Hatley has joined Spencer Fane Britt & Brown LLP, Kansas City, Mo., as a partner.  
Michael J. Hoes has joined the firm’s Overland Park office as an associate and Eric P. Kelly has joined the firm’s Kansas City, Mo., office as an associate.  
Harry H. Herington Jr. has become president of NIC Inc., Olathe.  
Seanna L. Higley has joined Ward North America, Fairway.  
John C. Kennyhertz has joined the Overland Park office of Wallace Saunders Austin Brown & Enochs Chtd.  
Timothy C. Klink has joined Husch & Eppenberger LLC, Kansas City, Mo., as an associate.  
Richard J. Libby has joined Ruegsegger Simons Smith & Stern LLC, Denver.  
David S. Lockett has joined Martin, Pringle, Oliver, Wallace & Bauer LLP, Overland Park.  
Stephen R. McAllister has become general counsel of the Kansas Legislature.  
Thomas J. McGrath has joined the Elder & Disability Law Firm P.A., Overland Park.  
Mary M. McSheeters has been elected a partner with Stinson Morrison Hecker LLP, Wichita.  
Jeremey A. Moseley has joined the staff of U.S. Magistrate Judge Michael E. Hegarty, Denver.  
Tricia M. Oldridge has joined the Sedgwick County District Attorney’s Office.  
Sally D. Pokorney has joined the Law Offices of David J. Brown L.C., Lawrence.  
Gary L. Price Jr. has joined the McPherson County Attorney’s Office as assistant county attorney.  
Daniel Richardson has joined American Century Investments, Kansas City, Mo.  
Burke D. Robinson has joined Long, Luder & Gordon P.A., Overland Park.  
John R. Schotts has joined Gates, Biles, Shields & Ryan P.A., Overland Park.  
Robin E. Scully II has joined 20/20 Financial Consulting, Broomfield, Colo.  
Kyle R. Skillman has joined Bond, Schoeneck & King PLLC, Overland Park, as an associate.  
Eric B. Smith has joined the city of Topeka as assistant city attorney.  
Michael D. Smith has joined Sanders, Conkright & Warren LLP, Overland Park.  
Mark A. Stites and Pascale L. Henn Zaldivar have joined Embarrq Corp., Overland Park.  
Kelly S. Sullivan-Deadly has joined Polsinelli Shalton Welte P.C., Kansas City, Mo.  
Curtis R. Summers has joined Blackwell Sanders Peper Martin LLP, Kansas City, Mo., as an associate.  
Robert M. Swiss has joined Martin, Leigh, Laws & Fritlen P.C., Kansas City, Mo., as an associate.  
Reginald L. Taylor has joined Total Sodding & Seeding Inc., Belton, Mo.  
Krystal K. Woodbury has become a member at Rhodes Woodbury LLC, Highlands Ranch, Colo.  

**CHANGING PLACES**

Jerry D. Bell has started the Bell Law Firm, 9308 W. 146th Terrace, Overland Park, KS 66221.  
Diane M. Breneman has started the Breneman Law Firm LLC, 2600 Grand Blvd., Suite 550, Kansas City, MO 64108.  
Hon. Rawley J. “Judd” Dent has started Penn Avenue Law, 201 N. Penn Ave., P.O. Box 467, Independence, KS 67301.  
William F. Kluge has started William F. Kluge Chtd., 1005 N. Market St., P.O. Box 454, Wichita, KS 67214-0454.  
Victor C. Panus has a new business address, 10034 N. Ambassador Dr., Kansas City, MO 64153.  
G. Hal Ross has a new business address, Bank of America Center, 100 N. Broadway, Suite 455, Wichita, KS 67202-2212.  
Unruh & Pratt have moved to 833 N. Waco, Wichita, KS 67201.  
Ward Law Offices LLC have moved to 345 Riverview, Suite 120, Wichita, KS 67203.  
Deborah C. Westphal has started Westphal Law Office PLLC, 5909 Martway St., Suite 100, Mission, KS 66202.  

**MISCELLANEOUS**

Hon. Karen Arnold-Burger, Overland Park Municipal Court, received the Justinian Award for Professional Excellence from the Johnson County Bar Association.  

(continued on next page)

Dan’s Cartoon by Dan Rosandich

“I’m not kidding ... my client is really insane!”
Edward L. Brown Jr.
Edward L. Brown Jr., 71, Wichita, died March 30. He was born Nov. 20, 1934, in Elizabeth, N.J.
Brown graduated from Case Institute of Technology in Cleveland in 1956 and received his juris doctorate from the University of Denver. After serving a short tour with the Navy Air Corps, he served eight years in the Navy Air Corps Reserve. He practiced patent law for 37 years in Wichita and was a member of the Kansas Bar Association, joining in 1964.

Survivors include his wife, Peggy, of the home; sons, Dylan, Kansas City, Kan., and Aaron, Denver; daughter, Jocelyne, Santa Fe, N.M.; stepson, Doug Burtt, Denver; stepdaughters, Melissa Burtt, Spokane, Wash., and Martha Serven Clark, Bellingham, Wash.; sisters, Anne Manning, Cleveland, and Constance Guild, Summit, N.J.; and five grandchildren.

J. Roger Hendrix
J. Roger Hendrix, 67, Topeka, died April 9. Hendrix was born Oct. 6, 1938, in Coffeyville, the son of Clark and Josepine Cole Hendrix.

Hendrix earned his bachelor’s degree from the University of Kansas in 1960 and his juris doctorate from Washburn University School of Law in 1964.

Hendrix was a member of the Kansas and Topeka bar associations, joining the KBA in 1964. He was licensed to practice law in the U.S. Court of Claims, the U.S. District Court for the District of Kansas, and the 10th U.S. Circuit Court of Appeals. He practiced law for more than 40 years in Topeka, where he was a member of Bennett & Hendrix LLP.

He is survived by his wife, Jan Buening Edwardson, of the home; one son, Eric Edwardson, Beaumont, Texas; three daughters, Jennifer Hendrix Nelson, Durango, Colo., Traci Edwardson Callandrillo, Austin, Texas, and Sarah Hendrix, Tuscon, Ariz.; two brothers, Cole, Keswick, Va., and Richard, Coffeyville; and four grandchildren. His son, Andy, preceded him in death.

Dalton T. Holland
Dalton T. Holland, 84, Harper, died May 8. He was born Jan. 11, 1922, in Harper, the son of Joseph T. and Mabel Elliott Holland. He practiced law for 40 years and was Harper city attorney for 33 years.

He was a lifetime member of the Kansas Bar Association, joining in 1949. He is also a member of the American Bar Association, Veteran of Foreign Wars, American Legion, and Masons.

Survivors include his wife, Mary Wilmetta Paschal, of the home; two sons, Joe, Redlands, Calif., and John, Ottawa; three daughters, Bonita Winer, Bethesda, Md., Rebecca Holland, Tulsa, Okla., and Sara Holland Adams, San Antonio; and eight grandchildren.

Roger H. Morse
Roger H. Morse, 91, Marion, died April 3. He was born Jan. 3, 1915. A veteran of the Air Corps during World War II, he was a retired lawyer who practiced in Marion for 50 years. Morse became a lifetime member of the Kansas Bar Association in 1991.

Survivors include his wife, Marie, of the home; son, Dick, Springfield, Ill.; daughter, Jean Slater, Guffey, Colo.; six grandchildren; and two great-grandchildren.

John R. Toland
John R. Toland, 61, Iola, died June 2 at the University of Kansas Medical Center. He was born Oct. 7, 1944, in Iola, the son of Stanley E. and June Thompson Toland.

He graduated from the University of Kansas with his bachelor’s degree in 1966. He attended law school at KU, where he served as editor in chief of the *Kansas Law Review* and graduated in 1969 as a member of the Order of the Coif.

Toland served four years as a captain in the Army’s Judge Advocate General’s Corps. He later served with the Army Defense Appellate Division in Washington, D.C.

In 1973, he joined the firm of Toland & Thompson. He was a member and past president of the Allen County Bar Association, was a member of the Kansas and American bar associations, and a Fellow of the Kansas Bar Foundation.

Toland served on the board of trustees of the Allen County Hospital. He was a member and president of the Iola Public Library Board, Iola Rotary Club, and a Paul Harris Fellow of Rotary International. He was also a member of the American Legion, Veteran of Foreign Wars, Allen County Historical Society, Kansas State Historical Society, KU Alumni Association, Friends of the Eisenhower Foundation, and a director of the Iola United Fund and Iola Area Symphony Orchestra.

Survivors include his wife, Karen, of the home; his mother, Iola; three sons, Mark, Scott, and Kent, all of Iola; a daughter, Carol, Lawrence; and a brother, Clyde, Iola.

Members in the News

(Continued from Page 16)

Richard T. Bryant, Richard T. Bryant & Associates, Kansas City, Mo., was elected state chancellor for the Missouri Society of the Sons of the American Revolution.

Gloria Farha Flentje, Spirit AeroSystems Inc., Wichita, and Jack Focht, Foulston Siefkin LLP, Wichita, were honored with the Donna E. Sweet Humanitarian of the Year Award at the second annual Evening of Note.

Laure L. Ice, Cessna Financial Corp., Wichita, has been elected president of the Wichita Bar Association.

Jeff Kennedy, Martin, Pringle, Oliver, Wallace & Bauer LLP, Wichita, has been named to the Kansas Energy Council by Gov. Kathleen Sebelius.

Joe A. Lang, Wichita, has been named to the board of trustees of Sterling College.

Chief Justice Kay McFarland, Kansas Supreme Court, Topeka, received the Distinguished Alumni Award from the Washburn Law School Association; H. Allan Caldwell, Wichita, received the Distinguished Service Award; and Dean Dennis R. Honabach, Washburn University School of Law, Topeka, was the recipient of an Honorary Life Membership.

John M. Parisi, Shamberg, Johnson & Bergman Chtd., Kansas City, Mo., has been elected chair of the Sole Practitioner and Small Firm Section of the Association of Trial Lawyers of America.

Hon. Julie A. Robinson, U.S. District Court for the District of Kansas, received the Women’s Pioneer Award from the Washburn University Black Law Student Association at its Recognition Banquet and Hon. Gregory L. Waller, Sedgwick County District Court, received the Superior Achievement in the Law Award.

Editor’s note: *It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.*
2006 Outstanding Speakers Recognition
(Continued from Page 14)

J. Scott Pohl, Hinkle Elkouri Law Firm LLC, Wichita
Robert T. Reader, National Institute for Strategic Technology Acquisition and Commercialization, Manhattan
Craig C. Reaves, Reaves Law Firm P.C., Kansas City, Mo.
Ryan Reeves, Shook, Hardy & Bacon LLP, Kansas City, Mo.
Professor Sheila M. Reynolds, Washburn University School of Law, Topeka
Cailin Farrell Ringelman, Woner Glenn Reeder Girard & Riordan P.A., Topeka
Rachel B. Rubin, Rubin Law Firm LLC, Leawood
Alan L. Rupe, Kutak Rock LLP, Wichita
Hon. Janice D. Russell, Johnson County District Court, Olathe
Larry R. Rute, Associates in Dispute Resolution LLC, Topeka
Nancy Schmidt Roush, Shook, Hardy & Bacon LLP, Kansas City, Mo.
Steve A. Schwarm, Polsinelli Shalton Welte Suelthaus PC, Topeka
Mark A. Scott, Wichita
Hon. K. Gary Sebelius, U.S. District Court for the District of Kansas, Topeka
W. Michael Sharma-Crawford, Sharma-Crawford Attorneys at Law LLC, Overland Park
Betty Sharon, Shook, Hardy & Bacon LLP, Kansas City, Mo.
Cynthia L. Shepheard, Weathers and Riley, Topeka
Douglas T. Shima, Kansas Court of Appeals, Topeka
John W. “Jay” Simpson, Shook, Hardy & Bacon LLP, Kansas City, Mo.
Wesley F. Smith, Stumbo, Hansen & Hendricks, Topeka
Dr. Scott D. Stacy, Acumen Assessments, Lawrence
Charles C. “Chris” Steincamp, Depew Gillen Rathbun & McInteer LC, Wichita
Hon. Franklin Theis, Shawnee County District Court, Topeka
Roger L. Theis, Morris, Laing, Evans, Brock & Kennedy Chartered, Wichita
Jana L. Torok, Shook, Hardy & Bacon LLP, Overland Park
Professor Andrew W. Torrance, University of Kansas School of Law, Lawrence
Wallace W. “Wally” Underhill, Attorney at Law, Wichita
Brian M. Vazquez, Estate Recovery Program, State of Kansas, Topeka
Gabriela Amanda Vega, Attorney at Law, Topeka
Professor James B. Wadley, Washburn University School of Law, Topeka
T. Lynn Ward, Ward Law Offices LLC, Wichita
Professor Nathan B. Webb, Washburn University School of Law, Topeka
Alice Craig White, Paul E. Wilson Defender Project – University of Kansas School of Law, Lawrence
Angela M. Wilson, Douglas County District Attorney’s Office, Lawrence
Matthew Wiltanger, Shook, Hardy & Bacon LLP, Overland Park
Douglas P. Witterman, Coffey County Attorney, Burlington
Colin D. Wood, Kansas Highway Patrol, Caldwell
Molly Mead Wood, Stevens & Brand LLP, Lawrence
Rebecca E. Woodman, Kansas Capital Appellate Defender’s Office, Topeka
Thomas E. Wright, Wright, Henson, Clark, Hutton, Mudrick & Gragson LLP, Topeka
Ronald E. Wurtz, Federal Public Defender, Topeka

ALWAYS HERE FOR YOU

ALPS RRG is your Kansas Bar Association endorsed professional liability insurer.

When Kansas bar leadership asked ALPS to support the expansion of the Kansas Law Center, we were proud to take a significant role in the “Raising the Bar” campaign.
I do not know how lawyers sleep at night. After more than 20 years in the engineering profession, I decided to go to law school. I attribute this decision to a momentary lapse of reason. Not only am I sleep-deprived because of the usual law school stuff, like homework and reading what seems to be hundreds of cases a week, but I also have thousands of questions — and no answers — running through my mind throughout the night. My thoughts are racing like NASCAR on speed. Three years of this and my brain might short circuit.

Before law school, I had nagging legal questions pertaining to the engineering profession. Most of them dealt with liability and ethical issues. For example, if an engineer is a subcontractor to a builder who is performing a design/build project, and the builder changes the design without the designer’s knowledge or consent, is the designer still liable for the design? Does a designer have a duty to follow updated codes when a municipality has failed to adopt newer codes in a timely manner, even though compliance with the new codes may significantly impact the cost of the project? Can a firm acting as a city engineer be hired by the same city to provide design services on major projects? What if the firm commits an error or omission in the design that violates a code or ordinance? As city engineer, the firm would have the power to waive the requirements. Is it a conflict of interest for the firm, acting in this dual capacity, to recommend approval and payment for additional design services required to correct the error?

I was hoping to get answers to these questions while in law school; however, I am afraid that my legal questions have become less specific, and I have become more tortured. Now I have other questions that stir up a range of emotions and a level of disturbance that I did not anticipate from law school.

Until a few weeks ago, I can honestly say that I had not thought about the Constitution since I had to learn the Preamble to graduate from eighth grade. The fact that I cannot seem to comprehend the numerous theories on how the Supreme Court makes decisions is irrelevant when my head is swimming with thoughts of the Brown v. Board of Education decision and the “what ifs.” What if the Court had not overturned Plessy v. Ferguson — would our schools still be segregated, or would they have become integrated with time anyway? Would we be a more or less tolerant society? Would there be a need for affirmative action?

Of course, Brown did overturn Plessy in 1954. As I grew up, I did not see what the big fuss was about. After all, our schools in Illinois were desegregated right after ratifying the 14th Amendment in 1868. Yet, for as long as I can remember, desegregation problems in St. Louis made the nightly news. Throughout my school years (1967-1980), several headlines — including Vietnam, Watergate, and the Equal Rights Amendment — came and went, but through it all, desegregation was still a nightly topic.

Today it could be argued that a fair amount of school segregation still exists due to “population trends.” As we stop bussing, build magnet schools, and debate over school vouchers, I question how far we have come since the Brown decision. These issues, coupled with the recent “chocolate city” comments by the mayor of New Orleans, make me ask whether we have truly achieved integration, or whether we have instead just pushed segregation and racism beneath the surface to a socially tolerable level.

In the design and construction world, does affirmative action really help women and minorities in federal and state contracting, or does it provide an avenue to legally limit their participation in projects to minimally acceptable participation goals? Women and minority firms are usually the subcontractor and rarely the prime (“always the bridesmaid, never the bride”).

Are we segregated based on race, or is our current state of segregation based more on economic status? If we, as a society, are segregated along economic lines, how do we change this situation? Do we provide more money to economically depressed areas? This approach did not seem to work with the magnet schools in the Kansas City, Missouri School District. Do we change our planning and zoning regulations? Implement neighborhood revitalization plans? Does planning and zoning even matter given the existence of private covenants, such as neighborhood servitude restrictions imposed by homeowners’ associations, which effectively segregate our communities into social classes?

In urban planning, how do we curtail the economic segregation imposed by private developments? How should we design and build communities to accommodate all income levels to avoid the social and economic problems of the past? How do we rebuild the Louisiana parishes destroyed by Hurricane Katrina?

I truly miss the nights when the only problems I tried to solve in my sleep were physics or differential equations. At least when I woke up, I could write down the answers.

About the Author

Kristina Blevins is beginning her second year at Washburn University School of Law. She has a B.S. and M.S. in geological engineering from the University of Missouri-Rolla and a Ph.D. in civil engineering from the University of Kansas.

She currently resides in Bonner Springs, where she is president of Blevins and Bradbury Inc., a small woman-owned architectural/engineering design firm. She is also serving as a legal intern for the City of Lawrence.

Blevins is a licensed professional engineer and geologist in Kansas and Missouri with more than 22 years of design and construction experience.

Her hometown is Dorchester, Ill., population 150.
Outstanding Service Awards

The Outstanding Service Awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and to recognize nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

Lt. Col. H.D. Callicotte, Radcliff, Ky., became a member of the KBA in 1990 after receiving his J.D. from the University of Missouri-Kansas City School of Law and passing both the Kansas and Missouri bar exams. He joined the Kansas National Guard while enrolled in law school and was called to active duty during Desert Storm shortly after passing the bar. He spent one year at Fort Knox, Ky.

Following his military service during the Gulf War, he was admitted to the Kentucky bar and opened a practice in Radcliff near Fort Knox. His primary areas of practice are personal injury, family law, and criminal defense. He also routinely conducted pro bono work for the Legal Aid Society of Kentucky, as well as representation of the local chapters of the NAACP and the Korean-American Community.

Since November 2003, Callicotte has been serving with the Multi National Forces of Iraq as a Civil Affairs officer. Prior to his service in Civil Affairs, he served as an armor officer in the U.S. Army Reserve and as an infantry officer in the Kansas National Guard. His prior active duty included service as a paratrooper in the Army’s 82nd Airborne Division. Since

Mary Kathleen Babcock

The Professionalism Award recognizes an individual who has practiced law for 10 or more years and who — by his or her conduct, honesty, integrity, and courtesy — best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession as identified by the KBA Hallmarks of Professionalism. Mary Kathleen Babcock of Wichita is the 2006 recipient.

After teaching history and political science for five years at Highland Community College, Babcock decided to go to law school at the University of Kansas.

After passing the bar, Babcock joined Foulston Siefkin LLP in 1976, where she was the first female attorney in the firm and would later become a senior partner. She advises public and private employers on the wide spectrum of legal issues related to employment; regularly defends federal discrimination cases and represents employers in First Amendment, 14th Amendment, and other Section 1983 litigation; serves as general counsel to school districts and represents both the schools and parents in special education litigation; and serves as a mediator. After 30 years of law practice, Babcock retired in June.

She has served on numerous boards and committees, including 16 years on the Kansas State Board of Discipline of Attorneys, serving as chair since 1995. As a member of the Kansas Bar Association, she served on the KBA's Board of Governors from 1991 to 1995, treasurer from 1993-1994, and two terms as secretary. She has also served on the board of trustees for the Kansas Bar Foundation. She is a member of the KBA Ethics Advisory and IOLTA committees and the Employment Law Section. Babcock also is a member of the Kansas School and Wichita Women attorneys associations and is a fellow of the American Bar Foundation. She is a frequent CLE speaker and co-authored a chapter on employment law in the 1990-1993 editions of the KBA Annual Survey of Law.

Babcock is a past member of the Board of Governors of the University of Kansas Law Society, Merit Selection Panel for Federal Judges, Selection Committee for Federal Magistrates, and the U.S. District Committee on Conduct of Attorneys.

Babcock received the Outstanding Service Award from the KBA in 2001 and was selected, in 2005, by both the “Best Lawyers in America” and “Chambers USA” as a leading employment lawyer in the United States.

Despite her numerous roles in the legal area, Babcock is active in many civic organizations, including serving on the board of trustees of the Wichita Symphony and as a member of the Music Theater of Wichita. She is a past member of the Sedgwick County Zoological Society Inc.

Babcock received a B.A. from Emporia State University in 1965 and a Master of Philosophy in 1972 and her J.D. in 1976, both from the University of Kansas, where she was articles editor for the Kansas Law Review.
arriving in Iraq, he has served as the military liaison between the Coalition Forces of Iraq and the Iraqi Ministry of Oil.

In addition to his law degree, Callicotte holds a B.S. in petroleum engineering from the University of Kansas and an MBA in management from the University of Texas.

Although Callicotte closed his law office when he was deployed to Iraq, he stayed involved in one criminal case in which his client was charged with three counts of child molestation. He believed in his client’s innocence and, based on the mounting evidence, believed that the case would be dismissed. However, the commonwealth set the case for trial. Callicotte asked another attorney to serve as co-counsel; that attorney worked on the case, and they conferred through e-mail and over the telephone. Callicotte conducted a mock trial in Iraq and put together a focus group to help him prepare. He was granted 25 days of leave to complete his preparation for trial and conduct the trial; he returned to Kentucky, where he represented his client at the five-day trial. After only a few hours of deliberations, the jury acquitted Callicotte’s client.

Callicotte expects to be home by the end of the year and will consider re-assignment to Fort Leavenworth.

During his service to his country, Callicotte has received numerous awards and decorations.

Marilyn M. Harp is a Wichita attorney who has been practicing law for 26 years. After graduating from the University of Kansas School of Law in 1979, she returned to Wichita to work at the Legal Aid Society of Wichita Inc. Harp joined Kansas Legal Services in 1984, where she is currently the director of the Wichita office and a regional director. Harp’s career has been dedicated to providing legal assistance to low-income persons and to promoting equal access to justice.

Since she began her legal career, Harp has been involved in the Kansas Bar Association. She currently serves on the Legal Aid and Referral and Diversity committees and is a past member of the Continuing Legal Education Committee. From 1994 to 2000 she served on the KBA Board of Governors and its Executive Committee. Harp currently supervises the KBA’s Lawyer Referral Service and the Elder Law Hotline. She was the key person responsible for the development and implementation of the Elder Hotline.

She has always been active in a wide range of community service organizations. These include the Wichita/Sedgwick County Domestic Violence Coalition, the Senior Citizens Law Care Project, chair of Operation Holiday, the Homestead Health Center, co-chair of the Women’s Equality Coalition, and the board of directors of Step Stone.

Harp played a key role in developing the innovative special procedures used in Sedgwick County for the fair and prompt disposition of protection from abuse (domestic) cases. She is an adjunct faculty member at Wichita State University, where she teaches a course related to women’s issues in law. She is known for always being willing to provide assistance to other attorneys, for her dedication to helping disadvantaged citizens, and her tireless support of the organized bar.

She received her bachelor’s degree in 1976 from the University of Kansas and her juris doctorate in 1979 from the University of Kansas School of Law.

Glenn I. Kerbs is a solo practitioner at Kerbs Law Office in Dodge City, who also happens to be the Ford County counsel, the Dodge City Community College Board attorney, and the Unified School District 381 Board attorney.

Originally from Tampa, Kan., he earned his bachelor’s degree from Bethany College, Lindsborg, in 1975 and his juris doctorate from Washburn University School of Law in 1978.

Many of his colleagues in the Ford County area say that he is a passionate advocate for his clients’ interests, which are always put first, but he is always cordial, mindful, and respectful of the opposing parties, their counsel, judges, and other court personnel.

Kerbs is a member of the Kansas Bar Association, where he is a member of the Solo and Small Firm Section and the Ethics Grievance Panel. He is past president of the Southwest Kansas Bar Association, chair of its Ethics and Grievance Committee, and recipient of its Distinguished Service Award in 2005. Kerbs is also a member of the Client Protection Fund Commission, the Ford-Gray County Bar Association, and the County Counselors Association of Kansas.

When he is not focusing on his legal career, Kerbs has many civic activities, including the Kansas State Board of Healing Arts (1986-1990) and the board of directors of Bethany College (1995-present, including being president from 1999 to 2002), United Cerebral Palsy of Kansas (1980-present), Boot Hill Museum Inc. (2006-present), and Dodge City Baseball (1995-2003).

Linda S. Parks, Wichita, is the managing partner with Hite, Fanning & Honeyman LLP. She has a wide range of experience with business transaction and commercial litigation. In 2003 she was appointed to serve as a Chapter 7 Trustee by the U.S. Trustee and continues to serve in that capacity.

Parks has served in various capacities on the KBA Board of Governors since being appointed as KBA Delegate to the American Bar Association in December 1999. She began her term as president-elect of the KBA at its Annual Meeting in June. She will also continue to serve on the Board of Governors Executive Committee.
Parks has been a member of the Kansas Bar Association since beginning her legal career in 1983. In addition to her duties with the Board of Governors, she currently serves on the Law Related Education Committee and the Ethics Grievance Panel. She is a Silver Fellow with the Kansas Bar Foundation and serves as the chair of the South Central Region Subcommittee for the Foundation’s “Raising the Bar” campaign. She served on the KBF Board of Trustees from 1999 to 2000.

She has been a member of the American Bar Association since 1983. As the KBA delegate to the ABA, she was on the Commission on Mental and Physical Disability Law, State Membership Chair, Select Committee of the House of Delegates, Minority Caucus, and National Caucus of State Bar Associations to the ABA. Parks is a Fellow of the American Bar Foundation, and she also serves on the board of the National Conference of Women’s Bar Associations.

She has served on the governing board of the Wichita Bar Association and currently serves on the Ethics and Bankruptcy committees. She is also a member of the Wichita Women’s Attorneys Association and received its Louise Mattox Attorney of Achievement Award in 1997.

Parks is a founding member and first president of the Kansas Women Attorneys Association. She received the KWAA’s Jennie Mitchell Kellogg Circle Attorney of Achievement Award in 2000.

Parks has been active with numerous charitable and civic organizations. She currently serves on the board of the Wichita YWCA and Wichita Greyhound Charities Inc.

She earned her B.A., summa cum laude, in political science from Washburn University in 1979 and her J.D., cum laude, from Washburn University School of Law in 1983, where she was a staff member of the Washburn Law Journal.

Hon. David J. Waxse, Kansas City, Kan., is a past president of the Kansas Bar Association (1998) and is currently one of the KBA delegates to the American Bar Association House of Delegates. He has served on the KBA Board of Governors since 1988.

He is a U.S. magistrate judge in Kansas City, Kan. Prior to becoming a judge, he was a partner with Shook Hardy & Bacon LLP, Overland Park, where he practiced from 1984 to 1999. He was with Payne & Jones Chtd. for 14 years prior. He received his B.A. from the University of Kansas and his J.D. from Columbia University in New York.

Waxse served as chair of the Kansas Commission on Judicial Qualifications and he served on the board of the Lawyers Committee for Civil Rights, American Judicature Society, and the Miller-Marley Youth Ballet. He served on the Kansas Justice Commission, on the Professionalism Committee of the ABA, and on the Board of Editors of the “Professional Lawyer,” an ABA publication. With the KBA, Waxse served as chair of the

Unauthorized Practice of Law, Access to Justice, and Nominating committees, and on the former Legal Aid Committee.

He is currently a member of the executive committee of the National Conference of Federal Trial Judges of the Judicial Division of the ABA and is a member and past president of the Earl E. O’Connor Inn of Court. He is a fellow of the Kansas, Johnson County, and American bar foundations. Waxse is also a member of the American, Wyandotte County, Johnson County, and Kansas City Metropolitan bar associations.

He has served as a lecturer in law at the University of Kansas School of Law and has presented CLE programs for various professional organizations. In 1982, he received a KBA Outstanding Service Award.

Diane S. Worth is with the firm of Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita. She joined the firm in 1988 and became a shareholder in 1992.

She became a member of the KBA in 1984 and has been a member of the Board of Editors (BOE) since 1988. During her tenure on the BOE she has provided many ideas and suggestions for substantive legal articles for the Journal of the Kansas Bar Association and edited countless others. In addition to this work, Worth has co-authored several employment law articles over the years.

Worth served as chair of the BOE from 2002 to 2005. In this position she exhibited considerable leadership and a serious time commitment to coordinate the actions of the board and ensure the on-going quality of the journal’s substantive legal articles. Prior to serving as chair, she served two years as vice chair with the duty of sitting in for the chair when he was not available for BOE business.

In addition, she served as president of the Employment Law Section in 1997 and authored the “Title VII” chapter of the KBA’s 2001 Employment Law Handbook. She has made numerous CLE presentations on employment law for the Kansas and Wichita Bar (WBA) associations.

As a member of the WBA, Worth is a member of the CLE Committee and a past member of the “Bar-O-Meter” Committee. She received the WBA 1997 President’s Award for outstanding service.

She served as the 2001-2002 president of the University of Kansas School of Law Board of Governors.

Worth is also active with her community. She is a current member of the board of directors of Episcopal Social Services and the Independent School and is on the Board of Deacons of the University Congregational Church.

She received her B.S. in secondary education, majoring in math and English, in 1981 from Kansas State University and her J.D. from the University of Kansas School of Law in 1984.

This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Amy Fellows Cline has been with the Wichita firm of Triplet, Woolf & Garrettson LLC since 2004, practicing civil and business litigation, including consumer protection and insurance defense.

Cline is a member of the Kansas, American, and Wichita bar associations; the Kansas Trial Lawyers Association; and the Wichita and Kansas women attorneys associations.

She is president of the KBA Litigation Section and president-elect of the Young Lawyers Section. For the past two years, Cline has been the statewide coordinator of the YLS-sponsored High School Mock Trial Competition. She has also been active with the Wichita Bar Association, serving as president of the WBA's Young Lawyers Section (2003-2004), as chair of the Public Relations/Law Day Committee (2002-2003), and as a member of Membership (since 2002) and Civil Practice committees (since 2000).

Her commitment to pro bono work is demonstrated by her representation of indigent plaintiffs at the Protection from Abuse Docket as part of the Wichita Lawyers Care Program. She also participated in the Sedgwick County criminal appointment system for indigent criminal defendants in 2000 and 2001.

Cline participates in numerous other professional, civic, and charitable activities. She worked with groups of foster-care teens to develop advocacy skills at a workshop put on by the Kansas Appleseed Center for Law & Justice and is a judge in Wichita-area high school forensics and debate tournaments. She is a board member of the Wichita Salvation Army Advisory Council and has been a participant and team leader for various fundraising activities to benefit the American Heart Association, United Way of the Plains, Goodwill/Easter Seals, Orpheum Theater in Wichita, and the Leukemia & Lymphoma Society.

She received her bachelor's degree, magna cum laude, from Wichita State University in 1997 and her juris doctorate from the University of Kansas School of Law in 2000.
This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service.

Brian J. Moline, Topeka, has devoted his legal career to state government service and Kansas Legal Services, the statewide public interest law firm he co-founded in 1976. He also served in the Kansas House of Representatives from 1967 to 1971, where he was selected as one of the 50 outstanding state legislators in the nation in 1970.

Moline was appointed to the Kansas Corporation Commission (KCC) in 1998 by Gov. Bill Graves and was reappointed in 2002 by Gov. Kathleen Sebelius. He was elected to the position of chair by the three-member commission in 2003. Although Moline’s term as chair officially expired in March, he serves at the pleasure of the governor and continues to fill the position at this time. He served as general counsel for the KCC from 1971 to 1987 and from 1991 to 1995. He then served as general counsel for the Kansas Insurance Department from 1995 to 1997. Moline has been an adjunct professor at Washburn University School of Law for more than 25 years.

He has served on the advisory committees to the Kansas Judicial Council on Kansas Administrative Procedure Act from 1980 to the present and on Family Law from 1975 to the present. Moline was a founding and intermittent member of the Kansas Government Ethics Commission from 1974 to 1993 and a member of the Kansas Advisory Council on Inter-Governmental Relations from 1968 to 1972. Moline has also served on various boards and commissions at the local level, including the Topeka Shawnee County Planning Commission and the board of trustees of the Topeka-Shawnee County Public Library.

Moline was elected to a three-year term on the board of directors of the National Association of Regulatory Utility Commissioners in January 2005.

Moline became a member of the KBA in 1966 and currently serves on the Board of Editors for the Journal of the Kansas Bar Association and the Ethics Grievance Panel. He has published numerous articles in the Journal as well as other publications. He is also a frequent CLE presenter and panelist.

Moline received his B.A. from Wichita State University in 1963, his J.D. from Washburn University School of Law in 1966, and his MPA from the University of Kansas in 1983.

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Beyond Your Numbers

24 – JULY/AUGUST 2006

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
This award recognizes an attorney who has displayed exceptional courage in the face of adversity.

For meritorious legal services he performed while in Iraq, often under fire, attack, or high pressure, Maj. David E. Vercellone is the 2006 recipient of the Courageous Attorney Award.

Vercellone is the deputy staff judge advocate for the 35th Fighter Wing, Misawa Air Base, Japan. The legal office, composed of eight judge advocates, 10 paralegals, and two Japanese legal advisors, serves a base population of nearly 14,000, including eight associate units from all four branches of the military and the Japan Air Self Defense Force.

He was born into an Air Force family at Travis Air Force Base in 1970. He earned his Bachelor of Arts from the University of Texas at San Antonio in 1993. Upon graduation, he entered into the Air Force as a distinguished graduate of the Reserve Officers’ Training Corps. He also holds an M.S. in administration from Central Michigan University, Mount Pleasant.

Following his commission, Vercellone served as a missile combat operator at Grand Forks Air Force Base, N.D. He was responsible for the wartime launch and peacetime operation of nuclear intercontinental ballistic missiles. He transitioned to satellite operations in 1997, where he directed congressionally mandated transition and stand-up of all operational assets to support the NATO/Skynet satellite constellation at Schriever Air Force Base, Colo.

For the delivery of direct legal services, free of charge, to the poor or — in appropriate instances — to charitable organizations whose primary purpose is to provide other services to the poor.

Thomas C. Henderson of Topeka spends a lot of his practice devoted to being a guardian or conservator for veterans with disabilities. While Henderson is compensated for many of his services, he goes beyond what his compensation covers. Their families have abandoned many of these veterans, and Henderson sees that they get the services they need and takes care of the details of their lives, which includes protecting their interests in probate court. He is on speed dial with the social workers at the Veterans Administration Hospital, and on many occasions, he has been the only person in attendance at some of the veterans’ funerals.

One of the veterans Henderson helps was a colleague during his 28-year tenure with the Kansas Department of Labor (KDOL). The veteran had to leave state employment on disability retirement, and Henderson stepped in to ensure his former colleague had what he needed. He arranged for the man to go to an assisted living facility, and recently the man left the facility and no one knew where he had gone; Henderson spent three hours searching for the man until he was located.

For the past 30 years, he has engaged in private practice, specializing in probate, mental health, and guardianship/conservatorship law. Henderson is currently of counsel with the firm of Alderson, Alderson, Weiler, Conklin, Burghart & Crow LLC. He served as an unem- ployment insurance judge for the KDOL and served the last four years as chief of appeals.

Henderson is a member of the Kansas Bar Association’s Real Estate, Probate, and Trust Law; Elder Law; and Government Lawyers sections. He is a past member of the former Elder Law and Disabilities Law Committee and Administrative Law Section.

Henderson received his bachelor’s degree from Washburn University in 1970 and his juris doctorate from Washburn University School of Law in 1975.
The KBA awards Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal service to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel; and
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge and/or lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low- and moderate-income persons.

One individual has been awarded a 2006 Pro Bono Certificate of Appreciation.

Jason J. Montgomery, Kansas City, Kan., is an associate with McAnany, Van Cleave & Phillips P.A., where he practices in the areas of workers’ compensation defense and civil litigation. He has spent many hours assisting the Servants of Mary, Ministers to the Sick whose convent in New Orleans was devastated by Hurricane Katrina.

Montgomery helped the order in filing an application for disaster relief from the Federal Emergency Management Agency and continues to pursue appeals of its denial of the claim; negotiating a settlement with the order’s insurance provider; and obtaining media coverage of the disaster, which helped the nuns in their efforts to raise money to rebuild their damaged New Orleans facilities.

He graduated from Baker University, cum laude, in 2001 and was a member of the Blue Key and Delta Mu Delta honor societies. In 2004 he graduated with his juris doctorate from the University of Kansas School of Law, where he was a member of the Kansas Journal of Law and Public Policy.

He is a member of the Kansas, Missouri, American, and Kansas City Metropolitan bar associations and the Lawyers Association of Kansas City. He is also a volunteer for the Special Olympics.
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The following bills were passed during the regular 2006 Legislative Session. Except where otherwise indicated, all bills were effective July 1.

**Administrative**

HB 2608 would require hearings of the new Health Policy Authority to follow Kansas Administrative Procedure Act (KAPA).

SB 361 exempts from KAPA the review of Kansas Department of Health and Environment action on variance of emission standards, and allows direct appeal to the Court of Appeals, effective on publication in Kansas Register (4/13).

**Civil Procedure**

HB 2610, a Judicial Council proposal, establishes a general Code of Civil Procedure long-arm jurisdiction statute, in lieu of special ones found under insurance or other codes. It clarifies the effect of the long-arm statute to provide personal jurisdiction of a person outside the state where there was “substantial, continuous, and systematic contact” with Kansas “if consistent with the constitutions of the United States and of this state.”

**Consumer**

HB 2159 amends the collision damage waiver portion of the Kansas Consumer Protection Act to redefine who is the authorized driver and adds exclusions to coverage for misconduct by renter. Also creates a presumption of no liability for loss due to theft.

HB 2485 prohibits certain acts by notaries public, and requires a notice that the notary is not authorized to practice law, if advertising in language other than English. (The bill is specifically designed to avoid confusion by immigrants/tourists from Spanish-speaking countries.) Penalty is loss of certificate for life, declared a deceptive act under the Consumer Protection Act, and/or a class B misdemeanor.

**Courts**

SB 180, was initially a bill to make up with a legislatively-imposed docket fee, but the funding was lost with repeal of the $5 surcharge imposed by the Supreme Court. However, the docket fee was placed into another bill, leaving only the legislative policy statement that imposing fees is a legislative prerogative only.

House Sub. SB 337 increases judicial salaries, with the exception of Supreme Court justices. Magistrates and district judges get a $9,000 increase, but no cost-of-living allowance (COLA), Court of Appeals gets $2,000 with COLA, and Supreme Court gets only COLA. Bill also establishes judicial performance evaluation system for merit selected judiciary through the Judicial Council. Finally, bill establishes funding for child exchange and visitation centers.

All funding is from increased docket fees (i.e., expungements now $100, Ch. 59 cases increased $2, and Ch. 60 increased from $106 to $147). HB 2529 (below) passed during sine die amends Sections 11 and 14 of the bill, increasing docket fees in criminal cases.
SB 404 includes Sedgwick County Law Library in sales tax exemption for law libraries located within courthouses.

SB 407 gives counties the option of setting juror fees between $10 and $50 per day.

SB 505 allows free electronic access to court records for indigent defendants, including contract attorneys. Also authorizes Judiciary Technology Fund to develop free statewide electronic access to court records, and allows counties to provide access to court records without additional fees.

HB 2284 in addition to a policy statement in support of nursing, also excuses nursing mothers from jury duty, effective on publication in Kansas Register (3/16).

HB 2704 amends the Small Claims Act by increasing the limit on cases from 10 to 20 per year.

Criminal

SB 25 creates new off-grid crimes of terrorism (defined as commission of any felony with intent to intimidate or coerce civilian populace or government) and illegal use of weapons of mass destruction (which includes developing or producing biological, chemical, or nuclear weapons) with no statute of limitations. Makes a severity level 1 person felony for assisting either crime. Also includes such crimes in statute listing crimes for which a prosecutorial inquisition may be had without a court order and in civil forfeiture statutes.

SB 51 creates new crime of trafficking in counterfeit drugs (not defined), a level 7 nonperson felony where retail value is more than $25,000, level 9 between $500 and $25,000, and a class A misdemeanor if under $500. Also orders Board of Healing Arts to study wholesale drug industry.

SB 261 updates the Juvenile Offender Code, with largely technical changes, many paralleling the code of criminal procedure.

SB 366 declares by statute what is commonly understood as the law of self-defense in Kansas and adds both civil and criminal immunity for such exercise. It also adds both civil and criminal provisions for dealing with street gangs and raises the felony threshold from $500 to $1,000.

SB 408 raises penalty for malicious cruelty to animals to an off-grid person felony requiring not less than 30 days or more than one year imprisonment. Requires psychological evaluation and anger management course upon conviction. Other forms of cruelty are class A misdemeanors for first offense, and nongrid nonperson felony on second and subsequent conviction, with five-day mandatory jail time. Harming a police dog is also raised to nongrid nonperson felony, illegal ownership of an animal offense is expanded to include those with prior cruelty to animals convictions, and livestock commissioner given greater powers over licensing.

SB 431 was initially a DUI records bill, but became a criminal Christmas tree bill, creating the new crime of aggravated endangering of a child and battery on a mental health employee. It also increases penalties for aggravated arson and battery on a law enforcement officer, and defines drug paraphernalia. More importantly, expands search incident to arrest to include fruits of a “a” crime, rather than “the” crime forming the basis for arrest. KBA had opposed this latter provision.

SB 506 is an extensive revision of both sex offender registration law as well as the creation of a violent offender registration system.

HB 2129 raises hourly rate for representing indigent defendants from $50 to $80.

HB 2529 passed during sine die to reconcile conflicts in HB 2122 and House Substitute for SB 337, amends Sections 11 and 14 of the latter. It imposes an additional $2 docket fee for criminal cases, i.e. felonies other than murder/manslaughter raised from $157 to $163 for a total increase of $6, until July 1, 2010, when the fee is reduced by $2.

HB 2554 amends current law to allow collection of DNA specimen upon arrest, to be phased in gradually to allow the Kansas Bureau of Investigation time to gear up for increase in specimens. Allows for expungement of sample upon acquittal or where charges are dismissed.

HB 2555 extends the Kansas Criminal Justice Recodification, Rehabilitation, and Restoration Committee until March 31, 2007.

HB 2576 raises penalty for sex predators, mandatory 25 years for first offender, with downward departure allowed and lifetime parole supervision; 40 years for second, also lifetime parole; and life without parole for third offender. Also limits diversions in domestic battery.

HB 2616 gives the state a right to a preliminary hearing. Current law gives the right only to defendant.

HB 2748 raises penalty for leaving the scene of an accident to a severity level 10 person felony where great bodily harm results and to a severity level 9 where death results. Mere injury remains a class A misdemeanor. The bill also requires use of headlights when windshield wipers are in use, but warning ticket is the only sanction.

HB 2893 enhances the state’s war against Medicaid fraud by (1) creating new crime of obstruction of Medicaid fraud investigation, a level 9 nonperson felony; (2) enhancing crime of unlawful acts relating to Medicaid fraud to include dividing or sharing illegal proceeds or trading Medicaid number; (3) changing penalty for misuse of public funds from level 5 nonperson felony for amount above $100,000 down to class A misdemeanor for under $1,000; (4) including Medicaid fraud, terrorism and use of weapons of mass destruction in civil forfeiture statutes, and giving attorney general priority in...
all forfeiture proceedings, with Medicaid fraud proceeds going to Medicaid fraud fund; and (5) requiring pharmacies filing Medicaid claims to use unique identification number. The bill also allows custodial law enforcement agencies to pay the lesser of actual costs or Medicaid rate for prisoners and prohibits release of prisoners to avoid incurring medical expenses.

**HB 2916** raises suspension for second and subsequent DUI to not less than one year and requires ignition interlock device during period of restriction. Also raises penalty for DUI offenses by commercial driver's license holders. Raises unlawful hosting of minors consuming alcohol penalty to class A misdemeanor.

**Family**

**SB 62**, dubbed the “Grandparents as Caregivers Act,” provides $200 per grandchild per month if child is in grandparents’ custody and grandparent is more than 50 with income less than 130 percent of federal poverty level. Bill also contains provisions from **SB 459** that prohibit the Department of Wildlife and Parks from issuing licenses or other privileges to persons who are behind in child support payments, provisions from **SB 491** increasing personal needs allowance for those residing in Medicaid supported facilities, and increases the reimbursement rates to nursing facilities.

**SB 420** changes child support enforcement for operation of Kansas Payment Center (KPC) by allowing Social and Rehabilitation Services additional flexibility in structuring the collection process, establishes a limited power of attorney for KPC to endorse and deposits checks, and directs payments that cannot be matched to the state treasurer to be administered under the Unclaimed Property Act.

**SB 323** restricts eminent domain powers for private development to five specific circumstances involving municipalities, defined as “city, county, or unified government,” with a catch-all sixth provision “as expressly authorized by the Legislature after July 1, 2007, by enactment of law that identifies the specific tract or tracts to be taken.” However, the bill operates retroactively to July 1, 2003. The bill also clarifies the appeal of condemnation awards by striking the requirement

**Insurance**

**SB 207** allows for reporting and filing of fraudulent insurance acts, on a form provided by the commissioner, with immunity for the reporter and requires each insurance company to have anti-fraud initiatives in place no later than July 1, 2007.

**S. Sub. HB 2366** amends automobile injury reparations act to increase penalties for driving without insurance and imposes new conditions for license reinstatement, including release of liability.

**Oil and Gas**

**SB 232** restricts eminent domain powers for private development to five specific circumstances involving municipalities, defined as “city, county, or unified government,” with a catch-all sixth provision “as expressly authorized by the Legislature after July 1, 2007, by enactment of law that identifies the specific tract or tracts to be taken.” However, the bill operates retroactively to July 1, 2003. The bill also clarifies the appeal of condemnation awards by striking the requirement

**Real Estate**

**SB 2352** is the revised Child in Need of Care code, with no major changes, includes consideration of parent’s disability and the status of parties.

**SB 2562** amends the adoption procedures to allow waiver of the assessment of advisability of adoption if requested by any relative of the child, not just grandparents, which is current law.

**SB 2655** allows a court the discretion to consider “best interests of the child” in termination of parental rights in adoption, including stepparent adoptions. Effective on publication in Kansas Register (3/23).

**SB 2706** restricts drivers’ licenses of those owing $500 or more in child support. Also allows juveniles driving without proof of insurance to be prosecuted as adult traffic offenders.

**SB 2928** allows those attempting to escape domestic violence or stalking to obtain confidential addresses designated by the secretary of state and prohibits employment discrimination against victims of domestic violence.
for payment of the docket fee (taken from SB 398). Effective on publication in Kansas Register (5/25).

HB 2432 exempts landowner of property adjacent to recreational trails from liability when property entered from trail without permission, effective on publication in Kansas Register (5/25).

**Trust and Estates**

SB 336 adopts the Uniform Real Property Recording Act in Kansas. Does not mandate such recording, but if a register of deeds establishes electronic recording, act must be followed. Establishes a 15-member Electronic Recording Commission, which includes two persons appointed by the Land Title Association and one by the Kansas Bar Association to develop standards. Implementation set for July 1, 2007.

HB 2582 requires removal of restrictive covenants in homeowner association bylaws that discriminate based on race, color, sex, disability, familial status, national origin, or ancestry by Sept. 1, 2007. The amended document must be recorded within 10 days. The bill also requires homeowners associations’ meetings to be open to all homeowner members, to adopt an annual budget, and to provide copies of the budget within 30 days of request.

HB 2659 amends requirements for determination of insurability of title by allowing searches by title insurance company or abstractor licensed in Kansas. Searches also limited to 25 years or date of previous title policy, whichever is less.

HB 2676 renders restrictive covenants requiring use of wood shingles and shakes unenforceable. Does not require that such language be removed nor are other restrictive covenants regulating esthetic characteristics affected.

HB 2607, a Judicial Council proposal, combines suggested changes to the Uniform Trust Act from the KBA, the Kansas Bankers Association, and the Uniform Law Commission. These changes include trustee excluded from exercising power of withdrawal; qualified beneficiaries would include current distributes as well as distributes of trust income or principal if trust is terminated; trust provisions could be merged or divided without being identical, if beneficiaries interests were substantially unchanged; and prohibition against self-dealing would contain exceptions for investments in mutual funds where trustee provides services in capacity other than trustee.

SB 40 places duty of notifying spouse regarding elective share on the representative of the estate, rather than the court. If spouse is representative, may file acknowledgment of awareness of rights, rather than sending notice to self.

SB 354 requires annual report and accounting for voluntary conservatorships.

SB 355, another Judicial Council proposal, attempts to clarify probate appeals, particularly appeals from a magistrate judge, which must be within 10 days in adoption, care and treatment, or guardianship and conservatorship cases; 30 days for probate matters; and, upon motion of any party, district judge will hold a trial de novo. If record made of original hearing is on the record, then appeal is on the record. Raises level for appeal of demands in magistrate jurisdiction from $500 to $5,000. Order from magistrate or district judges continues unless modified by temporary orders of the court hearing the appeal. Filing of supersedeas bond does not stay proceedings under appeal, and governmental entities are exempted from bond requirement.

SB 365 creates a stand-alone estate tax, no longer tied to outdated federal tax law, and gradually phases out the tax over a three-year period, for estates with date of death of Jan. 1, 2007, and thereafter. ■

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**REBEIN BANGERTER PA**

Attorneys at Law

Our Firm’s Attorneys:

**David J. Rebein**
Commercial Litigation
Personal Injury

**D. Shane Bangerter**
Workers Compensation
Personal Injury

**Michelle R. Mahieu**
Of Counsel

**Aaron L. Kite**
Probate
Estate Planning
Real Estate
Business
Taxation

**Jennifer H. Sherber**
Commercial Litigation
Personal Injury

810 Frontview
P.O. Box 1147
Dodge City, Kansas 67801
620.227.8126
www.rebeinbangerter.com
SPECIAL THANKS TO THE
2006 ANNUAL MEETING TASK FORCE

Patrick A. Carney, task force chair,
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Linda Coffee, Johnson County Bar Association, Olathe
Wendell F. Cowan Jr., Foulston Siefkin LLP,
Overland Park
Richard F. Hayse, Morris Laing et al. Topeka
Robert R. Hiller Jr., Kansas Division of Health Policy &
Finance, Topeka
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Kansas City, Mo.
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Overland Park
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Golf

First Place:
Glenn Braun, Hays; Bruce Brumley, Topeka; Scott Johnson,
Topeka; and Steven Tilton, Topeka
Net Score: 59

Second Place:
Sara Beezley, Girard; John Keller, Girard, Cindy Loy, Pittsburg;
and Kurtis Loy, Pittsburg
Net Score: 60

Closest to the Pin:
Hole #3  Doug Lattimer, Topeka
Hole #8  John Keller, Girard
Hole #15  Lee Johnson, Topeka
Hole #17  Dick Ewy, Wichita

Longest Drive:
Hole #14  Kathy Webb, Wichita
Hole #13  Gary Patterson, Wichita

Longest Putt:
Hole #9  Pat Salsbury, Topeka
Hole #18  Les Diehl, Topeka

Winning Total
Steve Doering, Garnett
Net Score: 59

Other Shooters:
John “Jack” Black, Pratt
Jeffrey Carmichael, Wichita
Whitney Damron, Topeka
Jay Deines, Wakeeny
Harold Houck, Topeka
Edward McNally, Overland Park
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Sporting Clays

The Journal of the Kansas Bar Association
I. Introduction

On June 5, 2000, the Supreme Court of the United States decided *Troxel v. Granville*, a case from the state of Washington involving paternal grandparents’ desire to obtain court-ordered visitation with their granddaughters pursuant to a third-party visitation statute. In a 6-3 decision, the Court held that *as applied to facts of the case* the Washington statute was unconstitutional.² Interestingly, however, there was no majority opinion in *Troxel*. Instead, Justice Sandra Day O’Connor wrote the plurality opinion in which Chief Justice William Rehnquist and Justices Ruth Bader Ginsburg and Stephen Breyer joined. Justices David Souter and Clarence Thomas each wrote concurring opinions. Three separate dissenting opinions were written by Justices John Paul Stevens, Antonin Scalia, and Anthony Kennedy.³ The various *Troxel* opinions issued by six of the justices demonstrate that members of the Court held significantly differing views about the constitutional dimensions of grandparent visitation rights.

Since *Troxel* was decided, many states have grappled with whether their own statutes are constitutionally sound.⁴ Most state courts, including Kansas, have relied on the *Troxel* plurality opinion as their primary guidance in examining the constitutional validity of their grandparent or third-party visitation statutes.⁵ In some states, legislatures either have abolished their third-party visitation statutes or amended them in an attempt to comply with *Troxel*.⁶

In the six years since the Court decided *Troxel*, the Kansas appellate courts have reviewed a number of cases involving grandparent visitation rights. This article reviews those decisions. A careful analysis of the *Troxel* plurality opinion and the Kansas appellate grandparent visitation decisions reveal that courts must consider a combination of factors in determining whether grandparent visitation is appropriate in any given case. No bright-line tests exist for these difficult cases.

3. See generally id.
5. Id.
6. Id.
II. The Troxel case

Before delving into the latest Kansas cases concerning grandparent visitation rights, a brief review of Troxel is helpful to understand how it has influenced case law in this area. The Troxel decision itself was dependent on the specific facts of the case, which involved the mother, Tommie Granville (Granville), and the paternal grandparents, Jenifer and Gary Troxel (the Troxels). Granville and Brad Troxel (Brad), the Troxels' son, were involved in a romantic relationship. The two never married, but two daughters, Isabelle and Natalie, were born of the relationship. After Granville and Brad ended their relationship in 1991, Brad lived with his parents, the Troxels. Brad had weekend visitation with his daughters, and the visits often took place at his parents' home. In 1993, Brad committed suicide. The Troxels continued to see the girls regularly until October 1993, when Granville informed them that they would be allowed one visit per month with her daughters.

The Troxels, dissatisfied with Granville's limitation on visitation and wanting more time with their granddaughters, filed a lawsuit in Washington state court.

The Washington statute under which the Troxels sought visitation provided that "Any person may petition the court for visitation rights at any time, including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." Granville, though not entirely opposed to grandparent visitation, asked the trial court to limit the Troxels' visitation to one day of visitation per month with no overnight stay. Ultimately, the trial court issued an order giving the Troxels visitation “one weekend per month, one week during the summer, and four hours on both of the petitioning grandparents’ birthdays.” Granville appealed the trial court order, and after appeals in state appellate courts, the U.S. Supreme Court of granted certiorari to consider the constitutionality of the Washington statute.

Justice O'Connor, writing a plurality opinion for the Court, narrowed the issue in Troxel as "whether § 26.10.160(3), as applied to Tommie Granville and her family, violates the Federal Constitution." In doing so, the plurality declined to consider the primary question of "whether the Due Process Clause requires all nonparental visitation to include a showing of harm or potential harm to a child as a condition precedent to granting visitation.”

The plurality opinion was organized into two parts. First, Justice O'Connor identified and addressed three constitution-al criticisms of the Washington third-party visitation statute, focusing specifically on the precise language and construction of the statute. Her first criticism of the Washington statute was that it was “breathtakingly broad” because it failed to restrict the types of person who can petition the court for visitation by allowing “any person” standing to seek court-ordered visitation rights. Her second problem with the statute was that it failed to limit the circumstances in which a petition for third party visitation may be granted by the trial court. Lastly, the statute did not include a provision that attributed any special weight to the parental decision concerning visitation.

The other part of Justice O'Connor's analysis in the plurality opinion centered around the facts of the case. Specifically, Justice O'Connor reviewed the state court's application of the Washington third-party visitation statute to Tommie Granville, which yielded more explicit criticism from her. For instance, she emphasized that there was no allegation by the Troxels that Tommie Granville was an unfit parent. Justice O'Connor stressed that as long as a parent is fit, there “will normally be no reason for the [s]tate to inject itself into the private realm of the family” to question a parent's decision-making ability. Furthermore, the state court failed to attribute any weight to Granville's decision concerning grandparent visitation. Rather, the state court placed on Granville, a fit parent, the burden of disproving that visitation with the Troxels would be in the best interest of her daughters.

Justice O'Connor also acknowledged Granville's willingness to allow some “meaningful” visitation between her daughters and the Troxels, noting that the legal dispute between Granville and the Troxels was essentially a “mere disagreement” over the amount of time the children were to spend with their grandparents. Finally, Justice O'Connor stated that the trial court's decision to award visitation was not "founded on any special factors that might justify the state's interference with Granville's fundamental right to make decisions concerning the rearing of her two daughters.”

III. Kansas Statutes

While Justice O'Connor's Troxel plurality opinion characterized the Washington third-party visitation statute as extremely broad, the language of the Kansas statutes, by comparison, is more restrictive because of explicit limitations on the circumstances in which court-ordered visitation may be awarded to grandparents. Two statutes, K.S.A. 38-129(a) and 60-1616(b), have been the subject of litigation in Kansas since Troxel was decided. K.S.A. 38-129(a), found in the “MINORS” section of the code, provides in relevant part: “[t]he district court may grant the grandparents of an unmarried minor

7. See generally Troxel, 530 U.S. 57 (2000).
8. Troxel, 530 U.S. at 60.
9. Id.
10. Id. at 60-61.
12. Id. at 61.
13. Quoting id., at 61.
14. Id. at 61-63.
15. Quoting id. at 64.
16. Id. at 58.
17. Id. at 67.
18. Id. at 73.
19. Id. at 67.
20. Id. at 68.
21. Quoting id.
22. Id. at 69.
23. Quoting id. at 68.
24. Quoting id. at 68.
25. See generally K.S.A. 38-129(a) and 60-1616(b). In a divorce action, stepparents may also seek court-ordered visitation pursuant to K.S.A. 60-1616(b).
child reasonable visitation rights to the child during the child’s minority … upon a finding that the visitation rights would be in the child’s best interests and when a substantial relationship between the child and the grandparent has been established.”

The other grandparent visitation statute, K.S.A. 60-1616(b), located in the divorce statute, allows grandparents and stepparents to seek court-ordered visitation with a child.\textsuperscript{27} Presumably grandparents may request court-ordered visitation in a divorce action either when the parents of the child are divorcing or have been divorced.\textsuperscript{28} A 2006 amendment to K.S.A. 60-1616(b), House Bill No. 2670, now requires that the grandparent prove the two-prong test of substantial relationship and best interest found in K.S.A. 38-129(a). Additionally, House Bill No. 2670 adds language to both K.S.A. 38-129 and K.S.A. 60-1616(b) that permits the grandparent seeking court-ordered visitation to intervene in “pending litigation” involving child custody or visitation. A third statute under which a grandparent or other third party may seek court-ordered visitation is found in the Child in Need of Care statute, K.S.A. 38-1563(f), but to date, this statute has not been the subject of an appellate decision in Kansas.\textsuperscript{29}

IV. Kansas Cases

The Constitutionality of K.S.A. 38-129(a) and 60-1616(b)

In the first Kansas grandparent visitation case decided post-Troxel, S.R.S. v. Paillet,\textsuperscript{30} a mother, Danielle S., challenged the constitutionality of K.S.A. 38-129(a), claiming the statute violated her fundamental parental right to direct the upbringing of her daughter, S.D.S.\textsuperscript{31} The facts of Paillet were strikingly similar to the Troxel case in that Danielle S. and Joshua Paillet were involved in a romantic relationship and had a child, but never married.\textsuperscript{32} The Kansas Department of Social and Rehabilitation Services (SRS) filed a paternity petition against Joshua, the putative father, on behalf of Danielle and the child, S.D.S., in Clay County.\textsuperscript{33} In August 1997, the district court issued a written order finding that Joshua was the biological father of S.D.S. and ordering him to pay $150 per month for child support.\textsuperscript{34}

Sometime after the judgment of paternity was issued, acrimony arose between Joshua and Danielle.\textsuperscript{35} Eventually, Danielle had her attorney send a letter to the Paillets (Joshua and his parents collectively) informing them that if they wished to visit S.D.S., they would have to do so at her home; otherwise, no visitation would be allowed.\textsuperscript{36} In June 1998, Joshua died in a motorcycle accident.\textsuperscript{37} The Paillets did not visit S.D.S. at Danielle’s home while Joshua was alive nor following Joshua’s death.\textsuperscript{38} Instead, in October 1998, the Paillets filed a petition for grandparent visitation rights in the original paternity case pursuant to K.S.A. 38-129(a).\textsuperscript{39}

In the written journal entry, the district court ordered that visitation by the paternal grandparents would be in the child’s best interests and that a substantial relationship had been established between S.D.S. and the Paillets.\textsuperscript{40} The court ordered that visitation take place the third weekend of each month.\textsuperscript{41} The mother, Danielle, unsuccessfully appealed the district court’s grandparent visitation order to the Kansas Court of Appeals. Thereafter, the Kansas Supreme Court granted review of the case.\textsuperscript{42}

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26. See K.S.A. 38-129(a). Subsection (b) of K.S.A. 38-129 reads, “The district court may grant the parents of a deceased person visitation rights, or may enforce visitation rights previously granted, pursuant to this section, even if the surviving parent has remarried and the surviving parent’s spouse has adopted the child. Visitation rights may be granted pursuant to this subsection without regard to whether the adoption of the child occurred before or after the effective date of this act.” This subsection applies in stepparent adoption cases wherein one of the biological parents has died, the surviving parent has remarried, and the parent’s spouse has adopted the child. To date, there are no Kansas appellate cases interpreting K.S.A. 38-129(b).

27. K.S.A. 60-1616(b). In In re Marriage of Hem, a case decided Feb. 17, 2006, the Kansas Court of Appeals affirmed a district court order for stepparent visitation. In Hem, the biological (divorced) parents of a child opposed visitation with the child’s stepfather who was also divorced from the child’s mother. The child believed that the stepfather was her biological father. The court concluded that “(1) it was in the best interest of the stepchild that she have visitation with her stepfather, (2) there existed a substantial relationship between stepparent and stepchild, and (3) in opposing all visitation between stepparent and stepchild, the natural parents were acting unreasonably and not in the best interest of their child.” 35 Kan. App. 2d 61, Syl. ¶ 10, 129 P3d 601 (2006).

28. See id.

29. K.S.A. 38-1563(f) provides: “If custody of a child is awarded under this section to a person other than the child’s parent, the court may grant any individual reasonable rights to visit the child upon motion of the individual and a finding that visitation rights would be in the best interests of the child.” (Emphasis added.)


32. Id. at 647.

33. Id.

34. Id.

35. Id. at 648.

36. Id.

37. Id. at 647.

38. Id. at 648.

39. Id. at 647. The Kansas Supreme Court treated the Paillets’ request for grandparent visitation, which they filed in the original parentage action, as a petition to intervene. See generally Paillet, 270 Kan. 646 (2001).


41. Id.

42. Id.
Among the issues the Kansas Supreme Court addressed in *Paillet* was whether K.S.A. 38-129(a) is constitutional after *Troxel*. Interestingly, the Court’s constitutional analysis of K.S.A. 38-129(a) tracked Justice O’Connor’s analysis in the *Troxel* plurality opinion. The Court highlighted examples of how the district court’s flawed application of K.S.A. 38-129(a) to Danielle mirrored the application of the Washington third-party visitation statute to Tommie Granville in *Troxel*. For instance, like *Troxel*, the district court presumed that grandparent visitation with the Paillets was in S.D.S.’s best interest, effectively substituting its judgment of best interest for that of Danielle. Relying on a prior 1992 grandparent visitation case, *Santaniello v. Santaniello*, the Court stressed that a trial court cannot presume that grandparent visitation is in the child’s best interest. Equally important, the Court emphasized, is that the burden of proof rests with the grandparent to show that visitation is in the child’s best interest.

Also of concern to the Court was the lower courts’ failure to consider Danielle’s fitness as a parent. It criticized the Kansas Court of Appeals’ decision affirming the district court’s order of grandparent visitation, stating that such a decision “essentially circumvents the presumption that a fit parent makes decisions in the best interests of his or her child.” After careful examination of *Paillet* while using the *Troxel* plurality opinion as guidance, the Kansas Supreme Court upheld the constitutionality of K.S.A. 38-129(a) as a general matter, but found that the lower courts unconstitutionally applied the statute to Danielle S. Thus, K.S.A. 38-129(a) is constitutional as written and when correctly applied in a manner that comports with *Troxel*.

*Skov v. Wicker* was the second Court case decided post-*Troxel* that involved grandparents’ desire to obtain court-ordered visitation with their grandchildren. Skov was decided about eight months after *Paillet*, and it, too, involved parents’ constitutional challenge of K.S.A. 38-129(a) as well as 60-1616(b). In *Skov*, a maternal grandmother, Melinda Skov, together with the maternal great-grandmother and step-great-grandfather, the Tankersleys, filed two separate grandparent visitation actions to obtain visitation rights with three children belonging to Mona Wicker. One action was filed in Wicker’s divorce case (from Sean Boydson) under K.S.A. 60-1616(b), wherein Skov and the Tankersleys sought court-ordered visitation rights with the children born of the Boydson marriage. The other suit was filed pursuant to K.S.A. 38-129(a), wherein the three grandparents (Skov and the Tankersleys) sought court-ordered visitation with V.W., the sole child of Wicker and her current husband, Vance Wicker. The Wickers opposed grandparent visitation with their daughter, V.W. Mona also opposed grandparent visitation with her other two children, H.B. and T.B., though it is unclear whether there was any opposition from the children’s father, Sean Boydson.

The district court dismissed both petitions for grandparent visitation, holding that K.S.A. 38-129(a) and 60-1616(b) were unconstitutional as a matter of law. The two cases were consolidated and the Kansas Supreme Court granted review to determine the constitutionality of the grandparent visitation statutes.

Like Danielle S. in *Paillet*, the parents, Vance and Mona Wicker, argued to the Court that K.S.A. 38-129(a) was per se unconstitutional, though they eventually conceded that the *Paillet* case had resolved this question. The Court reiterated that K.S.A. 38-129(a) is constitutional subject to the parameters set out in *Troxel*, as well as *Paillet*, and remanded the case to the district court for further proceedings to settle the issue of whether grandparent visitation with V.W. was appropriate. Unresolved was whether K.S.A. 60-1616(b), which allows grandparents to seek visitation in a divorce action, was constitutional in light of *Troxel* and *Paillet*. The Wickers contend that this statute was facially unconstitutional because it was written too broadly, giving trial courts unfettered discretion to award grandparent visitation. Moreover, the Wickers argued that the statute could not be interpreted in a manner that “satisfies the due process requirements set out in *Troxel*.” Indeed, in light of the *Troxel* decision, this statute appears constitutionally vulnerable as written because at the time the case was litigated it simply provided “grandparents may be granted visitation” without anything more.
Rejecting the Wickers’ constitutional arguments concerning K.S.A. 60-1616(b), the Court interpreted the statute expansively to protect parental prerogatives, requiring grandparents to prove the two-prong test of substantial relationship and best interest, as specifically mandated in K.S.A. 38-129(a). Thus, K.S.A. 60-1616(b) is constitutional when correctly applied by trial courts in the manner prescribed in K.S.A. 38-129(a), as well as in accordance with the additional parameters articulated in Troxel and Paillet. As a result of the Court’s decision to uphold K.S.A. 60-1616(b), the grandparent visitation petition involving the two Boydson children was remanded to the district court for further proceedings.

Proving “substantial relationship”

Both K.S.A. 38-129(a) and 60-1616(b), having withstood constitutional scrutiny by the Kansas Supreme Court in Paillet and Skov, require careful application by the trial courts when deciding whether an order for grandparent visitation is appropriate in any given case. Hence, a significant issue addressed by the Court in Paillet was whether the grandparents, the Paillets, met the condition of “substantial relationship” mandated under K.S.A. 38-129(a). The requirement of “substantial relationship” is undefined in the statute, but a few Kansas cases have fleshed out its meaning, though it appears that trial courts will review the existence of this condition on a case-by-case basis before an order of grandparent visitation may be awarded. Furthermore, although there is no concrete definition of “substantial relationship,” recent Kansas appellate decisions reveal that trial courts should closely examine the facts of each case to determine whether this prerequisite has been successfully proven by the grandparents.

In Paillet, the Court declared that the existence of a “substantial relationship” must be proven by the grandparent and that there are no exceptions to this statutory prerequisite to an award of grandparent visitation. Danielle, the mother in Paillet, testified that neither she, nor her daughter, S.D.S., had any relationship with the Paillets. Colleen Paillet corroborated Danielle’s testimony, admitting that she never visited S.D.S. at Danielle’s home because she did not feel welcome there. Paillet further testified that she saw S.D.S. only from a distance, conceding that Danielle never prevented her from making contact with her or S.D.S. Additionally, Paillet admitted that she never telephoned her granddaughter or sent her any presents. Though the trial record supported Danielle’s contention that S.D.S. did not have a relationship with the Paillets, the district court awarded grandparent visitation, concluding that visitation was in S.D.S.’s best interest and that a substantial relationship had been established between her and the Paillets.

The Kansas Court of Appeals took exception with the district court’s finding that a substantial relationship existed between S.D.S. and the Paillets, but nevertheless affirmed the district court grandparent visitation order, invoking the equitable principle of “unclean hands.” The appeals court found that Danielle had effectively denied the Paillets the opportunity to form a substantial relationship with the child, noting that “[w]here the grandparents of a child seek visitation with their grandchild and the parent continually and unreasonably denies visitation, the grandparents cannot be denied visitation for failure to have established a substantial relationship. Under such circumstances, a parent preventing grandparents from having meaningful contact with the child is estopped from claiming the grandparents do not have any rights because of no substantial relationship.”

The Kansas Supreme Court in Paillet disagreed with the Court of Appeals’ reasoning, declaring that the evidence at trial “establishes that no relationship, let alone a substantial one, existed between the Paillets and their granddaughter.” The Court also faulted the appeals court for creating an exception to K.S.A. 38-129(a), stating that “[t]he provisions of K.S.A. 38-129(a) are clear and unambiguous and do not provide for an exception to the requirement of finding the existence of a substantial relationship between the grandparents and grandchild.”

67. See id. at 246.
68. Id. at 248.
70. See generally id.
71. Paillet, 270 Kan. at 652-53. See also S.R.S. v. Davison, 31 Kan. App. 2d 192, 64 P.3d 434 (2002), wherein the Kansas Court of Appeals acknowledged Paillet, stating that the grandmother, Debbie Blake, had the burden of establishing that a substantial relationship existed between her and the child; but see Spradling v. Harris, 13 Kan. App. 2d 595, 778 P.2d 365 (1989), and Davis v. Heath, 35 Kan. App. 2d 86, 128 P.3d 434 (2006), wherein the court affirmed orders for grandparent visitation in cases in which the grandparent had proven a substantial relationship with at least one child but not with a younger sibling. In both Spradling and Heath, the orders for visitation included the child who did not have a substantial relationship with the grandparent. In affirming the orders, the court in both instances reasoned that although the grandparent had not established a substantial relationship with the younger sibling, all the affected children should be treated similarly.
73. Id. at 653.
74. Id.
75. Id. at 647-48.
76. Id. at 649.
77. Quoting id. at 649-50.
78. Quoting id. at 653.
79. Quoting id. at 654. See also, S.R.S. v. Davison, 31 Kan. App. 2d 192, 64 P.3d 434 (2002), wherein the Kansas Court of Appeals criticized the trial court for “attributing the lack of a substantial relationship” to the mother who refused to allow the maternal grandparents to see her children.
In a later case, DeGraeve v. Holm, the Kansas Court of Appeals gave special consideration to a child’s unique and close relationship with his maternal grandfather, who served as the child’s de facto parent while his mother was absent from his life for over two years. In DeGraeve, the court addressed whether the grandfather, Robert DeGraeve, met his burden of proving that he had established a substantial relationship with his grandson, Z. The biological mother of Z., Nicole Lee Holm (who also had two other children, all three by different fathers), had a history of drug abuse and dislike for her stepmother. Finding her feelings of anger toward her father visit their grandfather stemmed from other claims, that her father, DeGraeve, had a substantial relationship with Z., and that “he successfully overcame the presumption that Nicole was acting in Z.’s best interests.”

Curiously, in DeGraeve, the appellate court’s review of the facts primarily centered around DeGraeve’s parent-like relationship with Z. The court did not mention DeGraeve’s relationship with Nicole’s other two children, nor did the opinion reference a grandparent visitation order with them. Though DeGraeve petitioned for court-ordered visitation with all three of Nicole’s children, the order for grandparent visitation appears to include Z. only, excluding the other two children whose relationship with their grandfather was unclear, at least from the opinion.

The case of S.R.S. v. Strotkamp revealed that a past substantial relationship between a grandmother and a child is sufficient to meet the statutory requirement under K.S.A. 38-129(a). In Strotkamp, a paternal grandmother, Susan Strotkamp, began routine, mostly overnight, visits with her grandson, A.P., when the child was an infant. Along with visiting A.P., Susan supplied the baby with necessities, such as formula and diapers, and took A.P. various places, including camping, to the zoo, and movies. The mother of A.P., Casey, offered plans for 15 years old at the time of A.P.’s birth, was in SRS custody, and lived in foster care. Strotkamp provided Casey with transportation so that she could spend time with A.P. at Casey’s mother’s home where A.P. was living. This arrangement worked fine until Susan stopped providing transportation after discovering that Casey was not caring for A.P., but instead was spending time with a boy whom she was dating. Casey then refused to allow Susan to visit A.P., resulting in Susan’s decision to seek court-ordered visitation.

The district court found that a substantial relationship existed between Strotkamp and A.P. stating, “I can’t honestly find at this point in time, that a substantial relationship exists currently. It would appear that it existed for a while. It was allowed to lapse, but with a child 2 years of age, it should not be at all difficult to re-establish a relationship.” The Kansas

(continued on next page)
Court of Appeals affirmed the order for grandparent visitation, pointing out that K.S.A. 38-129 does not require any timing factor in the relationship, “such as that it be current, existing, or continuous.”96 Thus, according to the court in Strokamp, the past substantial relationship between the child and the grandparent was sufficient to meet the “substantial relationship” prong of the statute, though how far back in time a trial court would be willing to go to capture the substantial relationship between the grandparent and child remains an open question.

Proving “best interest”

In addition to the substantial relationship requirement explicitly mandated in K.S.A. 38-129(a), the statute provides that before a trial court may award grandparent visitation, it must also make a determination that visitation would be in the child’s best interest.97 While K.S.A. 60-1616(b) does not explicitly require a best-interest inquiry, the Court in Skov concluded that such a test must be applied in grandparent visitation requests filed pursuant to this statute as well.98

Although the best-interest test is undefined by statute, the Kansas courts have referenced the best interest of the child principle in the context of other domestic relations matters, such as child custody, residency, and parenting time proceedings.99 As a general matter, the Kansas courts have agreed that a determination of what is in the child’s best interest involves a factual inquiry, and such determinations are wisely left to the sound discretion of the court.100 Importantly, while the best interest principle is nebulous because it is not universally defined, courts traditionally consider a range and combination of factors to ensure that the welfare of the child is paramount.101 Not surprisingly, however, because there is no bright-line test that trial courts must employ, the best interest of the child must be determined in a case-by-case basis with careful attention to a variety of facts.102

Unlike child custody, residency, and parenting time disputes in which the wishes of the parents are often pitted against each other, in grandparent visitation matters, the parent’s decision concerning visitation must be given more weight than the grandparents’ desire and basis to have visitation.103 Therefore, in making the determination of “best interest” in the grandparent visitation context, a court must exercise caution so as to give sufficient deference and weight to the fit parent’s decision concerning best interest. More significantly, the court must refrain from substituting its own determination of best interest for that of the parents. This may be a difficult task for judges, many who often see the moral and societal value of children spending time with their grandparents.

The Troxel case highlighted how carefully a trial court must proceed in assessing best interest when Justice O’Connor, in the plurality opinion, stressed “there is a presumption that fit parents act in the best interests of their children” and as such, “there is normally no reason for the state to interject itself into the private realm of the family to further question the ability of that parent to make decisions concerning the rearing of that parent’s children.”104 Since Troxel, the Kansas appellate courts have scrutinized grandparent visitation orders carefully and have followed the lead of Troxel, stressing that trial courts must give deference to the parent’s determination of best interest. Moreover, the court has reemphasized its earlier ruling in Santaniello v. Santaniello that the burden of proof rests with the grandparent to prove that grandparent visitation is in the best interest of the child.105

Definition of “grandparent”

In addition to the constitutional arguments raised by the parents (the Wickers) in Skov, interpretation of the term “grandparent” was also addressed by the Kansas Supreme Court.106 The Wickers, opposed to allowing grandparent visitation with their children, relied on two earlier Court cases to bolster their contention that the term “grandparent” should be narrowly construed.107 The ostensible rationale underlying the parents’ argument for a strict definition of the term “grandparent” was that if the court accepted such an interpretation, the petition for court-ordered visitation with their children, which was filed by the great-grandmother and stepgreat-grandfather, the Tankersleys, would probably be dismissed.

The first case proffered by the Wickers was In re Hood.108 In Hood, the Court upheld a district court’s dismissal of a petition for grandparent visitation filed by a “grandparent like” person, who was unrelated to the child.109 The petitioner

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96. Quoting id. at 1146.
97. See K.S.A. 38-129(a).
98. Skov, 272 Kan. at 248.
100. Parish v. Parish, 220 Kan. 131, 551 P.3d 792 (Kan. 1976); see also In re Marriage of Rayman, supra note 99 (trial court is in the best position to determine best interest of the child and absent an abuse of discretion its judgment of best interest will not be disturbed on appeal.)
101. Supra note 99.
102. See generally id.
103. See generally Troxel, 530 U.S. 57 (2000).
104. Quoting id. at 58.
107. Id.
109. Id. at 689.
seeking court-ordered visitation in Hood was the grandmother of the child’s half brother and served as the child’s day care provider. Thus, Tankersley, the maternal great-grandmother, did not have standing to request court-ordered grandparent visitation with Mona Wicker’s children. The question of whether a stepgreat-grandparent met the definition of “grandparent” became moot because Mr. Tankersley, the stepgreat-grandfather, died before the Skov appeal was heard. Given the Court’s narrow definition of the term, however, it would logically follow that a stepgreat-grandparent would not have standing to seek or be granted court-ordered grandparent visitation under either of the Kansas statutes. The Skov decision seemed to cement the Court’s strict interpretation of the term “grandparent” and therefore should have guaranteed that trial courts would have little difficulty culling out and dismissing requests for grandparent visitation made by parties other than true biological or legally recognized grandparents, including requests by stepgrandparents. Nonetheless, a subsequent Kansas Court of Appeals case, S.R.S. v. Davison, raised the question whether a stepgrandparent may be awarded court-ordered visitation.

In Davison, the court vacated an order of grandparent visitation that awarded rights to the maternal grandmother and stepgrandfather. Both the grandmother and stepgrandfather were named petitioners in the request for court-ordered visitation. The court determined that the term “grandparent,” though not defined by statute, must be strictly construed in accordance with Hood, Sowers, and Skov. Relying on a Webster’s Dictionary definition, the court determined that a grandparent is defined as a “parent of one’s mother or father” and as such, the trial court erred in granting visitation to the stepgrandfather.

The Wickers also relied on Sowers v. Tsamolias, a 1997 case, wherein biological maternal grandparents, Barbara and James Sowers, sought court-ordered visitation with their grandchild, A.E., who had been adopted by unrelated third parties after the biological mother’s parental rights had been terminated.

Further complicating the facts in the case was that the Sowers were rearing A.E.’s biological sister, B.E. The Court recognized that the sibling relationship between A.E. and B.E. would probably be better preserved and fostered if the Sowers were awarded grandparent visitation, but noted that “extending natural grandparent visitation to include a post-adoption situation ... would be judicial legislation.” Although the Court appeared sympathetic to the children’s and grandparents’ circumstances, it held that the Sowers lacked standing to seek court-ordered visitation, reasoning that the termination of the biological mother’s parental rights and A.E.’s subsequent adoption by third parties created a new legal status. A.E. had new parents and new grandparents. Consequently, because A.E.’s ties with the biological grandparents had been legally severed, the Sowers no longer fit the narrow definition of the term “grandparent.”

Following the precedent of both Hood and Sowers, the Court in Skov defined the term “grandparent” narrowly, holding that great-grandparents are not included in the term “grandparents.” Thus, Tankersley, the maternal great-grandmother, did not have standing to request court-ordered grandparent visitation with Mona Wicker’s children. The question of whether a stepgreat-grandparent met the definition of “grandparent” became moot because Mr. Tankersley, the stepgreat-grandfather, died before the Skov appeal was heard. Given the Court’s narrow definition of the term, however, it would logically follow that a stepgreat-grandparent would not have standing to seek or be granted court-ordered grandparent visitation under either of the Kansas statutes. The Skov decision seemed to cement the Court’s strict interpretation of the term “grandparent” and therefore should have guaranteed that trial courts would have little difficulty culling out and dismissing requests for grandparent visitation made by parties other than true biological or legally recognized grandparents, including requests by stepgrandparents. Nonetheless, a subsequent Kansas Court of Appeals case, S.R.S. v. Davison, raised the question whether a stepgrandparent may be awarded court-ordered visitation.

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Legal Article: What’s Become of Grandma...
Fitness of a parent

Neither K.S.A. 38-129(a) nor 60-1616(b) explicitly require the trial court to consider the fitness of the parent as a prerequisite to granting grandparent visitation. Yet, Kansas case law is replete with reference to parental fitness in domestic relations matters when a parent’s actions or decisions concerning his or her child are challenged by another parent or third party.122 Interestingly, in 1957, prior to the enactment of the grandparent visitation statutes, the Kansas Supreme Court first addressed the issue of grandparent visitation rights in *Leach v. Leach*,123 a case wherein the Court recognized and considered the fitness of a parent in the grandparent visitation context.124

In *Leach*, maternal grandparents sought court-ordered visitation with a child whose father had primary custody.125 The trial court granted the grandparents the right to have “possession” of the child for one weekend every 60 days and ordered the father to “deliver said child to the maternal grandparents at said time.”126 The father appealed the trial court’s visitation order, claiming that he and the child lived in Omaha, Neb., and that it would be a hardship for them to travel to Wichita, Kan., where the grandparents lived. In finding that the trial court erred in granting visitation to the grandparents, the Court held that the district court’s decree was erroneous because the fit father was entitled to full custody of the child.127 Although the grandparents argued that the trial court merely granted them visitation rights, the Court rejected this contention, stating that the trial court’s order gave the grandparents possession of the child.128 “Possession,” the Court stressed, “imports far more than rights of visitation.”129

Importantly, in *Leach*, the Court made specific reference to the fitness of the custodial parent, the father.130 The Court appeared troubled by the language in the trial court’s visitation order, which suggested that the grandparents would, in essence, have custody of the child when the child was with them.131 The issue of grandparent visitation rights in the *Leach* case was a matter of first impression for the Court, and without explicit statutory authority, the Court may have been wary of extending such rights to grandparents. More than 40 years later, in 2000, the U.S. Supreme Court emphasized the importance of recognizing and giving significant weight to a fit parent’s decision concerning grandparent

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124. *Id.*
125. *Id.* at 546.
126. Quoting *id.*
127. *Id.* at 547. (Emphasis added.)
128. *Id.* at 548.
129. Quoting *id.*
130. See *id.* at 547.
131. *Id.* at 548.
Deference given to parental decision concerning grandparent visitation

In the Troxel plurality opinion, one of Justice O’Connor’s strongest criticisms of the state trial court’s handling of the case was that it did not give deference to the mother’s willingness to allow the grandparents “meaningful” visitation with her daughters. 146 Granville, the mother, was agreeable to allowing the grandparents, the Troxels, a monthly visit as well as short visits on special holidays with her daughters. 147 The Troxels wanted more visitation with their granddaughters. Thus, the legal dispute between the Troxels and Granville became a battle not over whether visitation would occur, but rather how much visitation would be allowed.148

In T.A.,149 the Kansas courts dealt with a similar dispute about the amount of visitation grandparents should be allowed. Like Troxel, the mother in T.A. did not seek to terminate her son’s visitation with the paternal grandparents altogether, but wanted the amount of grandparent visitation to be reduced.150 The mother sought modification of a prior agreement between her and the grandparents that allowed the grandparents visitation with the child, T.A., every Sunday from 7 a.m. to 7 p.m. The new visitation schedule proposed by the mother would have allowed the grandparents to visit with T.A. one Sunday every three or four weeks from noon to 7 p.m., effectively reducing the amount of grandparent visitation previously agreed to by the parties.151

133. Quoting Paillet, 270 Kan. at 658.
135. Id. at 34.
136. Id.
137. Id.
138. Id.
139. See generally Davison, 31 Kan. App. 2d at 194.
140. Id. at 194.
141. Id. at 194-95.
142. Id. at 200.
143. Id.
144. See generally id.
145. See id. at 200.
146. Troxel, 530 U.S. at 72.
147. Id. at 71.
148. See id.
150. Id. at 31. The father of T.A. committed suicide in 1999.
151. Id.
Without explanation, the district court refused to adopt the mother’s proposed modification of the visitation schedule, but altered the agreement giving the grandparents visitation one Saturday per month for eight hours.152 Dissatisfied with the trial court’s modifications, the mother sought appellate review.153 The Kansas Court of Appeals highlighted the district court’s failure to sufficiently articulate its reasons for not adopting the mother’s proposed schedule and remanded the case to the district court for further proceedings, stating that absent a finding of unreasonableness, a trial court should adopt the grandparent visitation plan proposed by the parent.154 Though the court in T.A. faulted the trial court because it neglected to make findings of fact to support departure from the mother’s proposed schedule, it did not define “unreasonableness” nor did it give the trial court any guidance on how to make such a finding in the context of a parent’s decision to limit or reduce grandparent visitation. After T.A., “unreasonableness” remained undefined, apparently leaving it to the discretion of the district court to determine.

The “reasonableness” of a parent’s decision to disallow grandparent visitation was also tested in Davison.155 In Davison, the Court of Appeals remanded the case to the district court to determine whether the mother’s refusal to allow the maternal grandmother and step-grandfather visitation with her two children was unreasonable.156 Davison was distinguishable from Troxel and T.A. because, unlike the mothers who were agreeable to some grandparent visitation in Troxel and T.A. respectively, the mother in Davison was unwilling to allow grandparent visitation at all.157 Testimony by the mother to support her decision to disallow grandparent visitation included claims that the grandparents, the Blakes, smoked around the children and that the Blakes would fight with and curse at Tamara in front of the children.158 There was also evidence that the grandmother, Debbie Blake, was arrested for making harassing phone calls to Tamara.159 The Blakes countered with claims of domestic violence between Tamara and her husband and an incident of child abuse involving one of the children.160

At the conclusion of the hearing the judge stated, “I distinguish this case from Troxel, because here the mother is saying she is going to exclude the grandparents from the grandchild’s life.”161 Before issuing an order for grandparent visitation granting the Blakes an overnight visit with both of the children every other Monday, the district court noted, “I don’t … have to rubber stamp any decision that mother makes.”162

Like T.A., the appellate court criticized the trial court in Davison for not determining whether Tamara’s decision to prevent and withhold grandparent visitation altogether was “unreasonable,” stating that it would be impossible to determine how much weight to give her decision to disallow grandparent visitation as opposed to the father’s willingness to allow it.163 Once again, the court did not provide guidance on how the trial court was to determine whether the mother’s refusal to allow grandparent visitation was “unreasonable.” To date in Kansas, “unreasonableness,” and conversely, “reasonableness,” remains undefined both by statute and case law in the context of grandparent visitation matters.

Ultimately what can be derived from both T.A. and Davison is that a trial court must scrutinize a parent’s reasons and motivations for either reducing grandparent visitation or refusing to allow it, without substituting its own judgment. Moreover, if the trial court considers either altering a parent’s proposed visitation plan or ordering grandparent visitation when a parent refuses to allow it, the trial court must make findings of fact on the record supporting its conclusion that the parent’s decision is unreasonable. Otherwise, Kansas case law suggests that a record, which is silent as to the trial court’s basis for deviating from the parents’ desires concerning grandparent visitation may, lead to reversal and remand on appeal.

Davies v. Heath: An Aberration

Since Troxel was decided in 2000, the Kansas Supreme Court’s and Court of Appeals’ decisions concerning grandparent visitation rights have carefully tracked Justice O’Connor’s plurality opinion. Moreover, the Kansas Supreme Court in both Paillet and Skov have given specific attention to the statutory language of K.S.A. 38-129(a) and K.S.A. 60-1616(b), interpreting the statutes in a manner that complies with the spirit and mandates of Troxel. Recently, on Feb. 17, 2006, however, the Kansas Court of Appeals decided a grandparent visitation case that appears to be inconsistent with the constitutional parameters outlined in Troxel as well as the Kansas Supreme Court’s interpretation of the state’s grandparent visitation statutes.

152. Id. at 35.
153. Id. at 31.
154. Id. at 35.
156. Id. at 201.
157. Id. at 194.
158. Id.
159. Id.
160. Id.
161. Quoting id. at 195.
162. Quoting id. at 195.
163. Id. at 201.
164. See In the Interest of T.M., 107 P.3d 1262, 2005 WL 638094 (Kan. App. 2005). In T.M., a recent unpublished decision that involved a third party’s challenge to a custody determination made by the SRS, the Kansas Court of Appeals, in dicta, provided that a “difference of opinion or the assessment of the situation does not necessarily rise to the level of ‘unreasonableness.’” Slip op. at 2.
In *Davis v. Heath*, Craig and Charlene Heath, married parents of two children, decided jointly to terminate grandparent visitation between their children and the paternal grandmother, Judy Davis, after Davis incorrectly informed SRS that the oldest child had been sexually abused. While Davis had a substantial relationship with the oldest child, her relationship with the younger child was more limited. The trial court concluded that although the grandmother had not visited the children since December 2003 when the parents “shut the door” on such visits, there was a past substantial relationship between her and the older child. As to the younger child, the court determined that the child’s relationship was “more limited” and “developing.” Over the parents’ objection, the trial court awarded the grandmother monthly four-hour visits with both children.

On appeal, the parents argued that because they were two fit parents belonging to a nuclear family, the court should give absolute deference to their decision to terminate grandparent visitation. The Kansas Court of Appeals rejected this argument concluding that if the Legislature intended to create a statutory exception for nuclear families under K.S.A. 38-129, it would have done so. Therefore, the court reasoned that since no explicit exception existed under the statute, trial courts need not give absolute deference to a decision by two fit parents to deny grandparent visitation.

While the court in *Davis* focused on the language of K.S.A. 38-129(a), its reasoning is likely misplaced, thus, undermining the constitutional principles outlined in the *Troxel* plurality opinion and Souter’s and Thomas’ concurring opinions. More importantly, the court’s reasoning in *Davis* seemingly ignores the deeply-rooted and well-established fundamental constitutional protections afforded parents under the 14th Amendment to the Constitution. For instance, Justice O’Connor plainly states in the *Troxel* plurality opinion that as long as a parent is fit, there “will normally be no reason for the [s]tate to inject itself into the private realm of the family” to question a parent’s decision-making ability. Moreover, Justice O’Connor criticizes the Washington nonparental visitation statute because it fails to limit the circumstances in which a petition for nonparental visitation may be granted by the trial court.

While Justice O’Connor wrote for a plurality of the Court in *Troxel*, Justices Souter and Thomas each contributed concurring opinions, both of which stressed the longstanding parental protections of the 14th Amendment. Justice Souter concludes in his separate concurring opinion that the Washington statute is unconstitutional on its face, precluding any analysis of its application. He wrote, “*Meyer v. Nebraska* repeatedly recognized right of upbringing would be a sham if it failed to encompass the right to be free of judicially compelled visitation by ‘any party’ at ‘any time’ a judge believed he could make a ‘better decision’ than the objecting parent had done.” In Justice Thomas’ concurring opinion, he recognizes the “fundamental right of parents to direct the upbringing of their children.” He writes that the Court has previously held that “parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them.”

He further stresses that the “opinions of the plurality, Kennedy, and Souter recognize such a right” and adds that any statute seeking to infringe upon that right would need to pass strict scrutiny. “Here, the [s]tate of Washington lacks even a legitimate governmental interest — to say nothing of a compelling one — in second-guessing a fit parent’s decision regarding visitation with third parties.”

The *Davis* decision also appears to contradict the Kansas Supreme Court’s clear mandate in *Pailet*, which requires strict interpretation of the grandparent visitation statutes while keeping in mind the *Troxel* constitutional parameters. In *Pailet*, the Court stressed that “[t]he provisions of K.S.A. 38-129 are clear and unambiguous and do not provide for an exception to the requirement of finding the existence of a substantial relationship between the grandparents and grandchild.” In *Davis*, the parents claimed that the grandmother did not have a substantial relationship with the younger child. Relying on the 1989 case of *Spradling v. Harris*, the Court of Appeals in *Davis* affirmed the trial court’s visitation order with the younger child, thus ignoring the language of the K.S.A. 38-129(a) and the Supreme Court’s mandate in *Pailet*. Like the court’s ruling in *Spradling*, which affirmed the order for grandparent visitation with a child who lacked a substantial relationship with the grandparent, the court in *Davis* concluded that it is in the best interest of the child to be treated

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166. Id. at 95.
167. Quoting id. at 90.
168. Id. at 90.
169. Id. at 90.
170. Id. at 92.
171. Id. at 92.
172. *Troxel*, 530 U.S. at 68.
173. See supra note 21.
175. Quoting id. at 78.
176. Quoting id. at 80.
177. Quoting id.
178. Quoting id.
179. See supra note 168.
similarly to his sibling and therefore grandparent visitation should be awarded with that child.\footnote{180}

After almost six years of thoughtful, deliberate, and consistent appellate review in Kansas, the \textit{Davis} decision complicates the area of law involving grandparent visitation rights. It ostensibly allows grandparents to seek court-ordered visitation with children any time a fit parent or parents deny visitation, thereby subjecting the parents to costly litigation and forcing them to defend against any claims for grandparent visitation. Surely, neither \textit{Troxel} nor the 14th Amendment contemplate such possibilities.

\textbf{Attorney's fees in grandparent visitation cases}

A collateral issue that the Kansas Court of Appeals has addressed in the grandparent visitation context is whether to order the grandparents (the petitioners) to pay the parent's costs and attorney's fees associated with defending against an action for court-ordered visitation.\footnote{181} K.S.A. 38-131 requires that a grandparent seeking court-ordered visitation rights shall pay the costs and reasonable attorney's fees of the parent, “unless the court determines that justice and equity otherwise require.” In \textit{DeGraeve v. Holm}, the mother, Nicole Holm, requested that court award her costs and attorney's fees, arguing that she was an unemployed mother of three children and could not afford to pay her attorney's fees.\footnote{182} Moreover, she contended that under K.S.A. 38-131, she was entitled to attorney's fees in defending against her father's request for court-ordered grandparent visitation.\footnote{183} The trial court denied the mother’s request for attorney’s fees. On appeal, the court stated that whether to award attorney's fees is in the discretion of the trial court. In this case, the court stated, the district court's denial of attorney's fees was proper because “[v]indicativeness on the part of the respondent in a case brought under K.S.A. 38-129 is a finding that supports the trial court's reasoning in denying the respondent attorney fees.”\footnote{184}

\textbf{V. Conclusion}

After several years of applying \textit{Troxel}, the Kansas appellate courts appear more comfortable handling requests for court-ordered grandparent visitation when a parent seeks to limit grandparent visitation. However, cases involving denial of grandparent visitation have been problematic for the courts because of the inherent difficulties in balancing all the interests involved. As revealed in this article, trial courts have been given some guidelines to assist with their decisions of whether to award grandparent visitation, modify an existing order for visitation, or deny a grandparent’s request altogether. Ultimately, the trial courts must consider a number of factors and make a determination on a case-by-case basis.

Indeed, while the grandparent visitation statutes remain legitimate in Kansas, \textit{Troxel} dictates that the courts must give significant weight and deference to a parent’s decision concerning grandparent visitation. The term “grandparent” has been narrowly construed by the Kansas courts, meaning that only biological or legally recognizable grandparents have standing to request court-ordered visitation. Grandparents seeking court-ordered visitation may file requests pursuant to both K.S.A. 38-129 (a) and 60-1616(b), but under both statutes, the grandparent has the burden of proving that there is a substantial relationship with a child and that grandparent visitation would be in the child’s best interests. In instances where the parent has proposed some visitation with the grandparent, the trial court should adopt the parent’s proposed schedule. In cases where the grandparent has alleged parental unfitness, the court should assess carefully whether consideration of such claims is appropriate to be handled in requests for grandparent visitation.

The \textit{Troxel} case and subsequent Kansas cases demonstrate how difficult these cases can be for the parties involved including the parents, the grandparents, and the children. As an alternative to litigation where time and money are spent, as well as emotional capital is expended, parents and grandparents should seek mediation as an effective and more efficient alternative for resolving these matters. 

\textbf{About the Author}

\textbf{Suzanne Carey McAllister} is a clinical faculty member at the University of Kansas School of Law. Prior to joining the faculty at the law school, she practiced in Wayandotte County as a legal aid attorney with Kansas Legal Services. She is a 1996 graduate of the University of Kansas School of Law.
Attorney Discipline

IN RE CHRISTOPHER P. CHRISTIAN
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 95,413 – JUNE 9, 2006

FACTS: Respondent, a private practitioner from Wichita, admitted the facts alleged in the formal complaint before a disciplinary hearing panel. The panel concluded that respondent converted funds belonging to his firm on numerous occasions by accepting payments of fees and expenses but failing to deliver those funds to the firm. A total of $36,777 was converted, and the firm incurred more than $22,000 in attorney’s fees while investigating the misconduct.

The panel found clear and convincing evidence of violations of Kansas Rules of Professional Conduct 1.5(d) (fees), 1.15(b) (safekeeping property), 4.1(a) (truthfulness), and 8.4(c) (misconduct involving dishonesty). After considering mitigating and aggravating factors, the panel unanimously recommended disbarment, finding that respondent intentionally violated his duty to maintain personal integrity and that the misconduct caused actual harm to the legal profession and undermined public confidence in the legal profession.

In aggravation, the panel found two prior disciplinary sanctions and the presence of selfishness, a pattern of misconduct, multiple offenses and substantial experience in the practice of law. In mitigation, the hearing panel found respondent had cooperated in the disciplinary process, acknowledged his misconduct, and expressed remorse. The panel also noted that respondent had a reputation as a competent personal injury attorney and the victim firm had been reimbursed. The panel did not find that respondent’s psychological condition or financial and family problems constituted mitigating evidence.

HELD: The Court considered respondent’s argument that the panel failed to consider his proposed plan of probation but found that the plan lacked adequate safeguards to protect the public. Without objection, the Court also considered newly submitted information regarding respondent’s physical health but held that the seriousness of the misconduct required disbarment.

IN RE MARK J. SACHSE
ORIGINAL PROCEEDING IN DISCIPLINE
ONE-YEAR SUSPENSION
NO. 95,240 – JUNE 9, 2006

FACTS: A disciplinary hearing on two separate client complaints was held involving respondent, a private practitioner from Kansas City, Kan. At the hearing, respondent stipulated to the facts and violations as set forth in the formal complaint.

The hearing panel found that respondent was retained in October 2002 to obtain an expungement of felony forgery convictions. At that time, he received $500 for attorney’s fees and a check for court costs. Despite numerous promises to the client, respondent failed to file the petition until April 30, 2003. When no order was obtained, the client filed a disciplinary complaint in April 2004. Respondent returned the fee and promised to complete the expungement at no charge despite being fired. He refiled the petition but again failed to obtain an order. Eventually, the disciplinary investigator, John Duma, obtained an order of expungement for the client in October 2004, two years after respondent was hired.

In the other matter, respondent hired a court reporter to provide translations services during a jail visit with an inmate who did not...
understand English. The interpreter billed respondent $60 in August 2002, but respondent failed to pay it. The court reporter filed a disciplinary complaint in May 2004 after unsuccessfully attempting collection. Respondent failed to respond to three letters from the disciplinary administrator and failed to provide a written response to the investigator. At the hearing, respondent stipulated to these facts and still had not paid the interpreter.

The panel found violations of KRPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation), 8.1(b) (disciplinary matters), and 8.4(g) (misconduct adversely reflecting on fitness to practice law) and SCR 207(b) (cooperation with the disciplinary administrator). The panel found five aggravating factors, including three prior disciplinary sanctions, and several factors in mitigation, including acknowledgment of the violations and absence of a dishonest or selfish motive. Respondent requested censure, but the panel cited his failure to cooperate and prior probation as reasons for recommending definite suspension for one year.

HELD: The Court adopted the findings of fact, conclusions of rules violations, and disciplinary sanction recommended by the panel.

IN RE MICHAEL K. LEHR
ORIGINAL PROCEEDING IN DISCIPLINE
DABARMENT
NO. 13,990 – MAY 15, 2006

FACTS: Respondent, a practitioner from Wichita, wrote to the appellate clerk voluntarily surrendering his license to practice law pursuant to SCR 217. At the time of the surrender, a disciplinary hearing on four separate complaints had been held. The allegations included violation of court orders when respondent failed to file briefs in two appellate cases, failed to act competently and diligently, and to expedite litigation in the representation of three clients. In addition, a formal complaint had been filed for hearing on two other counts. That complaint alleged that respondent caused a mistrial due to his admitted use of cocaine and marijuana during the representation as well as failure to place retainer fees in a trust account and to return the unearned retainer promptly.

HELD: The Court examined the disciplinary administrator’s files and found that the surrender should be accepted and the respondent disbarred.

Civil

COUNTY CLERK AND PAYROLL FUNCTION
PERRY V. BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF FRANKLIN ET AL.
FRANKLIN DISTRICT COURT – AFFIRMED
NO. 94,707 – MAY 5, 2006

FACTS: In March 2005, the Board of County Commissioners of the County of Franklin adopted a resolution assigning the preparation of county employees’ payroll to the newly created Human Resources Department. Perry, the county clerk, filed a petition for restraining order and injunction from enforcement of the resolution arguing the resolution would eliminate the county clerk’s statutorily mandated duty of performing payroll, improperly consolidate the county clerk’s office, and usurp the county clerk’s authority and duty over her office’s personnel matters. The district court held that the preparation of payroll is not a duty of the county clerk, and that K.S.A. 12-3901 was not applicable because the resolution did not constitute a county reorganization.

ISSUES: (1) Merits of the action, (2) statutorily mandated duty, and (3) K.S.A. 12-3903

HELD: Court affirmed the district court. Court held that despite the nature of Perry’s motion to dismiss, Perry availed herself of the opportunity to argue the pure issues of law in her written response and at oral argument. Consequently, the district court correctly addressed the merits. Court held that counties are prohibited from passing any legislation, which is contrary to or in conflict with any act of the Legislature, which is uniformly applicable to all counties in the state. Court held that based on the plain and unambiguous language of applicable Kansas statutes, the preparation of payroll is not a statutorily mandated duty of the county clerk. Court held that K.S.A. 12-3903 does not apply because the board was attempting to transfer the payroll duty from one who had historically performed that function to one that had never performed it.

STATUTES: K.S.A. 12-3901, -3903(a), (c); K.S.A. 19-101a, -101c, -212 Second, Sixth, -301 et seq., -305, -306, -311, -312, 313; K.S.A. 2005 Supp. 19-212a, -304; and K.S.A. 60-212(b)(6), -256

FORFEITURE
STATE EX REL. TOPEKA POLICE DEPARTMENT V.
$895.00 U.S. CURRENCY
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 94,719 – MAY 5, 2006

FACTS: Drugs and $895 were seized when Wright was arrested. Public defender appointed in Wright’s criminal case and Wright ordered to pay $50 application fee. State then filed civil forfeiture action against the seized funds. Prior to entry of judgment on the seized property, Kansas Board of Indigents’ Defense Services (BIDS) claimed an interest in the seized funds, seeking reimbursement of the $50 application fee and $2,000 for reasonable expenses for anticipated legal services in Wright’s criminal case. District court granted state’s motion to strike, finding BIDS lacked standing to file a claim in the forfeiture action.

ISSUE: Kansas Standard Asset Seizure and Forfeiture Act (KSASFA)

HELD: Issue of first impression in Kansas. Consistent with Model Asset Seizure and Forfeiture Act of 1991, KSASFA shows legislative intent that one must be an owner or interest holder in the seized property to have standing to file a claim in civil forfeiture proceedings. This is also consistent with cases in other jurisdictions. Under facts, BIDS was not an owner or interest holder in the seized funds, thus BIDS lacked standing to make a claim in the forfeiture proceeding.

STATUTES: K.S.A. 2005 Supp. 22-4504, -4504(c), -4529, 84-9-102(a)(52)(A), -312, -313; and K.S.A. 22-4501 et seq., 60-212 sections (c) and (f), -4101 et seq., -4102(e), -4106, -4106(a), -4106(a)(5)(A), -4106(b)(5), -4107(c), -4109(a), -4109(a)(3)(C), -411(a), -4112 sections (e), (h), (j), (k), and (l), -4160(a)(5)(A)

HABEAS CORPUS
DRACH V. BRUCE
FINNEY DISTRICT COURT – AFFIRMED
NO. 93,654 – JUNE 9, 2006

FACTS: Drach’s convictions for premeditated murder, aggravated battery with great bodily harm, and criminal possession of weapons in marital homicide case upheld. 268 Kan. 636 (2000). Drach filed 60-1507 motion alleging counsel was ineffective by depriving him of right to testify, and that convictions were based on inadmissible hearsay evidence in violation of Confrontation Clause under Ohio v. Roberts, 448 U.S. 56 (1980), and Crawford v. Washington, 541 U.S. 36 (2004). District court denied the motion. Drach’s appeal was transferred to the Supreme Court.

ISSUES: (1) Sixth Amendment right to testify and (2) confrontation clause and admission of marital discord testimony

HELD: Under facts, Drach failed to demonstrate that counsel’s representation was deficient, and no showing of prejudice by Drach’s inability to personally refute rebuttal testimony.

48 – JULY/AUGUST 2006

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
Joining majority of circuit courts that have decided the issue, the new Confrontation Clause analysis in Crawford is not a watershed rule entitled to retroactive application on collateral appeal. Direct appeal rejected the claim that admission of marital discord evidence as res gestae or under judicially created marital discord hearsay exception violated Confrontation Clause under Roberts. Res judicata, rather than law of the case doctrine, applies to issues raised in 60-1507 civil proceeding, which have been previously resolved by final appellate court in the criminal proceeding.

STATUTE: K.S.A. 20-3018(c), 60-1507

LICENSES – CONSTITUTION
KEMPKE V. KANSAS DEPARTMENT OF REVENUE
ELLSWORTH DISTRICT COURT
REVERSED AND REMANDED
NO. 94,013 – MAY 5, 2006

FACTS: Kansas Department of Revenue sought to suspend Kempke’s driver’s license under Kansas implied consent law. District court held the statutory scheme of Kansas implied consent law was unconstitutional as applied to Kempke, because Kempke was denied due process by not being permitted to subpoena a relevant witness to testify at his administrative hearing. Department of Revenue appealed, and appeal transferred to Supreme Court.

ISSUES: (1) Due process and (2) Kansas implied consent law
HELD: Kempke’s due process rights were not violated by Kansas law. Although Wulfkuhle v. Kansas Department of Revenue, 234 Kan. 241 (1983), and Carson v. Division of Vehicles, 237 Kan. 166 (1985), would appear to require subpoena of wide range of relevant witnesses at initial administrative hearing in driver’s license suspension case, Kansas implied consent law underwent numerous changes after those cases. Legislative changes provide for extensive hearing at administrative level and automatic extension of driving privileges if licensee petitions for review in district court. By appealing to district court, licensee can ensure a full due process hearing before any final action is taken against driving privileges for refusing to submit to test for intoxication. Under Kansas law, driver is provided with meaningful hearing and right to call witnesses and cross-examine witnesses before any final action is taken.

STATUTES: K.S.A. 2005 Supp. 8-259(a), -1001(b)(1) and (2); K.S.A. 8-1001 et seq., 1001(b)(1) and (2), -1002(a)(1), -1002(d)-(f), -1014, -1020 sections (a), (b), (g), (k)-(m), (o)-(s), 20-3018(c); K.S.A. 1985 Supp. 8-259, -1002(c)(2), -1002(d), -1002(e); K.S.A. 8-255(b), -1001 (1982 Easley); K.S.A. 1981 Supp. 8-1001(c); and K.S.A. 8-255(b), -259 (1975 Weeks)

INSURANCE
LEE BUILDERS INC. V. FARM BUREAU
SEDGWICK DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART
COURT OF APPEALS – AFFIRMED
NO. 90,944 – JUNE 9, 2006

FACTS: Lee Builders Inc. (Builders), general contractor for construction of a custom home, was insured under commercial general liability policy issued by Farm Bureau. Homeowner sued Builders over damage caused by water seepage. Builders notified Farm Bureau of the claim, but Farm Bureau denied coverage. Builders then joined with subcontractors to negotiate settlement with homeowner. Builders filed suit against Farm Bureau seeking recovery of settlement plus interest and attorney fees. Trial court granted judgment to Builders and awarded attorney fees under K.S.A. 40-908, but denied attorney fees under K.S.A. 40-256. Builders and Farm Bureau both appealed. The Court of Appeals affirmed in part and reversed in part, holding that general liability policy provided coverage for part of Builders’ claims but remanded for further proceedings to determine the amount of the covered claim. The Court of Appeals also vacated the award of prejudgment interest, but affirmed the award of attorney fees. Farm Bureau filed a petition for review, but Builders filed no cross-petition.

(continued on next page)

Appellate Practice Reminders . . .
From the Appellate Court Clerk’s Office

Case Caption

Generally, the case caption on appeal does not change from the caption used in district court. The caption does not change even if a party dies or is dismissed out of the case. The district court caption must be placed on the docketing statement. See Rule 2.041, examples 1-4. The appellate designation of the parties will be added to the case caption. For example, if the case caption is Smith (plaintiff) v. Jones (defendant) in the district court and Jones appeals, the caption on appeal will be Smith (plaintiff-appellee) v. Jones (defendant-appellant).

A major exception occurs in cases involving the code for the care of children, juvenile offenders code, or adoption. In these cases, the child should only be referred to by initials in the caption. See Rule 7.043.

Footnotes in Briefs

Footnotes in briefs should be avoided. If a footnote is absolutely necessary, every footnote shall commence on the same page as the text to which it relates. See Rule 6.07(a). The use of footnotes for citation to the record should be avoided.

The appellate courts require only the volume and page(s) for a complete citation to the record. For example, (R. II, 210) means the fact can be found in Volume 2 on Page 210.

If you have any questions about these or other appellate court rules and practices, call the Clerk’s Office and ask to speak with Jason Oldham, chief deputy clerk, (785) 368-7170.
ISSUES: Did the district court and Court of Appeals err in determining that moisture leakage over time caused by defective materials or workmanship, which led to structural damage within a constructed home, was an “occurrence” in commercial general liability policy? Did the district court err in awarding attorney fees?

HELD: Court affirmed the Court of Appeals decision. Court held the district court did not err in concluding indemnity provisions of policy were triggered. Property damage to surrounding structural components caused by moisture seepage resulting from faulty work constitutes an “occurrence” under general contractor’s commercial general liability policy because (1) policy definition of “accident” includes the continuous or repeated exposure to substantially the same general harmful conditions; (2) Supreme Court has indicated that “occurrence” is avoided only when act results in intentional injury; (3) to construe “occurrence” more narrowly would render other policy provisions and exclusions meaningless; and (4) to extend policy definition or precise phrase is ambiguous, policy is construed against insurer. District court’s judgment for entire settlement is reversed. Where insurer wrongfully fails to indemnify its insured, insurer has not forfeited its rights to contend that some or all of the amount paid by the insured to settle the claim was not within policy’s coverage. Remanded for factual determination of amount resulting from the occurrence. Court held district court did not err in finding Builders was entitled to attorney fees under K.S.A. 40-908. Statute applies in cases in which judgment is rendered on a policy that insures against loss by fire, tornado, lightning, or hail. Type of policy controls application without regard to actual type of loss incurred.

STATUTES: K.S.A. 16-201; K.S.A. 60-2101(b); and K.S.A. 40-256, -908

INEFFECTIVE ASSISTANCE OF COUNSEL
FLYNN V. STATE
GEARY DISTRICT COURT – AFFIRMED
NO. 94,568 – JUNE 9, 2006

FACTS: Flynn was convicted of first-degree murder, conspiracy to commit first-degree murder, and conspiracy to commit perjury in 1996, involving the shooting death of Randy Sheridan in rural Geary County. Brent Lonker represented Flynn during the inquisition and grand jury proceedings all the way through the lengthy trial. The Kansas Supreme Court confirmed Flynn’s convictions. Flynn filed a motion pursuant to K.S.A. 60-1507 raising eight claims that Lonker’s representation denied her effective assistance of counsel.

ISSUE: Ineffective assistance of counsel

HELD: Court affirmed. Court held that appointing new counsel in the course of Flynn’s lengthy trial could have in and of itself created a claim for ineffective assistance of counsel. Court also denied Flynn’s claim regarding Lonker’s inexperience. Court stated that inexperience, in and of itself, does not establish a presumption that a defendant received ineffective assistance of counsel. Court held that Flynn failed to find any support in the record that Lonker’s was incompetent based on his inexperience. Court also stated that Flynn retained Lonker for nearly three years before his appointment and that Lonker’s appointment, without objection, did not occur until Flynn exhausted her personal funds. Court held there was substantial evidence to support the district court’s findings that Flynn knew she had a right to testify and knowingly waived that right after consultation with Lonker. Court rejected Flynn’s claims based on allegations that Lonker failed to properly investigate her defense, that Lonker was not adequately prepared for trial, that Lonker failed to call witnesses, failed to admit evidence, failed to conduct a poll to establish bias within the community in support of a motion to change venue, or unreasonably relied on co-defendant’s counsel for motions and objections. Court concluded that Flynn failed to establish any deficiencies in Lonker’s performance, and it was unnecessary to consider whether Lonker’s performance prejudiced Flynn.

STATUTES: K.S.A. 20-3018(c) and K.S.A. 60-1507

INVERSE CONDEMNATION AND SUMMARY JUDGMENT
KAU KAU TAKE HOME NO. 1 ET AL. V.
CITY OF WICHITA
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,869 – JUNE 9, 2006

FACTS: Kau Kau Take Home No. 1 Inc. operated a Kentucky Fried Chicken (KFC) restaurant located on West Irving Street, southwest of the intersection of Tyler Road and Kellogg in Wichita. The city began a construction project to reconfigure and reconstruct the Tyler and Kellogg intersection that drastically changed access to the KFC. The appellants filed a petition for inverse condemnation seeking compensation for the temporary and permanent restriction of access to their property. The district court granted summary judgment in favor of the city.

ISSUE: Granting of summary judgment

HELD: Court affirmed. Court held that appellants’ claim for inverse condemnation due to a loss of access involves only the regulation of traffic flow. The city’s road construction project had not changed the appellants’ direct access to an abutting street. Because the city’s regulation of traffic flow near appellants’ property is a reasonable exercise of the city’s police power, appellants failed to demonstrate a compensable taking.

STATUTES: K.S.A. 12-105b and K.S.A. 26-504

PERSONAL INJURY, ATTORNEY FEES, AND LAW OF THE CASE
JOHNSON ET AL. V.
WESTHOFF SAND COMPANY INC. ET AL.
JOHNSON DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 92,700 – JUNE 9, 2006

FACTS: The Johnsons were involved in an automobile accident with a Westhoff semitrailer in a construction zone resulting in Michelle Johnson losing her dominant right arm below the elbow. The Johnsons retained counsel to file a personal injury lawsuit under a contingent fee agreement to pay their attorney 33 percent of any recovery through settlement or trial judgment or 40 percent in the event of an appeal. After all defendants settled, Mid-Continent Casualty Co., Westhoff’s insurer, failed to defend the lawsuit and default judgment against Westhoff was entered for nearly $2.3 million. Two years after the default judgment, the Johnsons instituted a garnishment action against Mid-Continent to collect the judgment. Mid-Continent denied coverage. The district court found Mid-Continent’s denial of coverage was without just cause or excuse. The district court held the Johnsons were entitled to collect their judgment that was now valued at $3.6 million and also awarded attorney fees of $1.2 million, which was one-third of the judgment. The Court of Appeals affirmed the default judgment but remanded for a full hearing for consideration of the factors to determine the appropriate amount of attorney fees (Johnson I). On remand, Mid-Continent paid the judgment of nearly $4 million. The Johnsons filed a motion with the district court to determine the amount of attorney fees. The district court conducted a full evidentiary hearing and determined the Johnsons were entitled to $1.3 million in attorney fees (one-third of the nearly $4 million judgment) and $5,360.38 for expenses in litigating the garnishment action. The district court also awarded $51,580 for attorney fees for expenses incurred to litigate the specific amount of attorney fees “fees for fees,” but denied fees and expenses for appellate work in Johnson I. The Court of Appeals affirmed the district court’s ruling (Johnson II).

ISSUES: (1) abuse of discretion (2) law of the case doctrine, and (3) expert witness fees and expense

HELD: Court affirmed in part and reversed in part. Court held
the district court considered all of the attorney fee factors prior to awarding attorney fees. The judge had been the judge of the case for more than 10 years and was quite familiar with counsel on both sides. Court held the district court’s decision was supported by the evidence and although the district did not state exactly how it computed the award, it was approximately one-third of the $4 million judgment. Court stated that it could not say that no reasonable person would agree with the decision of the district court. Regarding the law of the case, the Court stated that the Court of Appeals in *Johnson I* did not explicitly rule that the district court was forbidden from considering the contingent fee agreement. Court stated that the district court actually analyzed all of the factors in determining an appropriate attorney fee award. Court held the district court also properly analyzed all the appropriate factors in determining the fee for fee award. Court stated that Mid-Continent failed to demonstrate that no reasonable person would agree with the fee award and that it was in line with the reasonable figures provided by the Johnsons. However, the Court held that the absence of specific statutory authority for expert witness fees precludes such an award under K.S.A. 40-256 and the district court erred in awarding the fee for experts. Court stated that the Johnsons are entitled to recover witness fees of $10 per day plus mileage for these witnesses.


**STATUTORY APPRAISAL RIGHTS AND BREACH OF FIDUCIARY DUTY**

**WELCH ET AL. V. VIA CHRISTI HEALTH PARTNERS INC. ET AL.**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 92,867 – MAY 5, 2006**

FACTS: Welch, a physician, and the other nine of 21 limited partners of MR Imaging Center L.P. brought suit against Via Christi, the general partner and major limited partner, and MR Imaging seeking a statutory defined buyout price for their interests after Via Christi obtained a valuation of the business and caused the limited partnership agreement to be amended to permit a merger with a newly created limited liability company, MRI LLC. Under the merger agreement, the plaintiffs were cashed out and the limited partnership was subsequently converted into a limited liability company, MR Imaging LLC. Court granted summary judgment to Via Christi finding Welch did not have statutory appeal rights; the damages were unliquidated, Welch failed to establish a breach of fiduciary duty by Via Christi, and the appraiser was independent.

ISSUES: (1) statutory appraisal rights and (2) breach fiduciary obligations

HELD: Court affirmed. Court held that the limited partners in a domestic limited partnership whose interests have been terminated and paid for in a transaction effected by the general partner involv ing the merger of the domestic limited partnership with a limited liability company are not entitled to dissociated status under Kansas partnership law and are not entitled to statutory buyout rights under K.S.A. 56a-701. Court also held that the limited partners did not establish a prima facie case for breach of fiduciary duties of loyalty, good faith, and fair dealing under K.S.A. 56a-404(b)(1), (b)(2), and (d). Court lastly held that the limited partners did not establish specific acts of fraud, misrepresentation, or misconduct sufficient to shift the burden of proof to the general partner to establish the fairness of the transaction.

STATUTES: K.S.A. 17-7701 et seq., -7703, -7704(c), -7707(k), -7708; K.S.A. 2005 Supp. 17-7682, -7705(a)(2); K.S.A. 20-3018(c); and K.S.A. 56a-101(e), -404(b)(1), (b)(2), (d), -601, -701, -801, -901, -902, -903, -905, -906(e), -908, -1a01 et seq., -1a253, -1a353(b), -1a354, -1a603(a), -1a604, -1a609

**SUMMARY JUDGMENT, INSURANCE COVERAGE, AND LOSS OF USE**

**CONNER V. OCCIDENTAL FIRE & CASUALTY COMPANY OF NORTH CAROLINA ET AL.**

**JEWELL DISTRICT COURT – AFFIRMED AND REMANDED**

**COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART**

**NO. 92,286 – JUNE 9, 2006**

FACTS: Conner filed a claim with his commercial insurers, Occidental Fire and Wilshire Insurance, for damages to a farm trailer that collapsed when being loaded with grain. The insurers denied coverage; Conner sued. On cross-motions for summary judgment, the trial court concluded that Conner sustained an insured loss, the insurers failed to conduct a good faith investigation, and Conner was entitled to attorney fees. The trial court set the case for jury trial to determine damages. The jury awarded damages for repairs to the trailer and for loss of use between its collapse and repair. The Court of Appeals affirmed the trial court’s determination of liability and coverage under the insurance policy. However, the Court of Appeals concluded there was a material issue precluding summary judgment and remanded for a jury trial on the issue of bad faith of the insurer’s investigation and on the insurer’s contention that Conner fraudulently inflated his claimed loss. The Court of Appeals concluded that there was no coverage for loss of use of the trailer.

ISSUES: (1) Insurance policy coverage, (2) failure to consider exclusions, (3) demand of question of bad faith, (4) improper summary judgment, and (5) insurance coverage of loss of use

HELD: Court affirmed in part and reversed in part. (1) Court held that under the facts of the case, the district court was correct in concluding that the damage to Conner’s trailer was covered under the policy. (2) Court held that although the insurers plainly denied coverage in part on the basis of the wear and tear and mechanical breakdown exclusions, they denied asserting the exclusion in their reply brief in the Court of Appeals. The insurers are in no position to claim error on the part of the Court of Appeals for failing to address the application of the exclusions. (3) Court held there was no genuine issue as to any material fact regarding bad faith, and Conner is entitled to judgment as a matter of law. Court held the district court made the factual bad faith determination, and the Court of Appeals erred in holding the jury must make that determination. Court stated the Court of Appeals also erred in applying an abuse of discretion standard in reviewing the district court’s determination. (4) Court agreed with the district court, not the Court of Appeals, that the insurers failed to conduct a good faith investigation into Conner’s claim as shown by violation of the insurer’s claims investigation procedures, the failure to interview the two individuals who had inspected the trailer and who had provided plaintiff with repair estimates and the slow pace of the investigation. Consequently, the district court did not err in granting Conner’s motion for summary judgment. (5) Court held that considering the policy altogether, the provisions of Conner’s policy appear to provide recovery for the loss of use of his trailer. But, if the provisions pertinent to this issue are ambiguous, that ambiguity must be construed in Conner’s favor. (6) Court held that the record does not support the insurers’ claim that Conner committed a fraudulent act in misrepresenting or inflating his loss, which would excuse the insurers from paying the claim. However, the Court agreed with the Court of Appeals that summary judgment was not appropriate on the issue of Conner’s loss and the that issue needed to be remanded to the district court for a jury trial determination.

STATUTE: K.S.A. 40-256, -2,118(a), (c)
Criminal

STATE V. ANDERSON
SEDGWICK DISTRICT COURT – REVERSED
COURT OF APPEALS – AFFIRMED
NO. 92,580 – JUNE 9, 2006

FACTS: Police stopped Anderson's truck and issued citation for traffic violation. Stop extended for drug dog sniff after Anderson refused consent to search. Drugs found on passenger, but no additional drugs found in truck. After officers obtained verbal permission from Department of Corrections special enforcement officer to arrest Anderson for violating conditions of release, drugs discovered and seized. District court denied motion to suppress. Court of Appeals reversed and ordered drug evidence suppressed. 34 Kan. App. 3d 375 (2005). State's petition for review was granted.

ISSUES: (1) Terry stop, (2) probable cause, and (3) conditional release violator

HELD: Under facts, initial traffic stop was valid, and there was reasonable suspicion to extend Anderson's detention beyond end of traffic stop to allow for drug dog sniff of truck.

Court of Appeals correctly found the reasonable suspicion did not ripen to probable cause for Anderson's arrest. Justification for Terry detention ended when unproductive search of truck was completed. No incriminating evidence discovered during detention to indicate Anderson possessed drugs or to link passenger's drugs to Anderson.

Tenth Circuit holding in U.S. v. Anchondo, 156 F.3d 1043 (10th Cir. 1998) is discussed and not followed.

STATE V. COOK
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 92,731 – JUNE 9, 2006

FACTS: In 1992, Cook was convicted of first-degree premeditated murder of Charles Duty. His conviction was overturned by the 10th U.S. Circuit Court of Appeals based on a violation of his right to confrontation. Upon retrial, Cook was again convicted by a jury of having murdered Charles Duty. His conviction was overturned by the 10th U.S. Circuit Court of Appeals based on a violation of his right to confrontation. Upon retrial, Cook was again convicted by a jury of having murdered Charles Duty.

ISSUES: (1) Motion to recall the jury, (2) psychological examination of a state's witness, (3) request for continuance to determine witness's mental health, (4) motion for new trial based on newly discovered evidence, (5) failure to calculate sentence under Kansas Sentencing Guidelines Act (KSGA), and (6) enhanced sentencing under Apprendi

HELD: Court affirmed. (1) Court conducted a detailed discussion of Kansas case law and cases from other jurisdictions dealing
with a motion to recall the jury based on allegations that the jury was aware that the defendant had previously been convicted of the current charges and the present trial was a retrial. The affidavit of the juror in question stated that he heard another juror state that it was a retrial. This statement was not conjecture. The juror’s affidavit varied from other jurors’ in that he was the only juror to report hearing that Cook previously had been convicted of the same crime. The Court held that Cook failed to demonstrate any prejudice. The Court held that the trial court scrupulously articulated the reasons for denying the motion to recall the jury and there was no abuse of discretion in the denial. (2) Court found the issue of whether to order a psychiatric examination of a noncomplaining witness was one of first impression. Court held that Cook cited no authority that a particularly troubling sequence of events, including schizoaffective disorder and drug problems, or that the witness failed to meticulously recount the past 10 years constituted compelling reasons why the witness should not have been required to submit to psychological testing prior to testifying. Court found no abuse of discretion in the trial court’s decision to not order a psychological examination of the state’s witness. (3) Court held the trial court did not err in denying the motion for continuance to determine a state witness’s mental health. Court stated the trial court did not rely only on the witness’ situation, but also on the fact that the trial court and the state had rearranged schedules to accommodate an earlier trial requested by Cook and that Cook did not suggest any evidence that would be obtained from an investigation in his motion for a new trial. (4) Court found that Cook satisfied the burden that the newly proffered evidence could not with reasonable diligence been produced at trial. However, the Court held that the evidence would not likely have changed the result of the trial. (5) Court held the appropriate sentence under the KSGA was computed and was part of the record. (6) Court also held the trial court did not enhance his sentence beyond the statutory maximum and there was no violation of Apprendi. STATUTES: K.S.A. 21-3402(a), -4501(b), -4724(f); K.S.A. 2005 Supp. 21-4704; K.S.A. 22-3501(1); and K.S.A. 60-259, -441, -444, -460

STATE V. FANNING
MARSHALL DISTRICT COURT – AFFIRMED
NO. 94,621 – JUNE 9, 2006

FACTS: Fanning entered nolo contendere plea to one count of attempted manufacture of methamphetamine. Pursuant to plea agreement, state did not object to Fanning’s motion for downward durational departure from presumptive sentence of 146 to 162 months to 48 months. District court granted the departure. Fanning appealed, claiming he was improperly sentenced because possession of drug paraphernalia with intent to manufacture, severity level 4 felony, is identical to attempted manufacture of methamphetamine, severity level 1 drug felony. Appeal transferred to Supreme Court.

ISSUE: Identical offenses for sentencing

HELD: State v. McAdam, 277 Kan. 136 (2004) and State v. Campbell, 279 Kan. 1 (2005), involving sentencing issue, are distinguished from State v. Schoonover, 281 Kan. (2006) and State v. Futton, 280 Kan. 385 (2005), involving multiplicity issue. Application of same analytical framework is not required in both type of cases. Under facts in relation to statutory elements of this case, possession of drug paraphernalia with intent to manufacture methamphetamine is not identical to attempted manufacture of methamphetamine. STATUTES: K.S.A. 2005 Supp. 21-4705 and K.S.A. 20-3018(c), 21-3301(a), -4721(e)(3), 65-4150(c), -4152(a)(2) and (3), -4152(c), -4159, -4159(a), -4161(a), -7006(a)

STATE V. GROSHONG
LYON DISTRICT COURT – REVERSED AND REMANDED
NO. 93,419 – JUNE 9, 2006

FACTS: On appeal, Goodson claimed his videotaped confession to police should have been suppressed as involuntary because he had ingested a large quantity of methamphetamine and had been without sleep for days prior to arrest. Goodson also claimed district court erred in admitting evidence of gang affiliation as relevant to establish relationship between Goodson and other witnesses. Finally, Goodson claimed use of his prior convictions to enhance his sentence violated Apprendi.

ISSUES: (1) Suppression of statements, (2) evidence of gang membership, and (3) sentence

HELD: On record provided, which did not include the videotaped statements, substantial evidence supports trial court’s factual findings regarding the voluntariness of Goodson’s statements. Under totality of circumstances, confessions were knowingly and voluntarily given. No error in denying motion to suppress.

Admission of evidence of gang membership, and harmless error standard to be applied to the erroneous admission of such evidence, is discussed. Admission of gang evidence in this case was error, but error was harmless under facts.


STATUTE: K.S.A. 22-3601(b)(1), 60-261, -401(b), -404, -407(f), -455

STATE V. GROSHONG
LYON DISTRICT COURT – REVERSED AND REMANDED
NO. 93,419 – JUNE 9, 2006

FACTS: Groshong was the passenger in a vehicle subject to a routine traffic stop. During the stop, an officer searched Groshong’s purse left in the vehicle and found drugs and drug paraphernalia. The district court suppressed the evidence seized from Groshong’s purse. The Court of Appeals reversed the district court’s suppression finding that Groshong voluntarily left her purse in the car when she exited, and Groshong’s request for her purse came after officers had probable cause to search the vehicle, giving legal right to search all packages and containers within the vehicle.

ISSUE: Motion to suppress

HELD: Court affirmed the Court of Appeals reversal of the district court’s granting of the motion to suppress. Court held that a law enforcement officer may search a vehicle passenger’s purse left in the vehicle when the passenger exits, if the passenger makes no effort to retrieve the purse before probable cause to search the vehicle develops. In such a case, the purse is treated the same as any other package or container in the vehicle that could hold or conceal the object of the search.

STATUTES: No statutes cited.
STATE V. GUMFORY
LYON DISTRICT COURT – AFFIRMED
NO. 94,575 – JUNE 9, 2006

FACTS: Gumfory granted downward dispositional departure sentence of 18 months’ mandatory drug treatment pursuant to K.S.A. 2005 Supp. 21-4729. Based on misdemeanor violations and removal from the drug abuse treatment program, district court revoked probation. Gumfory appealed, claiming there was no judicial finding that any of the conditions necessary to revoke probation set forth in Senate Bill 123 Implementation Manual were present in his case. Appeal transferred to Supreme Court.

ISSUE: Revocation of probation

HELD: K.S.A. 2005 Supp. 21-4729(f)(1)(A) and (B) do not set forth exclusive grounds for revocation of nonprobation sanction of probation under K.S.A. 2005 Supp. 21-4729; rather, they set forth grounds for when district court must revoke offender’s nonprobation sanction of probation established under that statute. Under facts of case, district court had discretion pursuant to K.S.A. 2005 Supp. 21-4610, to revoke Gumfory’s S.B. 123 probation upon concluding Gumfory had violated terms of his probation simply by being convicted of multiple misdemeanors. Abuse of discretion claim is rejected.

STATUTES: K.S.A. 2005 Supp. 21-4603d(n), -4610, -4610(a), -4729, -4729(a), -4729(d), -4729(f)(1) subsections (A) and (B) and K.S.A. 20-3018(c)

STATE V. NGUYEN
FINNEY DISTRICT COURT – AFFIRMED
NO. 91,350 – MAY 5, 2006

FACTS: Nguyen convicted of first-degree felony murder after premeditated murder charge was amended to obtain 20-year parole eligibility. Before sentencing Harned moved to withdraw plea, claiming he misunderstood the applicable penalty included a life sentence. After full hearing, trial court denied the motion and sentenced Harned to life in prison with parole eligibility after 20 years. Harned appealed.

ISSUE: Withdrawal of plea

HELD: Abandoned claims of ineffective counsel are identified. Record supports conclusion that Harned understood nature of the amended charge prior to his plea and had ample time to discuss the amended charge with appointed counsel. Under these circumstances and record as a whole, defendant voluntarily and knowingly entered plea to charge of felony murder.

STATUTES: K.S.A. 2005 Supp. 22-3210(d) and K.S.A. 21-3401(b), -3402(a), -3426, 60-455

STATE V. HARNED
BUTLER DISTRICT COURT – AFFIRMED
NO. 93,168 – JUNE 9, 2006

FACTS: Harned entered no contest plea to first-degree felony murder after premeditated murder charge was amended to obtain 20-year parole eligibility. Before sentencing Harned moved to withdraw plea, claiming he misunderstood the applicable penalty included a life sentence. After full hearing, trial court denied the motion and sentenced Harned to life in prison with parole eligibility after 20 years. Harned appealed.

ISSUE: Withdrawal of plea

HELD: Abandoned claims of ineffective counsel are identified. Record supports conclusion that Harned understood nature of the amended charge prior to his plea and had ample time to discuss the amended charge with appointed counsel. Under these circumstances and record as a whole, defendant voluntarily and knowingly entered plea to charge of felony murder.

STATUTES: K.S.A. 2005 Supp. 22-3210(d) and K.S.A. 21-3401(b), -3402(a), -3426, 60-455

STATE V. POTTS
SEDGWICK DISTRICT COURT – AFFIRMED AND COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 92,018 – JUNE 9, 2006

FACTS: Potts convicted of rape, aggravated criminal sodomy, criminal threat, and domestic battery. Court of Appeals reversed the criminal threat conviction, holding it was multiplicitous with rape or aggravated sodomy convictions, and rejected Potts’ claim that one domestic battery conviction was multiplicitous with rape or aggravated criminal sodomy. 34 Kan. App. 2d 329 (2005). Review granted on issues of multiplicity in state’s and Potts’ petitions for review.

ISSUES: (1) Multiplicity and (2) double jeopardy

HELD: Under facts and applying same elements test, neither criminal threat conviction nor domestic battery conviction were multiplicitous with rape or aggravated criminal sodomy convictions, and neither constituted a double jeopardy violation. Fact-based multiplicity analysis used by Court of Appeals was overturned in State v. Schoonover, 281 Kan. 385 (2005), and multiplicity/double jeopardy analysis in State v. Schoonover, 281 Kan. (2006), applies. Reversal of criminal threat conviction is reversed and that conviction is affirmed. Although its reasoning was not correct, Court of Appeals’ conclusion that domestic battery conviction was not multiplicitous with rape or aggravated criminal sodomy convictions is affirmed.


Whitney B. Damron, J.D.
- Governmental Affairs -

Whitney B. Damron, P.A.
919 South Kansas Avenue
Topeka, Kansas 66612-1210
(785) 354-1354 • (785) 354-8092 (Fax)
E-Mail: wbdamron@aol.com
STATE V. TATUM
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 93,931 – JUNE 9, 2006

FACTS: Companion case to State v. Winston (decided this date). Tatum and Winston convicted of charges, including first-degree murder. Tatum appealed, claiming trial court erred in admitting evidence of gang membership and gang activity. Also claimed trial court erred in denying motion for mistrial based upon officer mentioning Tatum’s name in course of police investigation, testimony about Tatum selling drugs in the past, and witnessing a homicide.

ISSUES: (1) Gang evidence and (2) mistrial for K.S.A. 60-455 violation

HELD: Defense objections to admission of gang evidence were sufficient to preserve issue for review. Sufficient predicate proof was shown that Tatum and Winston were associated with Hilltop gang, and that their gang affiliation and activity were related to the charged crimes. No abuse of discretion in admitting this evidence.

Fact that officer mentioned Tatum’s name in course of police investigation, without more, is not evidence of a prior crime. Even assuming some prejudice may have attached from officer’s testimony, any such error was harmless. District court sustained objection to statements about Tatum selling drugs and witnessing homicide, and offered curative instruction to which counsel agreed. Given curative instruction, overwhelming evidence against Tatum, and failure to show substantial prejudice, trial court’s refusal to grant mistrial was not an abuse of discretion.

STATUTE: K.S.A. 21-3301, -3401, 22-3423(c)(1), -3601(b)(1), 60-455

STATE V. WINSTON
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 93,972 – JUNE 9, 2006

FACTS: Companion case to State v. Tatum (decided this date). Winston and Tatum convicted of charges, including first-degree murder. Winston claimed on appeal that trial court erred in (1) admitting gang evidence because state had not proved he was part of a gang or that crimes charged were related to gang activity, (2) denying Winston’s motion for a separate trial, and (3) denying Winston’s motion for mistrial based on admission of inadmissible evidence of Winston’s gang affiliation. Winston also claimed insufficient evidence supported his convictions.

ISSUES: (1) Gang evidence, (2) severance, (3) mistrial for K.S.A. 60-455 violation, and (4) sufficiency of the evidence

HELD: Defense objections to admission of gang evidence were sufficient to preserve issue for review. Sufficient predicate proof was shown that Winston and Tatum were associated with Hilltop gang, and that their gang affiliation and activity were related to the charged crimes. No abuse of discretion in admitting this evidence.

Winston’s attempt to distinguish gang “member” from gang “associate” or “affiliate” is rejected. Evidence of gang affiliation is the same as gang membership for purposes of admissibility of gang evidence. Sufficient evidence supported the convictions.

STATUTE: K.S.A. 21-3301, -3401, 22-3204, -3601(b)(1), 60-455

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Civil

CONSTRUCTIVE TRUST AND FRAUD
COUSATTE V. LUCAS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,150 – JUNE 9, 2006

FACTS: Cousatte brought an action seeking imposition of a constructive trust on the home of Lucas, who was the beneficiary of a trust created by Cousatte’s deceased half sister, Collier. Cousatte alleged that because Lucas exercised undue influence over Collier in the execution of Collier’s trust, and because Lucas’ home was purchased with proceeds traceable to assets from the trust, Cousatte was entitled to imposition of a constructive trust on Lucas’ home.

ISSUES: Did the district court err in finding it could not impose a constructive trust on the proceeds used to purchase the home where the bankruptcy court set aside the home as exempt? Does the bankruptcy court’s decision have res judicata or collateral effect on the constructive trust issue? Did the district court err by failing to impose a constructive trust on the home to the extent of the trust funds used to purchase the residence?

HELD: Court affirmed. Court held that Cousatte failed to identify, much less prove, the fraud, which is a necessary prerequisite to imposition of a constructive trust. Court stated that under the facts of this case, the district court’s judgment in which it found a presumption of undue influence based upon suspicious circumstances and failure to rebut that presumption did not establish the fraud required for the imposition of a constructive trust. Court also stated that the defendant’s liquidation of trust assets, pursuant to a valid state court judgment, did not breach any duty imposed by her relationship with the grantor of the trust and did not establish the fraud required for imposition of a constructive trust on the proceeds of the trust.

STATUTE: K.S.A. 60-513(a)(3)

DIVORCE
IN RE MARRIAGE OF OSBORN
FORD DISTRICT COURT – AFFIRMED
NO. 95,015 – JUNE 2, 2006

FACTS: Eleven-year-old daughter (C.M.O.) filed post-judgment motion to modify parenting time in her parents’ 1997 divorce case. District court dismissed the motion, finding C.M.O. had no legal standing to file the motion. C.M.O. appealed.

ISSUE: Standing of minor child

HELD: Issue of first impression in Kansas. District court correctly dismissed C.M.O.’s motion because a minor child has no legal standing to file a motion to modify visitation or parenting time in a divorce case. C.M.O. has two fit parents who can and should represent her interests before the district court. Kansas statutes provide alternatives for C.M.O.’s preferences to be made known to the court, including 60-1614 interview request.

STATUTE: K.S.A. 60-217(c), -224, -1610(a)(2)(A), -1610(a)(3)(B), -1614, -1616(c), -1628

DRIVER’S LICENSE SUSPENSION AND SERVICE OF DC-27 FORM
GUDENKAUF V. KANSAS DEPARTMENT OF REVENUE
RILEY DISTRICT COURT – REVERSED AND REMANDED
NO. 94,635 – MAY 12, 2006

FACTS: Gudenkauf was arrested for DUI, and he refused a breath test. The arresting officer filled out the DC-27 form in Gudenkauf’s presence, but Gudenkauf was handcuffed due to his uncooperative behavior. The officer testified that he thoroughly explained the form to Gudenkauf, but Gudenkauf refused to acknowledge the officer so the officer told Gudenkauf he was served with the form and that it was in his property bag. Gudenkauf refuted the officer’s testimony that he was not presented with the DC-27, and that the officer did not ask to remove the handcuffs so Gudenkauf could handle the form. The Kansas Department of Revenue affirmed suspension of Gudenkauf’s license, but the district court dismissed the proceedings concluding the arresting officer never personally served Gudenkauf with the DC-27 as required by statute.

ISSUE: Service of DC-27

HELD: Court reversed and remanded. Court held that when the person to be served with a DC-27 notice of driver’s license suspension form refuses to respond to one or more offers by an officer to take physical delivery of the form, such offers to deliver a copy thereof, together with the defendant’s refusal to respond, may be sufficient service of process for purposes of K.S.A. 8-1002(c). Placing a DC-27 notice of driver’s license suspension within the direct vision of the defendant and explaining its contents to him or her, together with offering physical delivery and ultimate placement of a copy in defendant’s belongings is adequate to constitute personal service for purposes of K.S.A. 8-1002(c).

STATUTES: K.S.A. 8-1002(c) and K.S.A. 60-303(d)(4)

FOREIGN CORPORATION AND KANSAS ACTIONS
ALLIANCE STEEL V. PILAND ET AL.
FINNEY DISTRICT COURT
REVERSED AND REMANDED
NO. 94,245 – MAY 19, 2006

FACTS: Piland owned real estate in Garden City. Piland entered into a contract with Dunlap for the construction of a pre-engineered metal building on the property. Dunlap subcontracted with Grooms for the purchase and erection of the metal building. Grooms in turn contracted with Alliance to furnish the materials and supplies necessary for construction of the building. Piland paid Dunlap, Dunlap paid Grooms, but Grooms did not pay Alliance. Alliance filed a lien on Piland’s property through the Kansas mechanic’s lien statutes and then filed a petition to foreclose the lien. The petition stated that Alliance was an Oklahoma corporation authorized to do business in Kansas. Piland filed a motion to dismiss for the lien being tardy and also invalid in Kansas. In both amended petitions, Alliance again stated it was an Oklahoma corporation authorized to do business in Kansas. Alliance filed another motion to dismiss stating that Alliance claimed to be authorized in Kansas but was not actually registered in Kansas. Alliance filed a motion for leave to amend its petition to clarify that it was not doing business in Kansas. The district court granted Piland’s motion to dismiss holding that Alliance was not authorized to bring a cause of action in Kansas without being registered with the secretary of state.

ISSUES: (1) Foreign corporation and (2) Kansas actions

HELD: Court reversed and remanded. Court found the district court erred in granting Piland’s motion to dismiss. Viewing the facts in the light most favorable to Alliance, court found that the district court should have denied the motion to dismiss. Court stated these types of cases are extremely fact specific, and the district court’s decision was not supported by substantial competent evidence and does not support the application of the whether a foreign corporation was doing business in Kansas. Court held that Alliance was not doing...
business in Kansas and was not required to register as a foreign corporation and was not prohibited from bringing the present action.

STATUTES: K.S.A. 17-7303, -7307 and K.S.A. 60-212(b)(6)

HEALTH CARE STABILIZATION FUND AND INTEREST ON SETTLEMENTS
HAYLE ET AL. V. BROWN ET AL.
SEDGWICK DISTRICT COURT – REVERSED
NO. 93,559 – MAY 26, 2006

FACTS: Haley sued Brown for medical malpractice and the parties reached a settlement agreement. The court found the settlement agreement valid, just, and equitable and dismissed Brown from the lawsuit with prejudice. The jury rendered a verdict in favor of the rest of the defendants and Haley appealed the judgment in a different appeal. Haley filed a motion for inclusion of interest on the lump sum settlement payments to be paid and that the Health Care Stabilization Fund statutes required interest on future installments. The district court granted interest to be paid on the settlement payments.

ISSUES: Whether the Health Care Stabilization Fund statutes required that interest be added to deferred settlement payments paid by the fund. Whether fund statutes violate the Equal Protection Clause of the Kansas Constitution if it does not require interest on the fund’s deferred installments of settlements, while requiring interest on deferred installments of judgments.

HELD: Court reversed. Court held that K.S.A. 2005 Supp. 40-3403(d) was not intended to create an independent statutory right to receive interest from the Health Care Stabilization Fund where the medical malpractice settlement agreement contains no contract provision for the payment of such interest. Court concluded that K.S.A. 2005 Supp. 40-3403(d) did not require the settlement payments to bear interest. Court held that because of its initial holding that K.S.A. 2005 Supp. 40-3403(d) does not create an independent right to receive interest from the fund by either judgment creditors or settlement contract payees, that statute does not create a classification. Without creating a classification, the statute cannot violate equal protection.


INJUNCTIVE RELIEF, AGRICULTURAL USE, RACE HORSE TRAINING, AND PRE-EXISTING USE
SEWARD COUNTY BOARD OF COMMISSIONERS V. NAVARRO ET AL.
SEWARD DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 94,598 – MAY 19, 2006

FACTS: In 1992, the Navarros acquired a 40-acre tract of land outside of Liberal and used it to breed, raise, and train horses. They also constructed a racetrack with four-horse starting gate to train the racehorses. In 1997, Seward County created and approved the first ever zoning and subdivision for Seward County. The Navarros’ land was zoned agricultural. In February 2003, the Navarros graded out another racetrack. In March 2003, the Navarros applied for a special use permit to operate a horse-training track on their land. The board denied the permit or special use concluding that horse training is not a substitute for the classification process, but indicated he would be classified and managed as a sex offender, but the letter failed to provide any notice of rights for review or appeal. McMillian filed a request for Form 9 review of the decision on July 27, 2004. On July 29, 2004, McMillian was advised that the parole board made the decision and that he should talk to his counselor to request an override, but again no notice of any rights for review or appeal. McMillian again requested relief from his classification. His request was denied and a letter dated Sept. 9, 2004, notified him. McMillian’s unit team informed him that he had been passed for parole and sex offender treatment had been recommended. McMillian tried the warden next. In a letter dated Oct. 18, 2004, the warden indicated that the grievance procedure was not a substitute for the classification process, but indicated he could appeal and that he can appeal within three days. After another request for review from McMillian, the warden stated that the correction facility supported McMillian’s override, but that the decision was out of his control. The district court denied McMillian’s petition filed pursuant to K.S.A. 60-1501 holding that it lacked jurisdiction because McMillian had 72 hours from the initial notification on Sept. 9 that his override was denied to file as Form 9 appeal.

ISSUES: Was McMillian entitled to notice of his appeal rights? Did McMillian’s efforts to exhaust administrative remedies toll his deadline to appeal?

HELD: Court reversed and remanded. Court noted that inmates are routinely confused about appeal rights and that notifications should contain a brief but clear statement of instructions to inmates as to the procedure, forms, and timing to seek review. Court stated that the warden’s acceptance of McMillian’s untimely Form 9 request for review and ruling was a waiver of the agency’s own rules concerning Form 9 appeals. Court held that the administrative agency misled McMillian and that this case was a proper case to invoke the doctrine of unique circumstances and the court considered McMillian’s 1507 petition timely. Court reversed the district court’s dismissal and remanded for further proceedings.

STATUTES: K.S.A. 60-1501 and K.S.A. 77-526(c), -613(b)

INMATE APPEAL AND NOTICE OF APPEAL RIGHTS
MCMILLIAN V. MCKUNE
LEAVENWORTH DISTRICT COURT – REVERSED AND REMANDED
NO. 94,816 – MOTION TO PUBLISH,
OPINION ORIGINALLY FILED MARCH 31, 2006

FACTS: McMillian is an inmate who received a letter on July 15, 2004, stating that he would be classified and managed as a sex offender, but the letter failed to provide any notice of rights for review or appeal. McMillian filed a request for Form 9 review of the decision on July 27, 2004. On July 29, 2004, McMillian was advised that the parole board made the decision and that he should talk to his counselor to request an override, but again no notice of any rights for review or appeal. McMillian again requested relief from his classification. His request was denied and a letter dated Sept. 9, 2004, notified him. McMillian’s unit team informed him that he had been passed for parole and sex offender treatment had been recommended. McMillian tried the warden next. In a letter dated Oct. 18, 2004, the warden indicated that the grievance procedure was not a substitute for the classification process, but indicated he could appeal and that he can appeal within three days. After another request for review from McMillian, the warden stated that the correction facility supported McMillian’s override, but that the decision was out of his control. The district court denied McMillian’s petition filed pursuant to K.S.A. 60-1501 holding that it lacked jurisdiction because McMillian had 72 hours from the initial notification on Sept. 9 that his override was denied to file as Form 9 appeal.

ISSUES: Whether fund statutes violate the Equal Protection Clause of the Kansas Constitution if it does not require interest on future installments. The district court granted interest to be paid on the settlement payments.
**PROBATE AND GIFT TAX**  
**IN RE ESTATE OF HJERSTED**  
**LEAVENWORTH DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**  
**NO. 94,711 – JUNE 2, 2006**

FACTS: A detailed factual statement regarding other aspects of this probate matter can be found in digest concerning the companion case of *In re Estate of Hjersted*, No. 93,470, filed the same day. Following the district court's issuance of orders in the companion cases, the IRS assessed a gift tax in the amount of $509,818 based upon the district court's valuation of shares of MRI stock that had been conveyed to Lawrence in March 2000 by Norman Hjersted, his father. Although the decedent had reported the value of the gift as $675,000, the district court's valuation of the same transaction at $1,770,536 triggered the additional gift tax liability. Court held the gift tax should not be included in the value of the probate estate inasmuch as it was a transfer within two years of death. District court stated it was more akin to an estate tax under the circumstances of the case.

ISSUE: Inclusion of the value of the gift tax in the value of the probate estate

HELD: Court reversed and remanded with directions. Court held that federal statutes and applicable regulations provide that a gift tax imposed under federal law is the liability of the donor, and an unpaid gift tax assessment becomes a debt of the decedent's estate. When these provisions are read in tandem with Kansas' elective share statutes, it is clear that such a debt should be considered an enforceable demand, which is deductible from the probate estate pursuant to K.S.A. 59-6a204.


**PROBATE, VALUATION OF AUGMENTED ESTATE, EXECUTOR FEES, AND ATTORNEY FEES**  
**IN RE ESTATE OF HJERSTED**  
**LEAVENWORTH DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS**  
**NO. 93,470 – JUNE 2, 2006**

FACTS: Norman Hjersted died testate in 2001, survived by his wife of 20 years, Maryam; a son born of the marriage, Timothy; and three children from Norman's prior marriage, Lawrence, Karen, and Ingrid. Some time before his death, Norman visited with his attorneys and expressed a desire to disinherit his wife. Norman created the Restated Norman Hjersted revocable trust and the Hjersted Family Limited Partnership (HFLP). HFLP contained the shares of Norman's company, Midland Resources Inc. (MRI). There were also transactions regarding real property in Nebraska and St. Louis. Following Norman's death, Maryam filed a petition seeking her spousal elective share of Norman's estate. The district court calculated the total value of Norman's estate at $4.5 million. After contentious and lengthy litigation, the court awarded Lawrence $100,000 as executor fee and awarded his attorney $233,602.75 in fees, $18,835.69 in costs, and $31,792.03 in expenses. Based on the length of the marriage, Maryam's elective share percentage under the statute was 50 percent and the court determined her unsatisfied elective share was $1,175,322.

ISSUES: Did the district court correctly value the transfer of the HFLP to Lawrence? Did the district court properly include a portion of the proceeds from the sale of the Nebraska realty and the valuation of the Missouri realty into the estate? Did the district court err in awarding executor and attorney fees and costs?

HELD: Court affirmed in part, reversed in part, and remanded with directions. Court affirmed the district court's valuation of the transfer of the HFLP to Lawrence. Court held there was no evidence that the district court used anything other than a fair market value standard in determining the value of the MRI shares in the HFLP. Court also found that discounts for lack of control and lack of marketability were unnecessary under the facts of the case. Court found the sale of the Nebraska realty was clearly not a judicial sale and it was not a forced sale either. Court adopted the rule that when a life tenant and remainderman unite in a nonjudicial sale of their property, the life estate is entitled to receive the estimated value of his or her estate at the time of the sale and the district court property included the $137,393.55 in the augmented estate from sale of the Nebraska real property. Court held that neither party provided substantial competent evidence of the value of the Missouri realty and that the court's adoption of Maryam's valuation was not sufficiently supported or detailed for appellate review. Court remanded for further proceedings to determine the fair market value of the Missouri realty at the date of Norman's death. Court held that given the complex circumstances involving the administration of Norman's estate and the nature of the duties imposed upon Lawrence as executor, the district court's view of the services performed by the executor and his attorneys was reasonable and the district court did not err in awarding and deducting from the probate estate the executor fee, attorney fees, costs, and expenses.

STATUTE: K.S.A. 59-102, -1717, -6a201 et seq., -6a202, -6a203, -6a204, -6a205, -6a207, -6a208

**REVOCABLE TRUST**  
**IN RE NORMAN B. HJERSTED REVOCABLE TRUST**  
**LEAVENWORTH DISTRICT COURT – AFFIRMED**  
**NO. 94,072 – JUNE 2, 2006**

FACTS: A detailed factual statement regarding other aspects of this probate matter can be found in digest concerning the companion case of *In re Estate of Hjersted*, No. 93,470, filed the same day. The Restated Norman B. Hjersted Revocable Trust contained the provision that if Maryam made an election against the will or trust, then all gifts or transfers to her would be revoked in their entirety and that Timothy can receive his share of inheritance from the property transferred to Maryam. After Maryam filed for her elective share, Lawrence as executor, sent Timothy a letter stating Maryam and Timothy's gifts were revoked. Maryam filed for declaratory judgment regarding the revocation language in the trust. After reviewing the trust agreement and a full trial, the court determined that the revocation provision was intended to apply to spousal election. The court rejected Maryam's estoppel argument finding her position was unreasonable given her receipt of notice of the trustee's contrary interpretation of the trust provision. District court denied Maryam's petition for declaratory judgment.

ISSUE: Revocable trust

HELD: Court affirmed. Court agreed with the district court's interpretation that the language of the trust was ambiguous. Court held the district court properly admitted extrinsic evidence to determine Norman's intent and agreed with the district court's ultimate construction of the trust provision. Court held that Maryam failed to meet her burden of proof on her claim of estoppel based on the executor's notice or lack thereof, of the effect of her decision to seek an elective share of Norman's estate. Court stated there was no evidence to disturb this negative finding. Even considered on the merits, court stated Maryam knew she had the option to withdraw her elective share claim at any time prior to the probate order.

STATUTE: K.S.A. 59-403, -1701, -6a201 et seq., -6a211(c)
TORTS

ESTATE OF PEMBERTON
CRAWFORD DISTRICT COURT – AFFIRMED
NO. 94583 – JUNE 2, 2006

FACTS: Twenty-two-year-old killed himself the same day he purchased a shotgun. Parents sued seller of shotgun, John's Sport Center Inc. (JSC), for wrongful death and survival action. Lawsuit based on negligence per se for alleged violation of 18 U.S.C. § 922, and negligent entrustment under Restatement (Second) of Torts § 390 (1964). District court granted summary judgment to JSC on all claims, finding no violation of federal firearm statute. Also granted summary judgment on survival claims because victim died instantly with little or no pain or suffering. Parents appealed.

ISSUES: (1) Negligence per se and (2) negligent entrustment

HELD: Applying federal private right of action analysis set forth in Boswell v. Skywest Airlines Inc., 361 F.3d 1263 (10th Cir. 2004), and Kansas two-part test, no private right of action exists under 18 U.S.C. § 922 or Kansas law. Cases in other states recognizing a private right of action are distinguished. Even if a private right of action existed, no violation of the statute in this case. Notwithstanding son's history in mental health facilities, parents failed to establish son was committed under Kansas law. Also, no merit to parents' contention that statute could be violated if seller had reasonable cause to believe the purchaser had been voluntarily institutionalized.

Kansas has never applied negligent entrustment principles from § 390 to a sales transaction. Issue is not decided because no negligent entrustment under facts.


TORTS - IMMUNITY

LANE V. ATCHISON HERITAGE CONFERENCE CENTER INC.
ATCHISON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART AND REMANDED
NO. 94,634 – JUNE 2, 2006

FACTS: Injured at loading dock at Atchison Heritage Conference Center (AHCC), Lane sued AHCC for negligence. District court found recreational use exception to tort liability under Kansas Tort Claims Act (KTCA) applied and granted summary judgment to AHCC. Lane appealed.

ISSUE: Recreational use exception under KTCA

HELD: District court correctly found AHCC was instrumentality of City of Atchison for the purpose of operating the conference center. Under facts, however, AHCC's primary use of conference center has not been recreational. Summary judgment on grounds of tort immunity under K.S.A. 2002 Supp. 75-6104(o) was improper.

STATUTES: K.S.A. 2005 Supp. 75-6102 sections (a)-(c), -6104, K.S.A. 2002 Supp. 75-6104(o), and K.S.A. 75-6101 et seq., -6104, -6104(o)

Criminal

STATE V. BLANCHETTE
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 93,962 – MAY 19, 2006

FACTS: Blanchette convicted on alternative charges of rape and aggravated indecent liberties with a child. Child victim testified by closed-circuit television pursuant to K.S.A. 22-3434. On ap-
peal, Blanchette claimed statute was unconstitutional after Crawford v. Washington, 541 U.S. 36 (2004), state failed to demonstrate closed-circuit testimony was necessary, and trial court erred in overruling Blanchette’s motion to have child victim interviewed by psychologist. Blanchette also claimed his alternative convictions were multiplicitious, trial court erred in admitting photographs of hymen injury into evidence, and fair trial denied by prosecutorial misconduct and cumulative error.

ISSUES: (1) Constitutionality of K.S.A. 22-3434, (2) application of K.S.A. 22-3434, (3) motion for independent psychologist, (4) multiplicitious convictions, (5) admission of photographs, (7) prosecutorial misconduct, and (8) cumulative error

HELD: Extensive facts are detailed in the opinion. Crawford is limited to testimonial hearsay where the defendant is denied an opportunity to cross-examine the witness. Crawford does not affect the constitutionality of K.S.A. 22-3434, which allows a child victim to testify by closed-circuit television under certain strict conditions and such testimony is subject to cross-examination in full view of defendant and the jury. Statute satisfies right of confrontation under federal and state constitutions.

No error in admitting child victim’s closed-circuit television testimony pursuant to K.S.A. 22-3434. Trial court made sufficient findings required by statute and case law to permit admission of child victim’s testimony.

Under facts, no abuse of discretion in denying motion for independent psychologist.

State concedes the convictions on alterative counts are multiplicitious. Aggravated indecent liberties with a child conviction are reversed.

Photographs admitted at trial were relevant and corroborated medical testimony. No abuse of discretion in admitting this evidence.

No merit to allegations of prosecutorial misconduct. Any harm resulting from prosecutor’s alleged misstatement of law about jury’s consideration of evidence for alternative charges was cured by reversal of the indecent liberties conviction.

No cumulative error sufficient to deny Blanchette a fair trial.

STATUTE: K.S.A. 22-3434, -3434(b)

STATE V. BURTON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,432 – JUNE 9, 2006

FACTS: Burton and Petitt followed Jason Vaughn to work after Vaughn had stopped at a bank and Burton and Petitt carjacked Vaughn’s car. Vaughn and a co-worker pursued Burton and found the car. When Burton and Petitt saw Vaughn they abandoned the car and jumped into another car. Vaughn said he saw objects being thrown from the vehicle, including Vaughn’s wallet. With the pursuit information, police apprehended Burton and found various forms of Vaughn’s identification and the cash he withdrew from the bank. Burton denied participation in the crime and that the money in his wallet was his own. Burton was convicted by a jury of aggravated robbery under a theory of aiding and abetting.

ISSUES: (1) Aiding and abetting language and (2) sufficient evidence to support conviction

HELD: Court affirmed. Court held the jury instructions properly and fairly stated the law as applied to the facts in the case and Burton makes no argument to the contrary. Court stated the jury instructions clarified to the jury that Vaughn was being charged as an aider and abettor rather than as a principal actor in the crime. Court held the evidence was undisputed that Burton drove the getaway car from the scene of the robbery and that Burton had the exact amount of money in his possession that Vaughn withdrew from the bank. Court held there was sufficient evidence of Vaughn’s guilt. Last, court held that his criminal history score does not need to be proven to a jury beyond a reasonable doubt and there is no evidence the Kansas Supreme Court is departing from this position.

STATUTES: No statutes cited.

STATE V. CHESBRO
SALINE DISTRICT COURT – AFFIRMED
NO. 93,454 – MAY 12, 2006

FACTS: Chesbro entered guilty plea to aggravated indecent liberties with a child. District court rejected downward departure sentence recommended in plea agreement and imposed 110-month sentence pursuant to sex offender provisions in K.S.A. 2005 Supp. 21-4704(j). On appeal from denial of his motion to withdraw plea, Chesbro claimed: (1) district court’s failure to adequately inform of potential maximum sentence or warn of potential application of 21-4707(j) denied due process, (2) state breached plea agreement by not encouraging the recommended departure sentence at sentencing, (3) error to rule on motion to withdraw plea without a full hearing, (4) error to find prior Nebraska conviction qualified as sexually motivated crime for application of 21-4707(j), and (5) error for district court to state it had no discretion to consider downward durational departure sentence due to mandatory language in 21-4704(j).

ISSUES: (1) Due process, (2) breach of plea agreement, (3) hearing, (4) evidence of prior crime, and (5) departures

HELD: Under the circumstances, district court’s failure to advise of potential sentencing consequences under 21-4704(j) did not render plea unknowing or involuntary. No manifest injustice demonstrated where sentence doubled by sex offender statute was still less than potential maximum penalty cited by court prior to accepting plea.

No case in Kansas or any other jurisdiction has ruled on analogous facts. Although state would have been well-advised to advise sentencing court of recommendation within plea agreement, due process requires no enthusiastic argument absent a specific agreement to do so. District court found no factual basis for downward departure sentence and was aware through plea agreement that state had joined in sentencing recommendation, thus state’s failure to make affirmative statement at sentencing did not prejudice Chesbro’s due process rights and is, though error, constitutionally harmless.

No error in deciding motion to withdraw plea without a hearing where only questions of law to be decided.

Any error in refusing to allow evidence regarding nature of Chesbro’s prior crime was harmless where no conceivable facts would have avoided conclusion that persistent sex offender provisions in 21-4707(j) applied.

District court erroneously believed persistent sex offender provisions permitted no departure sentence. Provisions in K.S.A. 2005 Supp. 21-4716(c) may be applied to depart from statutorily mandated sentence imposed upon one qualifying as a persistent sex offender. Because sentencing court affirmatively noted the record provided no basis to support a departure sentence, no reversal of the sentence is needed.

STATUTES: K.S.A. 2005 Supp. 21-3502(a)(2), -4704 sections (a), (d), (f)-(i), (j)-(1), (k) and (l), -4716, -4716(c), 22-3210(a), -3210(a)(2), -3210(d), -3717(d)(2), -3717(d)(2)(L); and K.S.A. 21-3502, 3504(a)(3)-(4), (c), -3510(a)(1), -3511(a), 22-3717, -3424(e), 60-261, -1507

CITY OF MANHATTAN V. FERIL
RILEY DISTRICT COURT – AFFIRMED
NO. 94,525 – MAY 19, 2006

FACTS: Feril convicted in municipal court on one count of DUI, second offense. On appeal to district court, Feril filed motion to suppress evidence obtained by officer during stop. District court denied the motion, finding Feril’s interaction with the officer was voluntary. After verdict was entered, Feril filed motion for acquittal, claiming city failed to establish corpus delicti of crime independent of his conviction because vehicle was parked when he was arrested. District court denied the motion. Feril appealed.

ISSUE: Corpus delicti

HELD: No appellate court in Kansas has evaluated corpus delicti within framework of DUI. Under facts, corpus delicti of driving and
intoxication were established. Identity of the perpetrator is not part of the corpus delicti, and circumstantial evidence proved that Feril was the driver spotted by officers in another county. Feril's exchange of the corpus delicti, and circumstantial evidence proved that Feril's intoxicated. Conviction was affirmed.

STATUTES: No statutes cited.

**CITY OF DODGE CITY V. IBARRA**

**FORD DISTRICT COURT - AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS**

**NO. 94,161 – MAY 5, 2006**

FACTS: Ibarra, who did not speak much English, was arrested for DUI. He was transported to the police station and officers testified that they did not have any concerns whether Ibarra understood the entire implied consent advisory. Ibarra gave a breath sample. Officers said that Ibarra nodded his head that he wanted a blood test, but officers never provided it. Ibarra was convicted in municipal court of DUI, failure to yield, and driving on the left side of the road. Ibarra filed a timely notice of appeal to the district court, but Ibarra did not sign the appearance bond document and never paid any money on the $750 own recognizance (OR) appearance bond. The district court ruled that since Ibarra did not sign the journal entry of conviction and did not submit a separate appearance bond, it did not have jurisdiction to consider the merits of his appeal and dismissed it. Before the case was dismissed by the district court, it held a hearing on Ibarra's motion to suppress. The district court held it was unclear whether Ibarra requested a blood test and the motion was denied.

ISSUES: (1) Jurisdiction and (2) motion to suppress

HELD: Court affirmed in part, reversed in part, and remanded with directions. Court held the district court did not err in finding that Ibarra's failure to sign his OR bond supported the district court's decision that it did not have jurisdiction. However, the Court reversed the district court under *State v. Ortiz* finding that Ibarra's counsel freely acknowledged that the lack of jurisdiction was due only to her mistake when she thought that since it was an OR bond, Ibarra's appearance at all district court proceedings would be sufficient to maintain the appeal. Court remanded for a hearing based on the original notice of appeal. Court stated that it was not prepared to find that the district court erred by denying Ibarra's motion to suppress. Court held there was sufficient evidence to support the district court's decision that Ibarra did not know he was requesting a blood test and the request was not clearly made.


**STATE V. KOTAS**

**SEDGWICb DISTRICT COURT – REVERSED AND REMANDED**

**NO. 94,249 – MAY 26, 2006**

FACTS: Kotas made a U-turn on bridge to avoid DUI checkpoint at end of bridge. After chasing and stopping Kotas, officer issued citations for making U-turn when not safe and clear, K.S.A. 8-1546(a), and driving under the influence, K.S.A. 8-1567(e). Kotas claimed stop was illegal and moved to suppress evidence resulting from the stop. District court granted the motion, finding officer's understanding of 8-1546(a) was flawed and not objectively reasonable. State appealed the suppression of evidence.

ISSUE: Reasonable suspicion for *Terry* stop

HEL: Under facts, a law enforcement officer's observation of motor vehicle crossing solid double yellow lines while making U-turn on bridge in advance of DUI checkpoint, which required several cars to slow down, provided an objective and articulable factual basis for officer to have reasonable suspicion that driver of vehicle had violated K.S.A. 1546(a). *State v. Knight*, 33 Kan. App. 2d 325 (2004), and *City of Manhattan v. Larson*, 26 Kan. App. 2d 851 (2000), are factually distinguished.

STATUTES: K.S.A. 8-1520(a), -1546(a), -1567(e), -1571(a)(1) subsections (iii) and (vi)-(viii), 22-2402(1) and K.S.A. 1997 Supp. 8-134

**CITY OF DODGE CITY V. REYES**

**FORD DISTRICT COURT – APPEAL DENIED**

**NO. 94,806 – MAY 19, 2006**

FACTS: On March 10, 2005, Reyes was convicted in Dodge City municipal court of DUI, speeding, and refusing a preliminary breath test. He was sentenced to 180 days with 175 days suspended and fines totaling $1,315. On March 16, 2005, Reyes paid $131.50 to the court and filed a notice of appeal to district court. He was given a receipt titled, "Dodge City Municipal Court Bond Record." Two days later, Reyes filed a signed document entitled appearance bond. That same day, the surety filed an appearance bond without Reyes' signature. On April 7, 2005, the city moved to dismiss Reyes' appeal on the grounds that the district court lacked jurisdiction because Reyes failed to file his appearance bond within the statutorily mandated 10 days. The district court denied the city's motion finding the appearance bond met the statutory requirements and directed Reyes to sign it. A jury convicted Reyes of refusing a preliminary breath test and speeding, but found him not guilty of DUI. The city appealed a question reserved concerning the district court's jurisdiction.

ISSUE: (1) Appearance bond and (2) jurisdiction

HELD: Court denied the appeal. Court found the district court properly concluded that it had jurisdiction over Reyes' appeal. At the April 20, 2005, hearing, the district court found that despite Reyes' missing signature from the appearance bond, it was valid because the surety's representative signed and filed the bond. Reyes' signature was not an absolute and Reyes complied with the statute and the district court directed him to sign the appearance bond.

STATUTES: K.S.A. 12-4301, -4304; K.S.A. 2005 Supp. 22-3609; and K.S.A. 60-206(a)

**STATE V. SIESENER**

**JOHNSON COUNTY DISTRICT COURT – AFFIRMED**

**NO. 93,188 – DECEMBER 23, 2005**

**PUBLISHED VERSION FILED MAY 30, 2006**

FACTS: District court considered Siesener's out-of-state conviction in calculating Siesener's criminal history score. Siesener appealed, claiming the suspended imposition of sentence in his Missouri case is equivalent to diversion in Kansas, and thus should not be included in his criminal history.

ISSUE: (1) Out-of-state conviction and (2) criminal history

HELD: Because Siesener pled guilty in Missouri before receiving his suspended sentence, substantial competent evidence supported trial court's consideration of Siesener's Missouri conviction for criminal history purposes. Constitutional attack on district court's determination of criminal history without jury determining prior convictions beyond a reasonable doubt is defeated by *State v. Ivory*, 273 Kan. 44 (2002).

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