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The New Kansas Estate Tax
Medicaid Long-Term Care Update ...
Let Your Voice
be Heard!

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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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In survey after survey, Americans identify Abraham Lincoln as one of the best of the American presidents. My interest, however, is more in Lincoln, the lawyer.

Lincoln's story is familiar. Lincoln attended perhaps a year of formal schooling. He was essentially “self-taught.” He did not attend law school but rather, “read” the law.

Lincoln was proud to be a lawyer. He was a trial and appellate lawyer skilled in arguing to both juries and appellate courts. When I look for inspiration, I look to Lincoln.

Lincoln was a prairie lawyer, riding a circuit comprised of about a dozen counties. He would go out for about 12 weeks in the spring and another 12 weeks in the fall. He took collection cases, tried divorce cases, and defended criminal cases. On occasion, he also prosecuted criminal cases. Lincoln became a prominent lawyer for the railroads and argued more than 200 cases in the Illinois Supreme Court. He was a lawyer with big and little cases, winning some and losing some. He depended upon his practice to make a living, and he tried and briefed his own cases. He handled cases for free and in one famous instance, he sued the railroad for his fee and collected.

Lincoln had a definite view of lawyering. In 1850, when he was 41 years old, he made some notes on the subject of lawyering and had this to say:

“I am not an accomplished lawyer. I find quite as much material for a lecture, in those points wherein I have failed, as in those wherein I have been moderately successful.

The leading rule for the lawyer, as for the man, of every calling, is diligence. Leave nothing for to-morrow, which can be done to-day. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done. When you bring a common-law suit, if you have the facts for doing so, write the declaration at once. If a law point be involved, examine the books, and note the authority you rely on, upon the declaration itself, where you are sure to find it when wanted. The same of defences and pleas. In business not likely to be litigated — ordinary collection cases, foreclosures, partitions, and the like, — make all examinations of titles, and note them, and even draft orders and decrees in advance. This course has a tripple advantage; it avoids omissions and neglect, saves your labor, when once done; performs the labor out of court when you have leisure, rather than in court, when you have not. Extemporaneous speaking should be practiced and cultivated. It is the lawyer's avenue to the public. However able and faithful he may be in other respects, people are slow to bring him business, if he cannot make a speech. And yet there is not a more fatal error to young lawyers, than relying too much of speech-making. If any one, upon his rare powers of speaking, shall claim exemption from the drudgery of the law, his case is a failure in advance.

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, and expenses, and waste of time. As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.

Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a fiend than he who habitually overhauls the Register of deeds, in search of defects in titles, whereon to stir up strife, and put money in his pocket? A moral tone ought to be infused into the profession, which should drive such men out of it.

The matter of fees is important far beyond the mere question of bread and butter involved. Properly attend to fuller justice is done to both lawyer and client. An exorbitant fee should never be claimed. As a general rule, never take your whole fee in advance, nor any more than a small retainer. When fully paid before hand, you are more than a common mortal if you can feel the same interest in the case, as if something was still in prospect for you, as well as for

David J. Rebein can be reached by e-mail at drebein@rebeinbangerter.com or by phone at (620) 227-8126.
your client. And when you lack interest in the case, the job will very likely lack skill and diligence in the performance. Settle the amount of fee, and take a note in advance. Then you will feel that you are working for something, and you are sure to do your work faithfully and well. Never sell a fee-note — at least, not before the consideration service is performed. It leads to negligence and dishonesty — negligence, by losing interest in the case, and dishonesty in refusing to refund, when you have allowed the consideration to fail.

There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence, and honors are reposed in, and conferred upon lawyers by the people, it appears improbable that their impression of dishonest is very distinct and vivid. Yet the impression, is common — almost universal. Let no young man, choosing the law for a calling, for a moment yield to this popular belief. Resolve to be honest at all events; and if, in your own judgment, you can not be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave."

That was good advice then and good advice today. Although Lincoln was successful as a lawyer, he never earned more than about $5,000 a year from his law practice and was worth about $15,000 at the time he was elected president.

I am impressed when reviewing Lincoln's career with the ordinary problems he had. After campaigning vigorously for the U.S. Senate and then losing to Steven Douglas, he returned to his office and a letter from an angry client to which he responded:

"You perhaps need not to be reminded how I have been personally engaged the last three or four months. Your letter to Lincoln & Herndon, of Oct. 1st. complaining that the lands of those against whom we obtained judgments last winter for you, have not been sold on execution has just been handed to me to-day. I will try to “explain how our” (your) “interests have been so much neglected” as you choose to express it. After these judgments were obtained we wrote you that under our law, the selling of land on execution is a delicate and dangerous, matter; that it could not be done safely, without a careful examination of titles; and also of the value of the property. Our letters to you will show this. To do this would require a canvass of half the State. We were puzzled, & you sent no definite instructions. At length we employed a young man to visit all the localities, and make as accurate a report on titles and values as he could. He did this, expending three or four weeks time, and as he said, over a hundred dollars of his own money in doing so. When this was done we wrote you, asking if we should sell and bid in for you in accordance with this information. This letter you never answered.

My mind is made up. I will have no more to do with this class of business. I can do business in Court, but I can not, and will not follow executions all over the world. The young man who collected the information for us is an active young lawyer living at Carrollton, Greene County I think. We promised him a share of the compensation we should ultimately receive. He must be somehow paid; and I believe you would do well to turn the whole business over to him. I believe we have had, of legal fees, which you are to recover back from the defendants, one hundred dollars. I would not go through the same labor and vexation again for five hundred; still, if you will clear us of Mr. William Fishback (such is his name) we will be most happy to surrender to him, or to any other person you may name. Yours &c”

I take comfort in the fact that even Lincoln had to deal with the difficult client wondering why their “interests have been so much neglected.” Lincoln was proud to be a lawyer. He rose from obscurity because of his skill as a lawyer. When one examines Lincoln's writings and speeches, the issues of the day are argued as though he were arguing his case to all of us as a collective jury.
Deadline to Submit 2007 IOLTA Grant Applications is Dec. 1

The Kansas Bar Foundation (KBF) is soliciting grant applications for the 2007 Interest on Lawyers’ Trust Accounts (IOLTA) grant cycle that runs from April 1, 2007, through March 31, 2008. The deadline to submit applications is Dec. 1. The KBF Board of Trustees will make a decision on the applications in February 2007.

The Kansas IOLTA program, approved by the Kansas Supreme Court in 1984, is supported by more than 3,450 lawyers across the state. The program collects interest from trust accounts in which funds are nominal in amount or are expected to be held for a short period of time. IOLTA grants are primarily aimed at funding programs that provide civil legal services for low-income people, law-related charitable public service projects, and improvements to the administration of justice, with the largest share going to provide direct legal services for victims of domestic violence.

Grant applications are reviewed by the KBF’s IOLTA Committee, comprised of appointees from the KBF, the Kansas Bar Association, the Kansas Supreme Court, the Kansas Trial Lawyers Association, the Kansas Association of Defense Counsel, and the governor’s office. The committee forwards its recommendations to the KBF Board of Trustees for final approval.

In order to qualify for IOLTA funds, an organization must:
• be a 501 (c) (3) or 501 (c) (6) if a local bar association,
• use the funds for a specific charitable purpose,
• agree to an audit or a review of expenses,
• provide quarterly and year-end reports as necessary, and
• demonstrate fiscal responsibility and the ability to provide quality services.

If your organization would like an IOLTA grant application for 2007, contact Meg Wickham, manager of public services, at (785) 234-5696, e-mail mwickham@ksbar.org, or visit www.ksbar.org/public/kbf/iolta.shtml.

Proposed Changes to the Kansas Rules of Professional Conduct

The Kansas Supreme Court is now reviewing proposed changes to the Kansas Rules of Professional Conduct. The changes were recommended to the Court by a committee appointed by the Kansas Bar Association. Proposed additions to the Kansas Rules of Professional Conduct are underlined and deletions are shown by a line through the former text. To view the complete proposed changes you may go to www.kscourts.org/attysdisc/KRPCproposed.htm.

The members of the Court invite comments regarding the proposed changes from members of the bar and the public. Comments will be accepted until Sept. 15. Readers may submit comments via e-mail to proposedrulechanges@kscourts.org or via U.S. mail to: Office of Disciplinary Administrator, 701 S.W. Jackson, Topeka, KS 66603.

Change in access to the members-only portion of the KBA Web site

Beginning Sept. 8, KBA members will no longer be able to log in with their current username and password on the members-only portion of the KBA Web site. Members will access the members-only site by using their e-mail address as the username and the password will be the member’s KBA ID number. KBA member ID numbers are located on the KBA membership card. An attorney’s Supreme Court number is not the same as their KBA number. This change will take effect Sept. 8; until then you simply continue to use your current username and password.

If you are unfamiliar with your KBA member ID number, just give the KBA office a call at (785) 234-5696 or e-mail info@ksbar.org; we will be more than happy to help you.
Gardening Takes a New Turn with the Watering Weedless Wonder

By Beth Warrington, publications coordinator

With a garden the size of half a football field, St. Francis attorney James Milliken needed a way to combat the constant weed and watering problems. As midsummer approached, he spent every night and weekend in the garden using a rototiller and a soaker hose, producing a lot of product.

Enter the Watering Weedless Wonder, a product designed by Milliken to reduce the amount of space needed to produce vegetables and at the same time preserve water and keep the weeds from overtaking the garden.

“The decision to create something like the Watering Weedless Wonder came through hours of discussion with my wife, Ruth,” said Milliken, “who finally convinced me I should create a method of producing a lot of product in a small space.”

In 1999, he armed himself with large sections of cardboard, weed barrier, and a soaker hose to conserve water. He laid the weed barrier, soaker hose and cardboard with holes cut in it, but the next day it had all blown into the neighbor’s pasture.

He was pleased with the initial concept but kept experimenting over the next five years until he came up with the solution for his problem. Gone is the cardboard, replaced with a tough woven polypropylene. The material allows air and water to pass through, but prevents weeds from growing through. Watering is done through a 3/8-inch porous hose encased in the weed barrier and goes directly to the roots of the plants.

Depending on the types of crops to be planted, the Wonder comes in four standard configurations: three-row, five-row, six-hole, and 12-hole. There are either planting rows or holes available or a combination of both.

Milliken said the Wonder is ideal for any gardener because it permits planting a lot of vegetables in a small space. The weed barrier acts as a mulch and retains water under the mat, which allows for even watering and constant moisture. Also, the weed barrier does not permit weeds to grow through except in the spaces where the product is going to be planted, therefore, nearly eliminating the weed problem that plagues most gardeners.

“I have grown nearly all types of plants, which would normally be planted by a home gardener,” he said.

Using the Wonder, his crops have included all kinds of lettuces, spinach, onions, snap and snow peas, beets, green beans, sweet corn, peppers, summer squash, musk melons, watermelons, and pumpkins to name a few. He said all the results have been very positive using the various configurations.

More than Milliken likes to admit, he is certain that developing and selling the Wonder has affected his law practice.

“I spent hours and hours designing various styles of mats,” he said, “drawing on graph paper the various patterns for planting, cutting them out one at a time, and putting them in the garden and planting various products in them.”

He spent numerous hours on the Internet and on the telephone finding the right weed barrier to use, the best porous hose he could find for watering, and the best rubber stripping for the outside of the mats. It all took a considerable amount of time away from his private practice.

Milliken’s daughter, Kari Gilliland, has been practicing with him for 10 years along with Kevin Berens for seven years. He also has two paralegals and two secretaries who help him in his practice.

“If it were not for these individuals, the law practice would have suffered immensely while I was in the development process of the Wonder,” he said.

He spent quite a bit of time in the initial marketing phases of the Wonder, but now has a full-time person employed to run the main street store, who is also in charge of the custom products that they make and sell. Milliken also employs a horticulturist on a part-time basis.

He said that without the benefit of these people, he would not be able to devote as much time as he does to do the gardening aspect of his life.

Next, Milliken is hoping to develop a somewhat “self-watering” system. It would be a manufactured stand that would have a water container on its top and a hose that would connect directly to the Wonder’s porous hose.

“This would eliminate having to have a hose to water with and would enable a small gardener to be able to water with a bucket,” he said. “When watering is needed, simply fill the container and let it free flow to the hose under the mat.”

Milliken earned his bachelor’s degree in sociology in 1966 and his juris doctorate in 1969 from Washburn University. Upon completing his law degree, he moved to St. Francis to start his own practice. Today, Milliken’s practice consists of not only income tax, but also federal and Kansas estate tax, estate planning, probate, real estate matters, and a considerable amount of oil and gas related matters.

For more information on the Watering Weedless Wonder visit www.carefreegardener.com.

Photo courtesy of Kansas Country Living magazine.
We’re counting down ...

We’re excited to announce the launch of the newest Kansas Bar Association member benefit — Casemaker Online Legal Research Library! Beginning in October, Casemaker will be your source for Kansas case law, statues, rules, and more. Casemaker will be provided exclusively to you as a KBA member at no charge. The Casemaker library will fulfill your online research needs as well as compliment other online legal research sites, saving you money!

Casemaker ... just another great reason to belong to the Kansas Bar Association.

To view the listing of state and federal libraries available in October, visit our Web site at www.ksbar.org and click on Casemaker. You can also access the Casemaker Library Online Tutorial. The tutorial will have you rocketing through the research site in no time.
Some attorneys, unfortunately, have to travel to conduct their business. Sometimes to interview witnesses, sometimes to prepare experts, sometimes to try cases. I’ve done more than my share of traveling over the years. My destinations tend to be obscure locations. For some Kansas attorneys, this means small towns like Elkhart or Bird City. For me, it means cities where the Bates Motel would be considered an upgrade. And so this has given me some expertise in what constitutes a horrible hotel. Here is my list of “10 signs your hotel is a bad one.”

10. Security guards in the parking lot. Visible policemen are trouble. Especially those guys with a gun on one side of the belt and Taser on the other. The presence of Rin Tin Tin is another huge red flag. It’s fair to say they are not there for a policeman’s convention. Get to your room and engage the triple action locks.

9. The employees. These are the “one-man band” hotels. The place where the front desk clerk is the one who knocks on your door for housekeeping. Check out now, go to Wal-Mart and get a tent. It’s safer.

8. The door. This can be another early indication of trouble. If the hotel door opens up to a nine-lane interstate, that’s bad. If that door has a space below it large enough to fit a small pet, things are getting worse. If it has three locks, then check your life insurance premiums. Use a towel to create privacy. Then pull out the remote and find the “Religion Channel” on cable.

7. The carpet. If the room carpet is in nine different shades, you are surrounded by a fungus that the Centers for Disease Control and Prevention has yet to culture. Heard of the “bird flu”? You are standing on a mutation of that virus. Create a buffer zone of towels leading to the room door and then to your rental car. Exit now before you start to grow feathers.

6. The towels. Bathroom towels should be white, but oh, no, the towels are brown. More like a whitish-brown. The bedspread hasn’t been washed since President Carter. If the bedspread is stiff, it’s because you are witnessing a biological reaction. Mustard and ketchup stains are the least of your problems.

5. Shampoo and soap. All hotels have complimentary soap and shampoo. But that’s like saying all cars have keys. Shampoo bottles that lack a safety seal are a red flag. Soap without a wrapper, another problem. Same with shampoo that has a head lice killer additive. Enjoy your stay!

4. HVAC. Lots of cheap hotels don’t have central air. That, in and of itself, is not necessarily bad. When the window unit dangles by a thread is when you need to start to get concerned. When the TV set has rabbit ears is independent grounds to get an early checkout.

3. Strange noises. This bad sign you normally don’t discover until it’s too late. Usually late at night. I’ve heard lots of strange noises, but pet noises is something I heard for the first time last fall. Dogs barking. No kidding. And I don’t mean Lassie, if you know what I mean. It sounded like two pit bulls were upset with room service.

2. Frequent Guest Program. Anytime the frequent guest program has a two-digit number, the minibar carries only Schlitz, and the complimentary buffet requires a microwave, consider sleeping in the rental car.

1. Motels in the motel. Ant motels inside the No Tell Motel. Those tiny motels they stick behind the bed where no one can see them tend to have a higher occupancy rate than the motel you are in. Follow the trail of ants out the door to the kitchen. That’s where they are serving a complimentary brunch.

And if you survive all these hotel hazards, averting that Summary Judgment motion will quickly find its proper perspective.

About the Author

Matthew Keenan grew up in Great Bend and attended the University of Kansas, where he received his B.A. in 1981 and his J.D. in 1984. For the last 20 years, Keenan has practiced with Shook, Hardy & Bacon. He may be reached at mkeenan@shb.com.
Become a History Teacher

By Paul T. Davis, KBA Young Lawyers Section president

Perhaps you considered being a teacher before you chose a career in law. Well, you may have the opportunity to become a teacher after all. Unfortunately, you won’t get paid for it because it is part of what many, including myself, believe is an inherent responsibility of being a lawyer.

Many Kansas lawyers became members of the bar when there was a sense of duty that accompanied being a member of the legal profession. There was an obligation to support the bar association, serve on the local court-appointed criminal indigent defense panel, represent clients pro bono, and give back to the legal profession in many other ways. Much discussion has been made about my generation of lawyers, who have a tendency to ask “what’s in it for me,” when it comes to these traditional obligations of the profession.

One of the problems with most young lawyers today is that the legal profession hasn’t done a very good job of educating new lawyers about how we all have responsibilities to the profession and American legal system as a whole that extend far beyond simply representing our clients on a day-to-day basis. Some of this stems from the fact that law schools have not done an adequate job of instilling a sense of obligation and responsibility in students as they prepare for a career in the law. We must realize that the challenges we face in our current legal system and how new lawyers have a duty to address these challenges requires much more attention from law schools than the typical commencement speech.

Therefore, it is incumbent upon lawyers who believe in the traditional notion that with the privilege of practicing law comes responsibilities to lead by example. We should continue to encourage all lawyers to support the bar association, both through membership and activity, and take on a pro bono client every now and then. But I believe there is a new challenge for those who feel an obligation to the legal profession and our system of justice. It is to tell the story of the American court system and the importance of the rule of law in our democracy.

The judiciary and our court system are under attack perhaps more than ever before. We’ve heard far too much rhetoric about greed-driven lawyers, judges legislating from the bench, and a court system that isn’t directly accountable to the people. The U.S. House of Representatives has even gone so far as to pass a number of measures that prohibit the federal judiciary from issuing rulings on basic constitutional questions. Our profession needs to take the lead in educating Americans that this rhetoric and action disrespects the work of the Founding Fathers and furthermore, abrogates the rule of law.

I recently attended the annual meeting of the American Bar Association (ABA) where I had the opportunity to hear a passionate and stirring speech given by U.S. Supreme Court Associate Justice Anthony Kennedy. Kennedy made the point that since the Cold War subsided, most Americans have believed that democracy has become the dominant system of government around the world. However, Kennedy argues that the jury is still out and that the United States’ position as the pre-eminent advocate for democracy has become threatened by the rhetoric and actions of a movement that in essence disrespects the rule of law, which Kennedy argues is at the core of a democratic system of government.

Kennedy called upon the legal profession to educate the public about why the rule of law is critical to the freedoms that we all enjoy as Americans and why it is essential to the progress of human existence. Kennedy said at the conclusion of his remarks that “this is a battle that we not only must wage, it is a battle we must win; because the future of the freedoms that we all enjoy is at stake.” We know that nobody can make this argument and win it better than lawyers.

I am pleased to report that young lawyers all across the country are answering this call. The ABA Young Lawyers Division recently launched a public service project titled “Choose Law.” The project focuses on educating middle and high school students about the rule of law, separation of powers, and the difference that lawyers can make in society. The KBA Young Lawyers Section plans to implement this project in schools all across the state of Kansas to do our part in helping to foster a respect for the American legal system and rule of law among future generations.

But it is incumbent upon lawyers of all ages, especially lawyers who have years of perspective on the legal system, to stand up for our profession and system of justice that so many of our predecessors fought diligently to build and protect. We can only do this by telling the story of the American legal system. Tell your friends, neighbors, and business acquaintances about the landmark legal decisions that upheld the constitutional principles that our country was founded upon. Tell them about the intentions of the framers and why people like John Adams and James Madison fought so hard to have an independent judiciary. Tell them how skilled lawyers and distinguished jurists like Thurgood Marshall protected the rights of the minority against tyranny. And remind them that almost everyone will be a minority of some sort at a point in their life and that the court system may be the only place they can turn to for protection.

Each of us works for justice by representing our individual clients every day. That is what lawyers do. But I hope we can act collectively and answer Justice Kennedy’s call to service by becoming teachers of the law to our fellow citizens. If we can accomplish this, we will have preserved the rule of law and the freedoms that it brings for generations to come. That would be a truly great legacy!

Paul T. Davis is a partner with the firm of Skepnek Fagan Meyer & Davis P.A., Lawrence. He may be reached by phone at (785) 843-7674 or by e-mail at pauldavis@sunflower.com.


Constitution Day 2006

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

On Sept. 17, 1878, our Founding Fathers signed the Constitution of the United States of America in Philadelphia. The Constitution is noted as the most perfect governmental document conceived by man.


President George W. Bush signed House Resolution 1848 on Dec. 8, 2004, which officially established Sept. 17 as “United States Constitution Day.”

With this act, educational institutions receiving federal funding were to provide educational programming on the Constitution. It will be observed on the same day it was signed, Sept. 17, unless the date falls on a weekend or another holiday, in which case it will be observed on the preceding or following week. As with this year’s date falling on a Sunday, most schools and the national observation of Constitution Day will fall on Monday, Sept. 18.

Constitution Day Inc. began with the simultaneous recitation of the Preamble across America in 1997. This year marks the 10th annual nationwide recitation of the Preamble with Gen. Colin Powell leading the ceremony on Monday, Sept. 18 at 1 p.m. CDT.

Following the recitation of the Preamble, there will be roll call of the 50 states in the order the state was admitted to the Union or ratified the Constitution.

The Kansas judiciary, Kansas Bar Association, and the Kansas Women Attorneys Association have numerous no-cost programs available to help school districts observe Constitution Day.

Since 1994, Kansas judges and lawyers have been presenting a live, interactive program on the Supreme Court of the United States, especially its duty to interpret the Constitution. Using interesting constitutional law cases decided by the Supreme Court, presenters use audience members to play the parts of the litigants, lawyers, judges, and justices. The important issues of the case are explored, the audience votes on the outcome, and then is told how the case was actually decided. A well-received, award-winning program for schools and community groups, the presentation is educational and entertaining. No preparation by the audience is needed. The program is called “You be the Judge.”

In 2004, the KBA sponsored a program presented by Kansas judges and lawyers to commemorate the 50th anniversary of the U.S. Supreme Court case of Brown v. Board of Education of Topeka. The program consists of an edited video version of the arguments presented to the Supreme Court and explanatory commentary. The popularity of this program prompted the KBA to produce another video concerning the case of Miranda v. Arizona and a third video, in cooperation with the Kansas Press Association, on the important First Amendment case of New York Times v. Sullivan.

“You be the Judge” is ideal for school presentations and community meetings. The Supreme Court argument videos are available to interested schools and additional explanatory materials are also available. For information on the availability of these programs, please contact Meg Wickham, manager of public services, at (785) 234-5696 or e-mail to mwickham@ksbar.org.

Additional information on Constitution Day can be found at www.ksbar.org under Public Services, Constitution Day.
Members in the News

CHANGING POSITIONS

Jeffrey C. Baker and Curtis O. Roggow have been elected partners with Sanders Conkright & Warren LLP, Overland Park.

Michael D. Smith has joined the firm’s Overland Park office as an associate.

Brendon P. Barker has joined Post Warren & Barker LLP, Overland Park.

Kevin D. Brooks, Paul F. Gordon, and Merry M. “Maggie” Tucker have joined Sherman Taff Bangert Thomas & Coronoado P.C., Kansas City, Mo., as associates.

Geoffrey W. Clark has joined Wilbert & Towner P.A., Pittsburg, Kan.

Gregory T. Cotton has joined On Goal LLC, Kansas City, Mo.

Suzanne R. Dwyer has become counsel with the law firm of Conlee, Schmidt & Emerson LLP, Wichita.

Rodney L. Eisenhauer has joined Performance Contracting Group, Lenexa.

Lisa A. Epps has been elected partner with Spencer Fane Britt & Brown LLP, Kansas City, Mo.

Tonna K. Farrar has joined Bonnett, Fairbourn, Friedman & Balint P.C., Phoenix.

James L. Horner has been named city attorney of Hoisington.

Paul M. Garvin has joined AmerUs Annuity Group, Topeka.

Daniel P. Goldberg has joined Fisher, Patterson, Sayler & Smith LLP, Overland Park, as an associate.

Angelie R. Gregory has joined Cargill Meat Solutions Corp., Wichita.

Brian A. Jackson has been elected partner with Shook, Hardy & Bacon LLP, Kansas City, Mo.

Megan Kimbrell and Laura B. Shanefelt have joined Monnat & Spurrier Chhd., Wichita, as associates.

Kimberly B. King has become an assistant county attorney for Labette County.

Alison N. Lee has joined Monses, Miller, Mayer, Presley & Amick P.C., Kansas City, Mo.

William F. Logan and David W. White have become members of Foland, Wickens, Eifelder, Roper & Hofer P.C., Kansas City, Mo.

Stephen R. McAllister has joined Thompson Ramsdell & Qualseth P.A., Lawrence, as of counsel.

Roger E. McClellan has joined Sherwood Companies, Wichita.

Suneetra N. Mickle has joined the Kansas Health Institute, Topeka.

Robert D. Parmley has joined Employers Reassurance Corp., Mission.

Benjamin R. Prell has joined Stafford & Associates LLC, Kansas City, Mo.

Todd N. Rasmussen has joined Sprint, Overland Park.

Matthew P. Reinsmoen has joined Oppenheimer Wolff & Donnelly LLP, Minneapolis, Minn., as an associate.

Kevin T. Stamper has become counsel with the firm of Toomey Pilgreen LLC, Wichita.

Douglas L. Stanley has been elected managing partner of Foulston Siefkin LLP, Wichita.

Richard F. Stevenson has become a partner with Schlagel Damore Gordon & Kinzer LLC, Olathe.

Yvette L. Willson has joined the Centre County District Attorney’s Office, Bellefonte, Pa.

CHANGING PLACES

Cook & Fisher LLP has moved to 1206 S.W. 10th St., Topeka, KS 66604.

Paul M. Dent has moved his law office to 816 Ann Ave., Kansas City, KS 66101.

Gilbert Consulting Group LLC has moved to 4741 Central St., Kansas City, KS 64112.

Barbara E. Hecht has started Barbara E. Hecht P.C., 3425 W. 95th Terrace, Overland Park, KS 66206.

Hentzen Law Firm has moved to 11551 Granada, Ste. 100, Leawood, KS 66211.

John C. Johnson has a new business address, 3120 Mesa Way, Ste. C, Lawrence, KS 66049.

Karla R. Jones-Wilson has a new business address, 3931 Main St., Ste. 301, Kansas City, MO 64111.

Charles F. Moser has started Moser Law Office, 113 W. Greeley Ave., P.O. Box 429, Tribune, KS 67879.

Stephen A. Murphy has a new business address, 125 N. Market St., Ste. 1250, Wichita, KS 67202-1801.

H. Michael Nichols has started Nichols Law Offices, 200 W. Douglas Ave., Wichita, KS 67202.

Patton & Patton Chhd. has moved to U.S. Bank Building, 800 S.W. Jackson, Ste. 1414, Topeka, KS 66612.

Robert G. Shviley has started his own firm located at 505 Leavenworth St., Manhattan, KS 66502.

Leberd D. Shultz has moved his law office to 4507 W. 89th St., Prairie Village, KS 66207-2250.

Unruh & Pratt has moved to 833 N. Waco, P.O. Box 830, Wichita, KS 67201.

MISCELLANEOUS

Husch & Eppenberger LLC has been named one of the Top 200 law firms that dedicates itself to pro bono legal services by The American Lawyer.

James W. Paddock, Lawrence, received the Distinguished Alumni Award from the University of Kansas School of Law. He has also been named president of the Ethel and Raymond F. Rice Foundation.

Schlagel, Damore & Gordon LLC, Olathe, has changed its name to Schlagel Damore Gordon & Kinzer LLC.

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.

“Jest Is For All” by Arnie Glick

“I just received a copy of the will of my late uncle, who owned a salvage business and junkyard. He literally left me the residue.”
Jerome E. “Jerry” Jones
Jerome E. “Jerry” Jones, 79, Wichita, attorney and partner with Hershberger, Patterson, Jones & Roth, died June 28. Jones was born in Atchison in 1927 to Richard H. and Maryzita (Cahill) Jones. He attended Wichita State University and the University of Kansas, where he graduated from its law school in 1952.
He joined the Kansas Bar Association in 1952, becoming a lifetime member in 2002. He was a past member of the KBA’s Oil, Gas, and Mineral Law and Real Estate, Probate, and Trust Law sections.
Jones is survived by his wife, Mary Ellen (Callahan) Jones, of the home; children, Kathleen, Alexandria, Va., Jennifer Haverty and Amy McPhail, both of Leawood, and Jerry, Wichita; and six grandchildren.

Nanette Louise Kemmerly-Weber
Kemmerly-Weber was a 1972 graduate of Circle High School at Towanda, a 1976 graduate of Washburn University, and a 1979 graduate of Washburn University School of Law. She was a private practice attorney and also served 20 years as Allen County attorney.
She was a member of the Kansas and Allen County bar associations and the Kansas County and District Attorneys Association (KCDAA), where she served as a board member and was past president. In 2004, Kemmerly-Weber was the recipient of the KCDAA’s Lifetime Achievement Award.
She is survived by her husband, Alan Weber, and daughter, Katherine, both of the home; two brothers, David and Clay, and her parents, Benton.

Wilbur G. Leonard
Wilbur G. Leonard, 89, Topeka, died June 14. The son of Frank C. and Gold E. (Good) Leonard, he was born March 14, 1917, in White City. He graduated from the University of Kansas in 1939 with a bachelor’s degree in political science and a juris doctorate from its law school in 1941.
He joined the Army Air Corps in 1942 and was commissioned at Mather Field, Calif. After his active duty, he served in the Air Force Reserve, retiring at the rank of colonel.
Leonard was admitted to the Kansas bar in 1941. He joined the Kansas Bar Association that same year, becoming a lifetime member in 1991, and began a private practice. He was admitted to practice before the Kansas Supreme Court, the U.S. District Court for the District of Kansas, the 10th U.S. Circuit Court of Appeals, and the U.S. Supreme Court.
Leonard was Morris County attorney for seven years, served as U.S. attorney for Kansas, attorney for the Alcohol Beverage Control, chief attorney for the Commission of Revenue and Taxation, executive officer of the Kansas Telephone Association, and as counsel for the Kansas Livestock Association until his retirement.
He was also active in the Kansas Chamber of Commerce, the Greater Topeka Chamber of Commerce, Topeka Bar Association, Military Officers Association of America, and the KU Alumni Association.
Survivors include his wife, O’Thene, of the home; daughters, Nancy Dietze, Lawrence, Jodi Kaigh, Casper, Wyo., and Gayle Harper, Edmonton, Alberta; a brother, Alvin Leonard, Portland, Ore., a sister, Elaine Vick, Lawrence; and four grandchildren. His parents and two brothers, Frank Wayne and Phillip Leonard, preceded him in death.

Hon. Cordell D. Meeks Jr.
Hon. Cordell D. Meeks Jr., 63, a district judge for the 29th Judicial District of Kansas, died June 28 in Kansas City, Kan.
Gov. John W. Carlin appointed Meeks to the district court in 1981. He previously served as senior partner in the law firm of Meeks, Sutherland & MacIntosh, served as a presiding judge of the Municipal Court of Kansas City, Kan., and was president of the Kansas Municipal Judges Association.
He received a bachelor’s degree in political science in 1964 and a juris doctorate in 1967 from the University of Kansas. He was selected a Reginald Heber Smith Community Lawyer Fellow at the University of Pennsylvania Law School in 1967 and received an honorary Doctor of Laws degree from Baker University in 2005.
Meeks had been recently elected chairman of the board of directors of Children’s Mercy Hospital. He was vice chairman of the boards of Swope Health Services, YouthFriends, the Midwest Center for Holocaust Education, and Kansas City Friends of Alvin Ailey; secretary of the Truman Presidential Museum and Library; and treasurer of the Native Sons and Daughters of Greater Kansas City. He also sat on the board of directors of Heart of America United Way, the Midwest Research Institute, Rockhurst University, William Jewell
College, the Truman Good Neighbor Award Foundation, Swope Community Enterprises, and the Wyandotte County Advisory Board for the Boys and Girls Clubs of Greater Kansas City; and was a member of the board of governors for the Liberty Memorial Association.

He served as chairman of the national board of directors of the American Lung Association, past chairman of the national board of directors of the KU Alumni Association, past chair of the Wyandotte Health Foundation, past vice chair of Operations for the Heart of America Council of the Boy Scouts of America and the Greater Kansas City Community Foundation. He also served as a member of the national board of directors of the Mental Health Association.

Additionally, Meeks served as president or chairman of the board of local organizations, including the KU Law School Society Board of Governors, El Centro, the United Way of Wyandotte County, the Visiting Nurse Association of Greater Kansas City, the Economic Opportunity Foundation, the Substance Abuse Center of Eastern Kansas, and the American Red Cross of Wyandotte County. He also served as co-chair of the Greater Kansas City Region of the National Conference of Community and Justice.

Meeks was a former member of the Kansas Commission on Veterans' Affairs. He served as judge advocate general and senior military judge for the Kansas Army National Guard, where he retired with the rank of full colonel. He also served as staff judge advocate for the 35th Infantry Division of the Kansas National Guard at Fort Leavenworth. A graduate of the Command and General Staff College and the Army War College, he was activated with the 69th Brigade of the Kansas National Guard for 19 months in 1968 and received the Army Commendation Medal for his service as chief legal clerk for Support Command at Fort Carson, Colo.

He is survived by his wife, Mary Ann, of the home; son, Cordell III, and grandson, Cordell IV, both of Kansas City, Kan. Other survivors include his mother, Cellastine, Kansas City, Kan.; sisters, Marlene Shelby and Marcena Chandler, both of Kansas City, Mo.; and Marquita Cross, Houston; brothers-in-law, Carl Sutherland, San Mateo, Calif., Tom Sutherland, Lenexa; and John Sutherland, Mound City; an aunt, Jane Brown, Kansas City, Kan.; and 21 nieces and nephews.

Marlin White

Marlin White, 71, died May 24 in Holton. He was born June 4, 1934, in Lincoln, Kan., the son of Ralph and Mabel Eggle White.

He graduated from Salina High School in 1952 and from 1950 to 1965, he worked in Salina and Topeka for Union Pacific Railroad as a yard clerk, switchman, and engine foreman. He served in the U.S. Air Force Aviation Cadets from 1954 to 1956. He graduated from Washburn University with a bachelor’s degree in 1960 and then with a juris doctorate from its School of Law in 1963.

He moved to Holton in 1963, where he later founded White Law Office. White continued to practice law until his death. He served as city attorney for Holton since 1979 and was a state of Kansas Employment Security Division Board of Review attorney since 1967. White was a member of the Kansas Bar Association and a past president of the Jackson County Bar Association. He served many years as secretary of the Second Judicial District Nomination Committee. He was often appointed as an assistant attorney general, special prosecutor, judge pro tem, and as a special master. He was also admitted to practice before the U.S. Supreme Court.

White was past president of the Holton Chamber of Commerce, Holton Rotary Club, Holton City Hospital board of directors, and Holton PTA. He was also a member of the American Legion, Jackson County Historical Society, Brotherhood of Railroad Trainmen, and was a Paul Harris Fellow.

He is survived by his wife, Frances, of the home; three daughters, Kathy Slayton, Marshall, Texas, Denise White, Dodge City, and Catherine Marten, Onaga; a son, Dennis, Holton; a sister, Marlene Zimmerman, Wichita; seven grandchildren; and two great-grandchildren.
The Horse and the Barn Door: Ethics of Inadvertent Disclosure

By J. Nick Badgerow, Spencer Fane Britt & Browne LLP, Overland Park

I. Overview

As litigation becomes more complex, more documents are produced. As electronic discovery becomes more available, even more information will be located for production. As lawyers become more busy, the possibilities for mistakes in production increase, sometimes despite stringent protections. Worse, some of those documents are privileged, or are otherwise confidential or represent work product. The question is, once that horse is out of the barn, what can be done to get him back? Additionally, if one receives a privileged document that was apparently produced through inadvertence, what ethical obligations are imposed on the recipient?

Generally, Kansas courts will not punish a lawyer for inadvertently producing a privileged document, so long as reasonable efforts were made to prevent such disclosures. If an adverse party receives a privileged document, he should notify the producing party and not use the document.

II. The Horse Escapes

Production of privileged, confidential, and/or work product information happens through inadvertence in the review process, particularly when there are thousands of documents to review. This kind of information is also disclosed by sending an e-mail to the incorrect addressee, hitting “Reply to All” instead of “Reply to Sender,” hitting “Reply” instead of “Forward,” or allowing address-completion software in the e-mail program to fill in (the wrong) address without looking.

III. The Middle Ground

Some courts view any inadvertent production of privileged documents as a waiver of the privilege.1 On the other side of the spectrum, some courts require an intentional waiver by the lawyer’s client, and therefore, hold that any inadvertent production must be reversed and that there was no waiver of the privilege.2

Between these two approaches lies the more practical view that looks at each disclosure on a case-by-case basis. This is the approach taken by Kansas courts.3

Under this approach, the court considers five factors, each of which suggests practical protections:

1. Reasonableness of precautions taken. The producing party should take means reasonably necessary under the circumstances, such as having a second person review all documents produced, segregating privileged from nonprivileged documents, and preparing a privilege log. This is measured by the “reasonable law firm” test.4

2. How quickly was the problem rectified. Obviously, the more time that passes from the discovery of the inadvertent production until notification to the receiving party, the less sympathetic will the court be to the producing party. So, once it is discovered, the producing party should promptly advise the receiving party and request return of the document.5

3. Scope of requested discovery. If the document was one among 9,000, there will be more sympathy than if the produced document was one among 100.6

4. Extent of the disclosure. If there was just one privileged document produced among many thousands, its production will be more likely to be viewed as inadvertent than if there were scores or hundreds of privileged documents produced.7

5. Fairness and justice. The court will weigh the entire situation and decide the matter equitably. Undue prejudice from disclosure will help cause the return of the document.8

A party producing documents should therefore establish reasonable precautions to avoid inadvertent production. This includes proper training of the people reviewing documents about the privilege, a second-tier review process, segregating any privileged documents to ensure they will not be copied, and prompt action as soon as inadvertent production is discovered.

IV. Getting the Horse Back

As noted above, the producing party should demand the return of inadvertently produced privileged documents – once he knows they have been produced. What is required of the party who receives a privileged document, which has apparently been produced inadvertently?

Rule 1.3, KRPC requires a lawyer to represent his client zealously. However, an ABA Ethics Opinion9 directs that the receiving lawyer take these steps:

1. Refrain from reviewing the document after determining that it is, in fact, privileged.

2. Notify the producing party of the production.

3. Abide the producing party’s request regarding the return or destruction of the document.10

A more recent ABA Ethics Opinion11 withdraws Op. 92-368 and holds instead that the recipient must “promptly notify the sender” of the privileged information, but he is not required to refrain from looking at the document or abide the sender’s instructions.

However, that opinion is based upon the language of amended Rule 4.4(b) in the Model Rules of Professional Conduct, adopted as part of Ethics 2000. Since the amended Rule 4.4(b) has not been adopted in Kansas or Missouri, the principles of 92-368 should still apply.

Opinion 92-368 should not be viewed as a safety valve for sloppy production. Reasonable precautions should be taken to prevent inadvertent disclosure of documents, which are privileged or represent confidential or work product information.

FOOTNOTES

Over the past two decades, more and more child custody cases in divorce, paternity, and post-judgment actions are being resolved by various alternative dispute resolution (ADR) processes. As a family law practitioner for 25 years, I was initially skeptical of alternative methods of handling child custody and parenting-time or visitation cases. Part of my initial skepticism was admittedly proprietary. I thought when our courts began referring cases to mental health care professionals for mediation back in the mid-1980s that it would take away a substantial slice of my family law practice. Gradually, family law practitioners generally became converted from resistance to begrudging acquiescence and finally to wholehearted acceptance.

My own involvement in ADR processes followed somewhat the same path. One of the early “pioneers” in developing ADR practices in Kansas was the Hon. James G. Beasley, who served for many years as the presiding judge for the Sedgwick County District Court Family Law Department and was instrumental in getting the case management statute passed by the Kansas Legislature in 1996. Prior to the enactment of K.S.A. 23-1001 et. seq., Beasley made a presentation at a Wichita Bar Association Family Law Committee meeting. I was the chair of the committee during that time period and after making his presentation, Beasley asked for any comments or questions. Perhaps succumbing to the cliche of “discretion being the better part of valor,” no one initially said anything. After a very pregnant pause, I assumed it was my duty as chairman to at least spark some debate or discussion. Accordingly, I asked Beasley whether he thought the case management bill posed any constitutional concerns, i.e. due process and equal protection. For those who know Beasley, his response was characteristically vigorous. He assured the committee that there were no constitutional defects since parties still had the right to have a hearing if they objected to the case manager’s recommendations.

Fast forward about nine months, shortly after the case management statute was enacted in July 1996. Beasley called to inform me that he had appointed me as a case manager. Initially, I thought with the relatively restrictive definition of “chronically conflicted” that I would get maybe one to two cases a month. Within three weeks I had about nine cases. Eventually, case management cases occupied about one day a week. It was similar to taking one of your worst cases, doubling it because you’re dealing with both parties instead of just your own client, and then multiplying it by the number of case management cases assigned to me. As I will detail later in this article, I developed a better way of handling case management cases over time; however, the early years were difficult to say the least.

Historically, ADR processes were developed in response to growing dissatisfaction with the traditional avenue of resolving custody/parenting time or visitation disputes by going to court. K.S.A. 60-1615 was enacted in 1982 to authorize courts to order child custody investigations conducted by court personnel, Social and Rehabilitation Services, or private agencies. K.S.A. 23-601 to 607 were enacted in 1985 for mediation. As noted above, K.S.A. 23-1001 to 1003 were enacted in 1996 for court-imposed case management. More recently, dispute resolution counseling or limited case management was subsequently developed by various courts as a hybrid between mediation and case management.

As with any litigation decision, there are obvious pros and cons of ADR. On the positive side, ADR can mitigate hostility by focusing on constructive (rather than competitive, adversarial) solutions. ADR can also reduce expenses for parties by sharing the cost (as opposed to each party paying their attorneys to litigate) and the comparatively shorter time period in which the professional is involved. Finally, ADR offers a more direct way for parties to resolve custody/parenting time disputes and perhaps greater likelihood that parties will follow an agreement as compared to a court-imposed order.

On the other hand, among the drawbacks of ADR is that it can actually aggravate hostility if not handled properly or due to the dynamics of the personalities involved. The overall expenses can also be increased if the parties fail to resolve, resulting in a hearing before the court. Finally, the parties may not get their “day in court.”

Perhaps the most determinative factor in whether to use ADR is identifying which particular professional will be handling the process. From the outset, a decision should be made whether to use an attorney or a mental health care professional. If the dispute seems to boil down to a fairly straightforward factual dispute and the consequent application of the law, an attorney will probably be the better fit. If, on the other hand, there are concerns about dysfunctional behavior by one or both parties, a mental health care professional can probably better handle those parties. Beyond which type of professional to use, attorneys should obviously also consider the prospective mediator’s experience, costs, time frame, and their basic philosophical approach.

The first step through the ADR process generally is mediation, which entails a court-referral to a neutral lawyer or mental health care professional. The parties equally (or proportionately to their incomes) share the expense. Mediation typically is a short-term process completed in one or two sessions, usually to resolve pending motion(s). If an agreement is reached, the
mediator drafts the document, which is reviewed by parties and counsel. If the agreement is accurate and complete, it is signed by the parties and counsel and attached to and incorporated by reference in a court order. If no agreement or impasse is reached, the court resolves the dispute(s) and similar to settlement negotiations, offers made during mediation are not admissible and the mediator may not be called as a witness.

A presumption arises that an agreement between the parties on a child custody arrangement is in the best interests of the child. However, any agreement regarding the custody of minor children is always subject to the overarching power of the court to determine the best interests of the child. Matters regarding custody of children are always subject to modification even though the parties enter into various written agreements or stipulations incorporated into either a divorce decree or other final order. When a child’s custody is determined by stipulation or default, the custody determination may in fact be at odds with the best interests of the child. In re Marriage of Jennings, 30 Kan. App. 2d 860, 50 P.3d 506 (2002).

The second step in the ADR “ladder” is limited case management or dispute resolution counseling. Like mediation, limited case management involves the appointment of a neutral lawyer or mental health care professional; the parties equally (or proportionately to their incomes) share the expense; it is a short-term process, usually to resolve pending motion(s); and if an agreement is reached, the limited case manager drafts the agreement that is reviewed by the parties and counsel. If the document accurately reflects the parties’ agreement, it is signed by parties and attached to and incorporated by reference in a court order.

The key difference, however, with mediation is that if no agreement is reached, the limited case manager prepares a written recommendation to the court. Usually, the limited case management recommendation is not automatically adopted by the court unless a hearing is conducted and the court approves the recommendation as the court’s order. The limited case manager may be called to testify as to basis for their recommendation and the parties’ positions, proposals, and behavior during process. The limited case management process typically ends once the agreement or recommendation is adopted (or disallowed) by the court.

My usual “format” for limited case management recommendations is to open with the background on the case (usually as reflected by the court file) and a listing of the people interviewed and other sources relied upon. I list the issues presented, followed by a summary of each party’s position. Then I usually set forth my own analysis, including application of the factors under K.S.A. 60-1610(a)(3)(B) to the particular case. Finally, I set forth my recommendations to the court to resolve the pending issues.

The “last stop Texaco” in the ADR process is case management. Again, like mediation and limited case management, the court appoints a neutral lawyer or mental health care professional and the parties equally (or proportionately to their incomes) share the expense. In contrast with mediation in limited case management, case management was designed to provide “a procedure, other than mediation, which facilitates negotiation of a plan for child custody, residency, or visitation/parenting time. In the event the parties are unable to reach an agreement, the case manager shall make recommendations to the court.” K.S.A. 23-1001. The court or a hearing officer may order case management, when appropriate, of any contested issue of child custody or parenting time at any time, upon the motion of a party or on the court’s own motion. K.S.A. 23-1002(a).

Cases in which case management is appropriate shall include one or more of the following circumstances (1) private or public neutral dispute resolution services have been tried and failed to resolve the disputes; (2) other neutral services have been determined to be inappropriate for the family; (3) repetitive conflict occurs within the family, as evidenced by the filing of at least two motions in a six-month period for enforcement, modification or change of residency, visitation or custody, which are denied by the court; or (4) a parent exhibits diminished capacity to parent. K.S.A. 23-1002(b).

Case managers are authorized to make recommendations to the court, including recommendations for primary residence of children. In re Marriage of Gordon-Hanks, 27 Kan. App. 2d 987, 10 P.3d 42 (2000). Gordon-Hanks is the leading, if not the only, Kansas case dealing with case management. Most notably, this decision dealt with the scope of review by courts as to case management recommendations. Gordon-Hanks noted that a court may adopt the recommendations of the case manager as orders of the court without a hearing, unless opposed by a party and that no burden of proof was established by the statute. However, since the case manager is neither a party to the dispute, nor representative of a party, but is a court-appointed official, the burden of proof would not logically lie with the case manager any more than the burden would lie with the court itself. The logical conclusion is that the disagreeing party bears the burden of proving the case manager’s recommendation to be erroneous or inappropriate. This conclusion isbuttressed by the fact that a hearing on the case manager’s recommendation is not automatic, but is held only if a party in disagreement files a motion for review with the court. K.S.A. 1999 Supp. 23-1003(d)(6).

About the Author

David N. Johnson, Wichita, is a solo practitioner. He received his undergraduate degree in 1978 and J.D. in 1981 from the University of Kansas. Johnson is a member of the Kansas and Wichita bar associations. He is a member of the WBA Family Law Committee and served as chairman in 1995. Johnson has also served as a chapter author of the KBA’s Family Law Handbook (1997 Edition). He has served as the Sedgwick County and Kansas District Court-appointed mediator and case manager since 1996.

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Introduction

Kansas has a new estate tax. Senate Bill 365, signed by Gov. Kathleen Sebelius on May 22, 2006, replaces the current estate tax as to decedents dying on or after Jan. 1, 2007. The new law will continue in effect throughout 2007, 2008, and 2009, but is repealed as to decedents dying on and after Jan. 1, 2010. At that point Kansas will no longer have a death tax.

The exemption for Kansas purposes will stay at the current level of $1 million. For taxable estates that exceed $1 million, the tax rates for 2007 are sharply below those applicable in 2006, and the tax rates decline further in 2008 and again in 2009. Very soon the Kansas Estate Tax will be “small potatoes” for even prosperous decedents. The incentive to move to a state without a death tax, such as Colorado or Missouri, should decline sharply.

The new law is “free-standing” in the sense that, except for a few cross references and certain definitions, it is not dependent on federal law. Unlike the prior law, it makes no mention of the state death tax credit formerly allowed under the federal estate tax. Therefore, the Kansas tax will not be affected by changes in federal law, including possible repeal of the federal estate tax. Achieving this “free-standing” status was the principal purpose of enactment of the new law.

The new law is intended to be “user friendly.” It adopts the long established and well-understood principles of the federal estate tax to build the Kansas gross estate and then subtract deductions to produce the taxable estate, to which the tax rates (including the exemption amount) are applied, producing the amount of tax due. There are a few respects in which these rules vary for Kansas purposes, primarily in a manner helpful to the taxpayer and the preparer. Because the new law closely follows federal law, the determination of Kansas estate tax liability should be relatively simple for an estate that is required to file a federal return. The new law is explained in greater detail below.

FOOTNOTES

2. For example, Sec. 9(b)(1) refers to the gift tax return requirements of I.R.C. § 6019.
3. Sec. 2(a).
4. SB 365 was created by a drafting group organized in 2002 by Nancy Schmidt Roush. The original members of the group were Martin Dickinson, Terry Fry, Timothy O’Sullivan, and James Weisgerber. The final version adopted in 2006 was drafted by Roush, Dickinson, and Weisgerber. The problems afflicting the prior estate tax law are described in Martin Dickinson, The Kansas Estate Tax Problem, 74 J. Kan. Bar Assn. 36 (Nov./Dec. 2005).
5. Sec. 21; I.R.C. § 2051. References to “IRC §” are to sections of the Internal Revenue Code.
What's the Same as the Federal Estate Tax

The Kansas estate tax provisions mandating inclusion in the gross estate are generally identical to the corresponding federal provisions. The generally identical provisions are (1) property directly owned, (2) property subject to a retained life estate, (3) property subject to a retained power, (4) annuities, (5) joint tenancies, (6) powers of appointment, and (7) life insurance.

The following provisions granting deductions are generally identical to the corresponding federal provisions: (1) funeral and administration expenses, claims, and mortgages; (2) casualty losses; (3) the marital deduction for outright gifts and trusts for which the qualified terminable interest property (QTIP) election is made; and (4) the charitable deduction.

The process for determining the Kansas tax is essentially identical to the federal process if the decedent owned only Kansas property. If the decedent owned some property with a situs in Kansas and other property with a situs outside Kansas, the tax is prorated, as explained below.

The existing procedural sections were re-enacted without significant change.

What’s Different from the Federal Estate Tax

Gross estate

There are two variances from federal law in determining the gross estate-inclusion of transfers within one year of death and clarification of when QTIP property is included.

First, there is a general rule that all transfers within one year of the decedent’s death are included in the gross estate. This provision is necessary because Kansas does not have a gift tax. Without this provision, the Kansas tax could readily be avoided through “deathbed” gifts.

The inclusion rule applies only if the property transferred “would have been included in the decedent’s gross estate if such transferred interest ... had been retained by the decedent on the date of death.” Such property is included in the gross estate at its value on the date of death, not the date of the gift. The one-year inclusion rule applies to relinquishment of a power, as well as an outright transfer. The one-year inclusion rule does not apply if the decedent made the transfer for “adequate and full consideration in money or money’s worth.”

The inclusion rule is subject to important exceptions that are patterned on similar exceptions in IRC § 2035(c)(3). The inclusion rule always applies to transfers involving life insurance. Transfers not involving life insurance, however, are not subject to inclusion if IRC § 6019 did not require the decedent to file a federal gift tax return reporting the transfer. IRC § 6019 exempts from the filing requirement four categories of gifts: (1) annual per donee exclusion gifts (currently up to $12,000 per donee), (2) tuition and medical expense transfers, (3) transfers qualifying for the marital deduction, and (4) most charitable transfers.

The Kansas one-year inclusion rule is broader in scope but shorter in time than IRC § 2035. The Kansas rule applies to all nonexempt transfers, not just the limited transfers described in IRC § 2035(a)(2), but the Kansas rule applies only to transfers within one year of death, not the three years covered by IRC § 2035(a). This is especially significant for life insurance on the life of the decedent. Under federal law, if the decedent owned the policy within three years of death, the policy proceeds are included in the decedent’s gross estate despite the decedent’s later transfer of the policy. Under the new Kansas law, the policy proceeds are included only if the decedent owned the policy within one year of death.

Second, qualified terminable interest property for which a Kansas QTIP election was made is included in the Kansas gross estate similar to the inclusion rule under federal law. The Kansas rule applies to any property for which a deduction for Kansas estate tax purposes was allowed upon the prior death of the decedent’s spouse, under the QTIP provision of the new Kansas law or any prior Kansas law. Under current law, the Department of Revenue permits differential elections; for example, a QTIP election for Kansas purposes but not for federal purposes. Therefore, QTIP inclusion under the new law will apply to any property for which the QTIP election was made for Kansas estate tax purposes even though the QTIP election was not made for federal purposes. Because the Kansas “pretend federal exemption” has been less than the real federal exemption over the last several years, it is likely that more property has been QTIPed for Kansas purposes than for federal purposes. In those cases, the Kansas gross estate of the surviving spouse may actually be greater than the federal gross estate. If no Kansas QTIP election was made, however, there is no basis for inclusion.

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Special use valuation

The general rule is that the decedent’s property is included in the gross estate at its “fair market value” on the date of death. There is a very important exception for farmland under the new Kansas law. If the decedent was a Kansas resident, land that is located in Kansas and valued as agricultural property for property tax purposes is assigned the same value for estate tax purposes. This provision will dramatically reduce the value of many farm estates.

Federal special use valuation is not a part of the new Kansas law, in part because of its complexity. Given the low Kansas tax rates, it is unlikely that anyone would go to the trouble of qualifying and claiming special use valuation just for Kansas purposes anyway. If the estate owns farmland, the special valuation provision described above will be more beneficial and certainly easier. If federal special use valuation is used for other kinds of property, however, the Kansas gross estate will include that property at the greater fair market value.

Marital deductions

The new law provides for the same type of marital deduction as federal law, with one important expansion. The new law grants a deduction for “any interest in property, which passes or has passed from the decedent to a surviving spouse.” This is exactly the same as the federal language, but the Kansas law does not include the terminable interest rule set forth in IRC § 2056(b)(1). As a result, a marital deduction is available under Kansas law for any spousal interest in a trust, regardless of whether the QTIP requirements are met. Alternatively, the new law provides a deduction for the entire value of a trust for which a QTIP election can be and is made. The inclusion of both these rules in the new law means that the executor will have two alternatives available if QTIP property is involved.

When property is going into a “QTIPable” trust for the surviving spouse, the executor will need to decide whether to make the QTIP election or just deduct the value of the spouse’s interest in the trust.

For example, assume that wife dies, bequeathing $1 million to a trust that provides income for life to husband, with remainder to the children. Assume that the actuarial value of the husband’s life interest is 40 percent, or $400,000. The executor has a choice between two options. First, the executor can take a marital deduction of $400,000, with the result that estate tax will be imposed on the children’s $600,000 remainder interest (assuming the total taxable estate is in excess of $1 million). In this event, no estate tax will be imposed on the trust property when the husband dies. Second, the executor can make a QTIP election, with the result that the entire trust will qualify for the marital deduction and no taxes will be imposed at the wife’s death. At the husband’s death, however, the entire trust will be included in his gross estate. If a deduction for the full amount of the trust is needed to reduce the Kansas estate tax on the first death, and it is likely that the surviving spouse will live until 2010 or later (or the surviving spouse will not have a taxable estate even with inclusion of the trust property), then the Kansas QTIP election will be preferable. If a deduction of only the value of the spouse’s interest in the trust is sufficient to avoid Kansas estate tax, then there would seem to be no reason to risk later inclusion of the full amount of the trust by making a QTIP election.

There is no guidance in the statute regarding how to determine the “value” of the spouse’s deductible interest if QTIP treatment is not elected. If the spouse has the right to all income during life, using the federal tables for valuing a life estate would seem an unassailable approach. If the principal can be used for the benefit of the spouse, that should increase the value of the spouse’s interest. If the spouse’s interest may be terminated sooner, such as on remarriage, that should decrease the value of the spouse’s interest. There is precedent in the similar concept that existed under the old Kansas Inheritance Tax. The same issue of valuing a spouse’s interest in a trust arises when determining the amount of the spouse’s elective share.

Other federal provisions

As explained above, SB 365 is generally designed to replicate the process for determining federal estate tax liability. In the interest of simplicity, however, a number of federal provisions are not included in SB 365. The primary omitted provisions include: (1) special use valuation, (2) deferred payment, (3) alternate valuation date, (4) credit for tax on prior transfers, (5) credit for foreign death taxes, (6) qualified conservation easement exclusion, (7) transfers taking

35. Sec. 5.
37. Sec. 6.
38. I.R.C. § 2032A.
39. Sec. 23(a).
40. I.R.C. § 2056(a).
41. Sec. 23(b).
42. Sec. 23(b). The QTIP requirements stated in Sec. 23(b) are essentially identical to those stated in IRC § 2056(b)(7).
43. Sec. 17.
45. K.S.A. 79-1537(b)(a).
46. See K.S.A. 59-6a209(b); see also discussion at Section 2.12 of the Kansas Estate Administration Handbook, 6th ed.
47. I.R.C. § 2032A.
49. I.R.C. § 2032.
52. I.R.C. § 2031(c).
effect at death. Chapter 14 special valuation rules, and (9) disallowance of the marital deduction where the surviving spouse is not a U.S. citizen and qualified domestic trusts.

**Filing Threshold, Exemption, and Rates**

A return is required if the Kansas gross estate exceeds $1 million. This requirement refers to the entire gross estate, including property outside Kansas. A return is required even if the Kansas property does not exceed $1 million and even if the taxable estate is less than $1 million.

Under the old law the filing threshold was to be $2 million in 2007 and 2008 and $3.5 million in 2009, and if that filing threshold was not met then no tax was due. Therefore, under the new law, some estates will be subject to Kansas estate tax that would not have been subject to tax under the old law. The new law, however, provides a number of advantages, including lower rates, much more straightforward calculation of the tax, and elimination of certain inequities. Also, for some estates the new law will provide a higher filing threshold because the old law took adjusted taxable gifts into account in determining the filing obligation.

The Kansas exemption remains at $1 million throughout 2007, 2008, and 2009. This is the same as the exemption amount under current law for 2006. Thus, you could have a gross estate of more than $1 million and be required to file a Kansas return, but no tax would be due because of the exemption and other deductions such as the marital deduction.

Because the Kansas exemption will remain at $1 million during 2007 through 2009, while the federal exemption is $2 million during 2007 and 2008 and $3.5 million during 2009, many estates that do not have to file a federal return or do not have a federal tax liability will have to file a Kansas tax return and may have a Kansas tax liability during these three years.

The tax rates range from 3 percent to 10 percent for 2007, 1 percent to 7 percent for 2008, and 0.5 percent to 3 percent for 2009. The 2007 rates represent a sharp drop from the rates in effect for 2006 under current law, and further substantial drops will occur in both 2008 and 2009.

IRC § 2058 must be taken into account in determining the true impact of the tax rate reductions. IRC § 2058(a) allows a deduction for federal estate tax purposes for any death taxes paid to a state. For estates that have significant federal estate tax liability, IRC § 2058 has the effect of reducing the cost of the Kansas tax by the marginal federal estate tax rate, which after 2006 will be 45 percent for all taxable estates over the exemption amount. For example, if the Kansas tax is $100,000 and the estate will be subject to federal tax liability of at least $45,000, the IRC § 2058 deduction reduces the federal tax by 45 percent of $100,000, or $45,000. Therefore, the net cost of the Kansas tax is only $55,000.

The table below sets forth the net cost of the Kansas tax, after taking into account the value of the IRC § 2058 deduction, at various taxable estate levels for the years 2006 through 2009.

<table>
<thead>
<tr>
<th>Taxable Estate</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>$1 million</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
<td>$0</td>
</tr>
<tr>
<td>$2 million</td>
<td>$99,600</td>
<td>$30,000</td>
<td>$10,000</td>
<td>$5,000</td>
</tr>
<tr>
<td>$3 million</td>
<td>$98,280</td>
<td>$49,500</td>
<td>$16,500</td>
<td>$15,000</td>
</tr>
<tr>
<td>$5 million</td>
<td>$211,464</td>
<td>$115,500</td>
<td>$38,500</td>
<td>$19,250</td>
</tr>
<tr>
<td>$10 million</td>
<td>$576,504</td>
<td>$335,500</td>
<td>$176,000</td>
<td>$74,250</td>
</tr>
</tbody>
</table>

You cannot deduct the federal tax in determining the Kansas tax. As a result, there is no need for a circular computation. The executor first determines the Kansas tax, and the Kansas tax is then deducted under IRC § 2058 in determining the federal taxable estate. (Most federal estate tax computer programs actually calculate the Kansas tax and thus, the deduction, so you can do the federal return first and then the Kansas return.)

**Property in Multiple States**

The situs of property for tax purposes is determined in the same way as under current law. Importantly, the situs of intangible property is the state in which the decedent was “resident” at the time of death. A decedent is presumed to be a Kansas resident if he or she “spent in the aggregate more than six months of the calendar year immediately preceding their death” in Kansas.

If some of the decedent’s property has a situs outside Kansas, the tax is reduced by the following method. The tax is first determined by including all property, wherever located, in the decedent’s gross estate. All deductions are then applied to produce the taxable estate, and the exemption and tax rates are applied to produce a tentative tax on the entire estate. Finally, the tax is reduced to reflect the portion of the gross estate outside Kansas. The Kansas tax consists of the tentative tax multiplied by the ratio of the value of the Kansas property to the value of the entire gross estate.

For example, assume that the value of the decedent’s gross estate is $5 million, consisting of $3 million in Missouri and $2 million in Kansas. All deductions are then applied to produce the $5 million gross estate to produce the taxable estate, and the exemption and tax rates are then applied. Assume that the result is a tax of $100,000. Because the Kansas property is 40 percent of the gross estate, the Kansas tax is 40 percent of $100,000, or $40,000. There is no provision for a credit or deduction for taxes paid to other states.

53. I.R.C. § 2037.
54. I.R.C. §§ 2701-2704.
55. I.R.C. §§ 2056(d) and 2056A.
56. Sec. 25(a).
57. K.S.A. 79-15,102; I.R.C. §§ 2010(c) and 6018(a)(1).
59. Sec. 3(b).
60. Sec. 3(b).
61. Secs. 2(e), (k), and (m) of current law.
62. Sec. 2(n).
63. Sec. 2(k).
64. Sec. 4.
It is important to note that the actual disposition of the Kansas property is irrelevant. In the above example, assume that the entirety of the $2 million of Kansas property will pass to the surviving spouse and qualify for the marital deduction. The estate nevertheless has a Kansas tax liability of $40,000.

The residence of the decedent determines the situs of intangible property but otherwise has no effect on the filing obligation. In the above example involving property in both Kansas and Missouri, there is a Kansas filing obligation because the gross estate (including both Kansas and Missouri property) exceeds $1 million and there is at least some property in Kansas. The residence of the decedent is irrelevant. The filing obligation exists even if the value of Kansas property is below $1 million and the decedent is not a Kansas resident.

Planning and Implementation Suggestions

Estates subject to federal tax
As with the current Kansas estate tax, the new law will have an impact on marital deduction formulas in existing documents. For estates that are large enough to be subject to federal estate tax through 2009, the following analysis should be considered regarding how the formula will work under the new Kansas law and what changes (if any) you want to make in your formulas or approach.

1. With a “reduce to zero” formula that solves for zero federal estate tax, the amount in the shelter trust will be $2 million (or $3.5 million in 2009) and the marital trust will be funded with the rest of the estate. If the shelter trust does not qualify as a QTIP, then for Kansas purposes you can still take a marital deduction for the value of the spouse’s interest in the shelter trust. In 2007 and 2008, if the value of the spouse’s interest is $1 million or more, no Kansas estate tax will be owed, since the $1 million exemption will cover the rest of the shelter trust. Because the value of the spouse’s interest will depend on various factors, such as the terms of the trust and the age of the spouse at the time of the first death, it will not be possible to “reduce to zero” the Kansas tax with total certainty, but a good guess can be made. Even if this results in some Kansas tax, the relatively small amount of Kansas tax may be worth a fully funded shelter trust for federal purposes. However, you will no longer have the option you have under the current Kansas estate tax (at least by practice) to take a QTIP deduction for what actually goes into a non-QTIPable shelter trust.

2. A “reduce to zero” formula that solves for zero federal and no increase in state tax raises an interesting question. If the new Kansas law didn’t allow for the option of deducting the value of the spouse’s interest but only allowed a QTIP deduction, this formula would fund a non-QTIPable shelter trust with $1 million. But the deduction for the spouse’s interest in the shelter trust will allow you to additionally fund the shelter trust under this formula. Let’s assume that the spouse’s age and the terms of the trust would allow a Kansas marital deduction for the spouse’s interest in a $2 million shelter trust of $1 million. In 2007 and 2008 you could put $2 million in the non-QTIPable shelter trust and still result in zero Kansas tax. If you have an older spouse, however, there is still the possibility that this kind of formula will underfund the shelter trust. It
is probably not worthwhile to change these formulas for the three-year window. To the extent this formula allows the spouse to add to the shelter trust by a disclaimer, you will have the flexibility to decide whether you want to incur Kansas tax or underfund the shelter trust for federal purposes at the time of the first death.

3. With a “one-lung” QTIP, which can be divided into multiple QTIPs on death and differing elections made, you will have a great deal of flexibility. (The one-lung QTIP doesn’t work in those situations where you want the shelter trust to go to the children, or don’t want to have to pay the spouse all the income.

The one-lung QTIP can be used to make the most advantageous elections at the state and federal level as follows:

a. For a death in 2007 or 2008, you can have a $1 million QTIP for which no QTIP election is made at the state or federal level, a second QTIP of $1 million for which the Kansas QTIP election is made but not the federal, and a third QTIP of the rest for which QTIP elections are made at both levels. If the spouse is likely to live three years, there won’t be much downside to making the Kansas QTIP election on the second QTIP.

b. In the alternative, the first QTIP can be the highest amount (not to exceed the federal exemption) that results in $1 million taxable estate for Kansas purposes after taking a deduction for the spouse’s interest. You would make no QTIP election on the first QTIP at the state or federal level, but would take a deduction for the spouse’s interest at the Kansas level. This will be advantageous if the spouse is likely to die soon or has a large estate because there is no risk of including all of the first QTIP in the spouse’s estate on the spouse’s death.

Estates not subject to federal tax
If there is no concern about the federal estate tax, it may not be worthwhile revising client’s documents for only a three-year window, particularly when you consider that only married couples with net assets more than $1 million but under $2 million (or $3.5 million for one year) would be affected. If you do want to revise documents for these individuals (such as in the case of couples unlikely to live until 2010), here are some options: (i) a formula that funds the shelter trust with the Kansas exemption amount, (ii) an even more complicated formula that funds the shelter trust with the amount that results in $1 million after a deduction for the spouse’s interest, (iii) a one-lung QTIP, or (iv) all outright to the spouse with a disclaimer to the shelter trust.

For an estate that is somewhere between $1 million and $2 million and a relatively young surviving spouse, you can probably ignore the QTIP rules and, for example, leave everything to the spouse in a trust that (i) distributes income only as needed, (ii) terminates on remarriage, and/or (iii) provides benefits to other family members (all standard features of a traditional shelter trust). Each of these features will reduce the value of the deduction, of course, but you will still be likely to get at least a deduction for the amount exceeding $1 million.

For those clients who are not expected to live until 2010, and have a $2 million total estate, $1 million could be given away as long as there is a chance of surviving at least one year. Because of the $1 million federal gift tax exemption there will be no federal gift tax due, and the $1 million remaining at death will be under the filing threshold and/or covered by the Kansas $1 million exemption. The main drawback is the loss of step-up in basis on the $1 million gifted for income tax purposes.

About the Authors

Martin Dickinson is the Robert Schroeder Professor of Law at the University of Kansas. He is the author or co-author of many publications, including Taxation of Estates, Gifts, and Trusts, now in its 23rd edition, and has received the American Bar Association’s Harrison Tweed Award for his numerous continuing legal education presentations. He has also received the KBA’s Outstanding Service Award and Phil Lewis Medal of Distinction. He was formerly of counsel with the Lawrence firm of Barber Emerson.

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Introduction

Even though you won’t go to jail, Medicaid planning is fraught with peril. Medicaid is a welfare program. It is, of course, appropriate for practitioners to advise clients of the rules, regulations, and statutes so that the client can position herself financially to her best advantage. But in so doing with respect to eligibility for Medicaid, the practitioner finds himself at odds with the thrust of prudent public policy, which seeks to conserve scarce public resources and provide assistance only to the truly needy. The 2004 Kansas Legislature’s amendments to K.S.A. 39-709(e) leave no doubt about the direction of public policy, prudent or otherwise. Two anomalous decisions from the Kansas Supreme Court — Miller v. SRS and Brewer v. Schalansky — highlight this tension and perhaps illustrate the maxim, “bad facts make bad law.”

Most recently, do you remember when Vice President Cheney came back from the Middle East to break a tie vote in the Senate? It was just before Christmas last year, and the so-called Deficit Reduction Act of 2005 (DRA) passed the Senate 51-50. On Feb. 1, 2006, the House of Representatives (the vote was 216 to 214) adopted a slightly different version of the DRA, which President Bush signed into law on Feb. 8. Although relatively few of the DRA’s more than 700 pages deal with Medicaid, and the harshest changes will impact the 62 million Medicaid recipients who are not residing in long-term care facilities, the DRA contains significant eligibility rules changes that will have an impact on our elderly and disabled clients who might need assistance with the cost of nursing facility care.

Constitutionality of the DRA

As you may recall from eighth grade, for a federal bill to become law both the House and Senate must have approved it in identical form. Due to a mix-up in the Senate clerk’s office, a Medicare provision of the DRA as passed by the House was different from that in the version passed by the Senate. (It’s also known as the “$2 Billion Typo.”) So, what the president signed on Feb. 8, 2006, may not actually be a law. Litigation has commenced seeking to declare the DRA unconstitutional. The House could eliminate the issue by acting again on the DRA, but House Republican leaders have indicated they do not intend to do so.

FOOTNOTES

Medicaid Eligibility Basics

Applicants for long-term care assistance must meet a four-part eligibility test: medical need for institutional care, limited income, limited resources, and the absence of penalties for certain transfers. Applications for medical assistance are submitted to the Kansas Department of Social and Rehabilitation Services (SRS), but the Medicaid authority — the state-designated entity responsible to the Centers for Medicare and Medicaid Services (CMS) is the new Kansas Health Policy Authority. Its authority to administer Medicaid is delegated to SRS through a memorandum of understanding. This bifurcated structure becomes relevant at the administrative hearings process or when naming the state as a defendant in state or federal court.

Medical need

Nursing facility care, whether skilled, intermediate, or custodial, must be the appropriate level of care for the medical assistance applicant. Most states require applicants to complete a screening prior to, or soon after, nursing home admission. The purpose of the screening is to identify the medical assistance applicant's functional deficits and determine whether services short of institutionalization are available and appropriate.

Income

Kansas does not have a specific income limitation for eligibility. Rather, if the Medicaid applicant's income is less than his private-pay cost of care, the applicant meets the income test. Attribution of income to the recipient follows the "name on the check" rule, that is, income is attributed to the spouse to whom payment is drawn. Jointly held income producing property is allocated pro rata.

Once a Medicaid applicant becomes eligible for assistance, some portion of his income will be used to meet his patient liability amount (aka client obligation), among other things, and he will retain very little for his own use. A Medicaid recipient without dependents would normally apply all his income to his nursing home expenses except the amount he pays in premiums for health insurance for himself and $50 per month personal needs allowance.

Exempt resources include:

- A home and contiguous acreage valued at less than $500,000.
- An applicant is entitled to exempt the home even if there is no real expectation that he or she will be able to return home.
- A life estate in the home qualifies for the exemption as well as sole or joint ownership.

However, in the absence of a community spouse or other eligible dependent residing there, the utility of this exemption is undercut by three problems: (1) Unless the recipient has family members who will act as custodians of the home, pay the property taxes, and keep the property insured, obvious practical problems arise — the Medicaid recipient has nothing but his $50 per month personal needs allowance to pay these expenses. (2) Because Health Policy's Estate Recovery Unit (ERU) will enforce a medical assistance claim against the estate of a deceased Medicaid recipient, family members are less likely to realize any benefit from performing these services unless the recipient really might be able to return home after a period of institutionalization. (3) After a medical assistance recipient has resided in a nursing facility for at least six months, ERU may file a lien against any real property owned by the recipient to secure its claim; if the claim eventually exceeds the value of the property, ERU may foreclose its lien. If the medical assistance recipient has a spouse, a minor child, an adult disabled child, or a sibling who resides in the home for at least one continuous year, SRS may impose, but may not enforce the lien.

Resources

A Medicaid recipient cannot retain more than $2,000 in available nonexempt resources, but may retain unlimited exempt resources. Except for the special Medicaid rules regarding transfer of assets, division of assets, and special needs trusts, the resource rules are drawn from the law and regulations governing eligibility for Supplemental Security Income (SSI), which deal with the availability and exempt status of resources. Practitioners can also rely upon the large body of case law in this area for guidance.

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- An applicant is entitled to exempt the home even if there is no real expectation that he or she will be able to return home.
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Annuities, if the annuity is irrevocable, nonassignable, actuarially sound, and provides for payments in equal amounts during the annuity’s term.\textsuperscript{21}

Other exempt resources (which remain unchanged under the DRA) include:

- A car of any value.\textsuperscript{22}
- Household goods, tools, personal effects, family keepsakes, memorabilia.\textsuperscript{23}
- The cash value of life insurance with a total death benefit of $1,500 or less and unlimited term insurance.\textsuperscript{24}
- Real property, equipment or materials used in an income-producing trade or business.\textsuperscript{25}
- Contract Sales. A contract from the sale of real or personal property is exempt if the property is sold at fair market value, the proceeds are attributable as income, and the terms of the contract are otherwise commercially reasonable.\textsuperscript{26}
- Burial plans.\textsuperscript{27} The recipient can have a revocable burial fund set aside up to $1,500 or an irrevocable plan up to $5,000, not including the burial plot or mausoleum, headstone or grave marker, or casket.\textsuperscript{28}
- The work-related pension funds of the community spouse — Keogh plans, IRAs, 401(k)s, etc. — as well as annuities purchased with such funds, are not countable against the community spouse’s resource allowance.\textsuperscript{29}

All other resources are nonexempt, including, but not limited to:

- Cash, stocks, certificates of deposit (CDs), mutual funds, savings bonds, etc.
- Fair market value of real estate other than the home.\textsuperscript{30} The market value of real property in Kansas is initially determined by the state tax appraisal.\textsuperscript{31}
- Cash value of life insurance policies, if the total face value of all policies exceeds $1,500, of which the applicant or the applicant’s spouse is the owner. Clients often can borrow against the cash value of whole or universal life insurance policies so that the nonexempt resource value is diminished while still retaining the death benefit.\textsuperscript{32}
- Any deposit held under a contractual arrangement by a continuing care retirement community, if refundable under any circumstances, will be counted against Medicaid resource limits and must be spent down before eligibility. This is a new definition of “availability” imposed by the DRA.\textsuperscript{33}
- Most trusts. For trusts created after Aug. 10, 1993, the assets of a Medicaid applicant conveyed to a trust (other than by Will) for the benefit of the individual or the individual’s spouse are considered available if the trust is revocable or, if irrevocable, the trustee has any discretion with respect to distributions of principal or income. Transfers to irrevocable trusts in which all or part of the corpus is unavailable to the applicant will invoke the transfer penalty provisions.\textsuperscript{34}

A discretionary trust, that is, a trust in which the trustee has the discretion to pay or withhold corpus or income, funded with the resources of someone other than the applicant or the applicant’s spouse — sometimes called a third-party trust — is not an available resource. The Kansas Supreme Court has refused to find third-party trust corpus or income available to a beneficiary if the trustee has unfettered discretion.\textsuperscript{35}

The 2004 Kansas Legislature’s attempt to modify this exception sets out a two-prong test for whether a discretionary trust is “available” as a resource to a Medicaid applicant.\textsuperscript{36} First, the trust must be a restricted gift from someone who is not obligated to support the Medicaid applicant. This prong of the test is already the law. Pursuant to Myers, the person creating the trust must be voluntarily making a gift to a potentially Medicaid eligible person to whom he or she owes no duty of support.

\begin{enumerate}
\item 21. 42 U.S.C. § 1396p(c)(1)(F) & (G).
\item 22. KEESM § 5520.
\item 23. KEESM § 5430(11), (15), & (18).
\item 24. KEESM § 5430(13).
\item 25. KEESM § 5332; 42 U.S.C. § 1382b.
\item 26. KEESM § 5430(5).
\item 27. KEESM § 5430(1).
\item 28. KEESM § 5430(2) & (8).
\item 29. 42 U.S.C. § 1396p(c)(1)(G)(ii); KEESM § 5430(16)(c)(iii); but see Houghton ex rel. Houghton v. Reinerton, 382 F.3d 1162 (10th Cir. 2004).
\item 30. KEESM § 5331.
\item 31. KEESM § 5320.
\item 32. KEESM § 5430(13)(b).
\item 33. 42 U.S.C. § 1396p(g).
\item 34. KEESM § 5434.1; 42 U.S.C. § 1396p(d).
\item 36. K.S.A. 39-709(e)(3).
\end{enumerate}
The second part of the test — that the trust must contain “specific contemporaneous language that states an intent that the trust be supplemental to public assistance, and the trust makes specific reference to Medicaid, medical assistance, or [T]itle [XIX of the] S[ocial] S[ecurity] A[ct]” — just means that everyone with competent legal assistance creating a trust prospectively will get it right, but that disabled folks with older trust instruments without this second technical requirement could be unfairly disadvantaged. The Myers case already required that the trustee’s obligation to pay be discretionary — that it not be a support trust, and the additional “magic words” requirement is technical, burdensome, and likely in violation of federal law.37

Division of Assets

Also known as “spousal impoverishment,” division of assets modifies the resource test (less than $2,000 of nonexempt resources) in the context of a well spouse (aka the “community spouse”) remaining at home.38 For purposes of eligibility of the institutionalized spouse, therefore, the community spouse retains all the exempt resources. At the time of institutionalization, all the nonexempt resources of the marriage partnership are pooled, regardless of ownership and regardless of pre- or post-nuptial agreements — the so-called “snapshot” of the total nonexempt resources — and a portion is set aside for the community spouse. The community spouse retains a minimum of $19,908 and a maximum of $99,540;39 therefore, if the total nonexempt resources of the marriage partnership are greater than $39,816 (2 x $19,908) and less than $199,080 (2 x $99,540), the community spouse retains one-half of the couple’s nonexempt resources. This amount is designated the “community spouse resource allowance.”

Example No. 1: Mr. Smith enters the nursing facility on Sept. 1. He and his wife own one car, a home, and have a $15,000 CD as savings. Mrs. Smith keeps everything — the $15,000 as well as the house, household goods, and car — because the total nonexempt resources are less than the minimum ($19,908).

Example No. 2: Mrs. Jones enters the nursing facility the same day as Mr. Smith. She and her husband own one car, a home, and have $100,000 in savings. Mr. Jones keeps the house, household goods, and car as well as $50,000 — his community spouse resource allowance — because they are between the minimum and maximum. Mrs. Jones has a $48,000 [(100,000 ÷ 2) – $2,000] spenddown.

Example No. 3: Mr. Johnson enters the facility. He and his wife own a home, a car, and $250,000 in mutual funds, stocks, CDs, and the cash value of several life insurance policies. Mrs. Johnson retains all the exempt property, but her community spouse resource allowance is only $99,540 of the nonexempt resources because she cannot protect more than the maximum. Mr. Johnson has a $148,460 [(250,000 – 99,540) – $2,000] spenddown.

After the institutionalized spouse has spent his share down to the protected $2,000 amount, he has met the resource test. (Actually, it would be more precise to say that once the combined nonexempt resources of the marriage partnership are reduced below the community spouse resource allowance as determined by the “snapshot” plus $2,000, the applicant has met the resource test.) Proper spenddown techniques include:

• purchase of prepaid exempt burial plans for both spouses;
• any and all improvements and repairs to the exempt home;
• reducing or eliminating any debts, mortgages against the home, upgrade of exempt family car, etc.;
• purchase of an annuity for the community spouse IF the state of Kansas is named as the primary beneficiary to the extent of the medical assistance claim (or secondary to the institutionalized spouse);40 and, of course,
• payment of medical and other expenses for both marital partners.

More broadly, both the institutionalized spouse and the community spouse may properly use their money to buy anything either of them needs or wants. The only transfers

(continued on next page)

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37. This more restrictive methodology for treatment of trusts is contrary to federal law and the conditions under which the state is permitted to participate in cost-sharing with the federal government. 42 U.S.C. § 1396a(a)(2)(A)(ii); Houghton v. Reinertson, 382 F.3d 1162, 1171 (10th Cir. 2004); Anna W. v. Bane, 863 F. Supp. 125, 128-9 (W.D.N.Y. 1993).
38. SRS’s general operating procedure with respect to Division of Assets is found at KEESM §§ 8140 et seq.
39. KEESM § 8144.1(1). Amounts are for 2006 and will increase with cost-of-living adjustments for subsequent years beginning in January 2007.
40. 42 U.S.C. § 1396p(c)(1)(F); the DRA approves this new (to Kansas) technique to beef-up the income of a community spouse in appropriate circumstances.
that have eligibility consequences are transfers for less than adequate consideration within the look-back period.

The community spouse of a Medicaid recipient is also potentially eligible for a spousal income allowance — sort of a “division of income” — in which her income can be supplemented to $1,650 (known as the Minimum Monthly Maintenance Needs Allowance) from the income of the institutionalized spouse after eligibility. Community spouses who rent or have mortgage payments can become eligible for an additional amount — an “excess shelter allowance” — of up to $839 per month.

Practice tip

What about divorce? It goes without saying that a divorced person doesn’t have a spouse and, therefore, is no longer obligated to provide for the necessities of the former marriage partner. In the absence of an enforceable pre- or post-nuptial agreement, however, it’s uncertain whether the community spouse will end up much better off than if she’d gone through the Division of Assets allocation. In a divorce, the community spouse would presumably assert the position that a court approved an objectively unfair divorce settlement agreement, however, it’s uncertain whether the community spouse will end up much better off than if she'd gone through the Division of Assets allocation. In a divorce, the community spouse would presumably assert the position that a court approved an objectively unfair divorce settlement agreement. In the absence of an enforceable pre- or post-nuptial agreement, however, it’s uncertain whether the community spouse will end up much better off than if she’d gone through the Division of Assets allocation.

The DRA

Nonexempt transfers — the fourth Medicaid eligibility criterion — are at the heart of the most sweeping changes implemented by the DRA. Transfers for less than adequate consideration — gifts — may incur eligibility penalties. These provisions were altered considerably by Omnibus Budget Reconciliation Act of 1993, but more importantly, for transfers after Feb. 8, 2006, the DRA changes the look-back period and the methodology for calculating any penalty period dramatically. It will be critical, therefore, to determine the date a gift was or will be complete as part of advising a client regarding transfers.

It is crystal clear that pre-DRA transfers are grandfathered-in. For transfers occurring after Aug. 10, 1993 (but before Feb. 8, 2006), therefore, the look-back period for outright gifts is 36 months, and the look-back period for transfers to trusts is 60 months. It is important to remem-

41. KEESM § 8144.2(1)(a); 2006 amount with annual cost-of-living adjustments each July.
43. 42 U.S.C. § 1396p(c).
44. See KEESM § 5720.
46. Id.
47. KEESM § 5725.
49. 42 U.S.C § 1396p(c)(1)(D)(ii):

In the case of a transfer of asset made on or after the date of the enactment of the Deficit Reduction Act of 2005, the date specified in this subparagraph is the first day of a month during or after which assets have been transferred for less than fair market value, or the date on which the individual is eligible for medical assistance under the [s]tate plan and would otherwise be receiving institutional level care described in subparagraph (C) based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility under this subsection.
ates problems for many gifts that could not have been for the purpose of becoming eligible for Medicaid. As the law is written, even an accumulated gift of $500 ($100 to your nephew for his birthday each year) over five years will incur a penalty; no minimum amount of gift is expressly allowed. Although it seems unlikely that such a burdensome approach will be practical to administer, any gift has the potential of producing disproportionately harsh results well after it was made.

While the states grapple with the DRA’s implementation, some principles of Medicaid planning remain unchanged. It is still possible to “cure” a problematic transfer at any time if the assets are used to support the applicant.57 And all the exempt transfers carved out by federal law remain intact,51 including:

• Transfers beyond the look-back period;52
• Transfers of the institutionalized person’s home to the spouse, a child under age 21 or an adult child who is blind or disabled, a sibling with an equity interest in the home and who was residing in the home for one year immediately before institutionalization, or an adult child who has resided in the home for two years before institutionalization and who provided care permitting the applicant to stay at home;53
• Transfers between spouses do not incur transfer penalties.54
• Transfers at or near fair market value;55
• Transfers approved by SRS;60 and
• Transfers of assets to the spouse or conservator or relative, if the assets are used to support the applicant.59

The special needs trust exemptions allowed by federal law are still viable.58 Gifts of an undivided interest in real property, either joint tenancy with rights of survivorship or remainder interest, could still be a successful strategy, but only if the transferor retains enough resources to meet his own expenses for five years after the date of the transfer (presumably the date of the recorded deed).

Estate Recovery

Beginning July 1, 1992, the state was permitted to collect a claim for medical assistance against the probate estate of the recipient.61 As applied, it has been implemented relatively straightforwardly. With the exception of a couple of interesting cases62 with quite limited application, estate recovery occupies a predictable niche within the scope of creditor claims in probate. And because the Kansas Legislature’s more recent changes to K.S.A. 39-709(e) relevant to estate recovery have only been effective since July 1, 2004,63 we do not have much case law to guide us regarding its implementation. This two-step development of estate recovery — beginning with the probate estate (in 1992 in Kansas) followed by an enhanced definition of “estate” (in 2004 in Kansas) — is set out in federal law. 42 U.S.C. § 1396p(b)(1)(B) provides that, “[i]n the case of an individual who was 55 years of age or older when the individual received such medical assistance, the state shall seek adjustment or recovery from the individual’s estate ...” For purposes of estate recovery:

• Transfers beyond the look-back period;52
• Transfers of the institutionalized person’s home to the
spouse, a child under age 21 or an adult child who is blind or disabled, a sibling with an equity interest in the home and who was residing in the home for one year immediately before institutionalization, or an adult child who has resided in the home for two years before institutionalization and who provided care permitting the applicant to stay at home;53
• Transfers between spouses do not incur transfer penalties.54
• Transfers at or near fair market value;55
• Transfers approved by SRS;60 and
• Transfers of assets to the spouse or conservator or relative, if the assets are used to support the applicant.59

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Pursuant to the Kansas Legislature’s expansion of estate recovery in K.S.A. 39-709(e), the medical assistance estate is defined as including all real and personal property and other assets in which the deceased Medicaid recipient had any legal title or interest at the time of death (to the extent of such interest), including assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.64

The Estate Recovery Experience in Other States

At the time of this writing, Kansas has no reported cases regarding the 2004 expanded definition of “estate” for estate recovery purposes. Like many other states, Kansas has adopted the expanded definition found in federal law almost word-for-word, but Kansas was far from the first, and it may prove cautionary to see how other states’ courts have applied similar principles.

50. 42 U.S.C. § 1396p(c)(2)(C); KEESM § 5725.
51. 42 U.S.C. § 1396p(c)(2).
52. KEESM § 5721(1).
53. KEESM § 5721(2)(a-d).
54. KEESM § 5721(2)(a) & (6). It may be a appropriate to convey ownership of the home to the community spouse. The community spouse may, after the institutionalized spouse becomes eligible for assistance, liquidate the house and use the proceeds as she chooses, because under the federal law (42 U.S.C. § 1396r-5) there is no reassessment of her resource allowance.
55. KEESM § 5721(3).
56. KEESM § 5721(4).
57. KEESM § 5721(6).
60. The value of the gift is determined by the fair market value less the value of the retained life estate. See 26 C.F.R. § 20.2031-7; Item T-e at www.srskansas.org/KEESM/Appendix/Appendix.htm.
61. KEESM § 1725.1.
64. 42 U.S.C. § 1396p(b)(4) (emphasis added). The states have had the option of adopting the enhanced definition of “estate” found in subparagraph (B) of this statute since OBRA 1993.
What’s the value of a life estate owned by a deceased Medicaid recipient for estate recovery purposes?

Arguably, the value of the life tenant’s interest at death is zero, and immediately preceding death is almost zero, but that’s not how the first few cases are coming out. In *Department of Human Services v. Laughead*, the Supreme Court of Iowa determined that the decedent’s life estate in her 338-acre farm was includible in her probate estate under the Iowa statute implementing enhanced estate recovery. The value of the property in fee simple was $405,000, and the value of the decedent’s life estate was determined to be $41,451.75 — using the Medicaid agency’s “life estate or remainder table” based on her age at the time of death. The Oregon Court of Appeals adopted an almost identical rationale on similar facts in *State ex rel. Department of Human Services v. Willingham*. Both courts rejected the claim that because the life estates were created before the change in state laws implementing the expanded definition, the laws were applied unconstitutionally.

How about joint tenancy with rights of survivorship?

Interpreting the expanded definition of “estate” in Iowa, again, the Supreme Court in *In re Estate of Serovy* noted: “The purpose of this legislation was to capture and make available for payment of Medicaid-reimbursement claims certain interests in property that are not ordinarily subject to the payment of a decedent’s debts.” The court allowed the inclusion of the joint tenancy in the decedent’s probate estate for purposes of Medicaid estate recovery and the costs of administration, but only subjected the decedent’s pro rata share to these obligations (there were two other joint tenants, so only one-third of the value was impaired).

How about property received by a surviving spouse in joint tenancy “or other legal arrangement”?

In a case that suggests different outcomes depending upon the different combinations of facts — both transfer mechanics and timing of death — and state laws, the Supreme Court of Illinois found that “the Medicaid Act cannot be construed as permitting the state to look to the estate of a spouse of a recipient of medical assistance for reimbursement of costs correctly paid on the recipient’s behalf.” In *Hines*, the decedent was the surviving spouse and, therefore, sole owner of the home that she had owned jointly with rights of survivorship with the Medicaid recipient. The state could not have collected against the Medicaid recipient’s estate because federal law prohibits recovery if the recipient has a surviving spouse. The state could, however, have defined the Medicaid recipient’s “estate” as including the joint tenancy interest received by his surviving spouse, but it did not elect to do that. According to *Hines*, Iowa, New Jersey, Minnesota, Nevada, and Idaho, at least, have adopted the expanded definition of “estate” permitted by federal law, and their courts have interpreted their relevant statutes to allow recovery against the estates of surviving spouses, but Illinois has not. If the Kansas courts follow the reasoning in *Hines* and its progenitors, it appears that Kansas would fall into the latter camp.

There are more questions than answers in the continuing estate recovery saga, not to mention the implementation and application of the DRA. The good news is there is a lot more lawyering to be done.

About the Author

**Molly M. Wood** is a partner at Stevens & Brand LLP, Lawrence, and visiting professor of law and director of the Elder Law Clinic at her alma mater, the University of Kansas. She co-authored a new edition of Advising the Elderly Client (*West 2003*) and a law school text, *Elder Law: Readings, Cases and Materials* (*Anderson 2002*) and is editor of the Kansas Bar Association’s Long-Term Care Handbook. A member of the National Academy of Elder Law Attorneys, she concentrates her practice in Medicaid eligibility for long-term care and division of assets, special needs and disability planning, individual preservation of assets, guardianship, and general estate planning.

65. 696 N.W.2d 312 (Iowa 2005).
67. 711 N.W.2d 290 (Iowa 2006).

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Supreme Court

Civil

CONSTITUTIONAL LAW – SCHOOLS
MONTLOY V. STATE
SHAWNEE DISTRICT COURT
APPEAL DISMISSED AND CASE REMANDED
NO. 92,032 – JULY 28, 2006

FACTS: History in this school finance case is detailed through 2005 decision affirming in part district court’s conclusion that the Legislature had failed to make suitable provision for finance of public schools as required by Kansas Constitution. Mandate stayed to allow Legislature a reasonable time to correct constitutional infirmity in school finance formula. Legislative response in 2005 and S.B. 549 (2006) examined. State claimed case is moot because school finance formula challenged by the plaintiffs no longer exists, and Court cannot engage in fact finding that would be necessary to determine constitutionality of S.B. 549. Plaintiffs claimed S.B. 549 fails to comply with Court’s orders and fails to make suitable provision for financing public schools as required by Article 6 of Kansas Constitution.

ISSUES: (1) Mootness, (2) constitutionality of S.B. 549, and (3) compliance with Supreme Court’s orders.

HELD: Mootness argument is rejected. Compliance stage of this litigation continues.

Constitutionality of S.B. 549 is not before the Court. If this new legislation is challenged, its constitutionality must be litigated in new action before the district court.

Legislative Post Audit Cost Study Analysis is considered, but not as substantial competent evidence of actual and necessary costs of providing a suitable education because it has not been subjected to fact-finding litigation process. Legislature’s efforts in 2005 and in S.B. 549 constitute substantial compliance with prior orders. Court elects to end litigation rather than remand to district court to allow plaintiffs to amend to challenge the new funding formula. Previously imposed stays are lifted, appeal is dismissed, and case remanded to district court for dismissal.

CONCURRENCE (Rosen, J.): Agrees with concurrences in Montloy II (2005) filed by Justices Beier, Davis, and Luckert. Concurs with dismissal of case and with conclusion that S.B. 549 complies with Court’s prior orders, but disagrees with majority’s analysis.

CONCURRENCE AND DISSENT (Beier, J.): (joined by Luckert, J.): Concurs with decision not to interfere with immediate implementation of S.B. 549. Dissects from dismissal of action. Although Legislature has made substantial efforts to improve adequacy and equity of school finance system, more appropriate to retain jurisdiction, acknowledge factual deficiencies of the record, and remand to district court for further proceedings focused on constitutionality of finance system as altered by S.B. 549.

DIVORCE – ARMED SERVICES
IN RE MARRIAGE OF BRADLEY
FRANKLIN DISTRICT COURT
AFFIRMED AND REMANDED
NO. 95,727 – JULY 14, 2006

FACTS: Mother filed motion to modify temporary custody order in divorce proceeding. Father, who had been deployed to Iraq, sought stay of the proceedings pursuant to Servicemembers Civil Relief Act. District court concluded the act did not apply to the temporary custody order, and certified the issue for interlocutory appeal. Appeal transferred to Supreme Court.

ISSUE: Servicemembers Civil Relief Act

HELD: To entitle servicemember to mandatory stay pursuant to Servicemembers Civil Relief Act, servicemember must comply with the two conditions in 50 U.S.C. § 522(b)(2). Where servicemember fails to do so, as in this case, the granting of a stay is within district court’s discretion. Under the circumstances, no abuse of discretion in denying father a stay and granting mother temporary custody of the child. District court’s decision is affirmed on grounds that father failed to meet conditions of § 522(b)(2). Supreme Court does not reach question of whether trial court could have entered temporary change of custody order if father had complied with § 522(b)(2). Decision cites Journal of the Kansas Bar Association article by Potortoff on Servicemembers Civil Relief Act, 74 J.K.B.A. 20 (Oct. 2005).

STATUTES: 50 U.S.C. §§ 501 et seq., 502, 512(b), 522(a), 522(b), 522(b)(1), 522(b)(2), 522(b)(2)(A) (2003) and K.S.A. 20-3018(c), 60-2102(c)

FORECLOSURE AND REDEMPTION
ALLIANCE MORTGAGE CO. V. PASTINE ET AL.
GEARY DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 91,929 – JUNE 16, 2006

FACTS: Alliance sued to foreclose its first mortgage on property in Junction City. Alliance requested a money judgment against Leighty who had assumed and agreed to pay the debt owed to Alliance. Beneficial Mortgage, the second mortgagee, was named as a party defendant and claimed an interest in the property. Beneficial asked for proper relief, but did not cross-petition against the owner to foreclose its mortgage and failed to seek relief on its note and to set out the amount that was due under the note. The trial court foreclosed Alliance’s mortgage and granted judgment for approxi-
River City filed a motion for distribution of sale proceeds, claiming in full satisfaction and held the remaining proceeds of $20,407.29. The district court paid Fidelity $73,092.71 and set a three-month redemption period. The sheriff’s sale netted $65,321.25. The court did not recognize an interest in any other party to participate in the foreclosure. The district court foreclosed properly served, U.S. Bank did not appear or file an answer or otherwise participate in the foreclosure. The Kings defaulted the mortgage holder. In 2000, the Kings executed a second mortgage on certain real property in Wichita in 1997. Fidelity Bank was the mortgage holder. The court held the correct remedy for the denial of Beneficial’s statutory notice under K.S.A. 60-205, because it had appeared as a party defendant in the foreclosure proceedings. Court held that if Beneficial had a right of redemption, there was no dispute that any such right had expired by the time the district court attempted to extend it. Court held the correct remedy for the denial of Beneficial’s statutory and due process notice of the sheriff’s sale was not a revived right of redemption but a set-aside of the sale, provision of adequate notice, and due process notice of the sheriff’s sale. At a properly noticed sheriff’s sale, 166 bids were re-ceived. The Coxes were the highest bidders and paid $85,001 for the property. Alliance was paid $43,290.73, leaving excess proceeds of $41,710.27. Beneficial claimed it had no notice of the sale otherwise it would have bid $117,500 for the property and moved to set aside the sale or allow a substitute bid. The trial court denied the motion finding proper notice was given, Beneficial had participated in the foreclosure proceedings, Beneficial could have secured its interest by a money judgment, the property had been sold for fair market value in a legitimate transaction, and the sheriff’s sale was conducted according to law in all respects. On a motion for rehearing, the trial court found Beneficial, by not receiving notice of the sheriff’s sale, had been denied the right to bid at the sale and denied a protected property right. Court granted Beneficial 10 days to redeem the property and Beneficial paid $117,500 into court for redemption. Trial court confirmed the redemption and repaid the Coxes the sale price and all costs, interest and expenses. The Court of Appeals reversed the trial court holding that the trial court had abused its discretion in allowing Beneficial to redeem out of time and remanded to confirm the sale to the Coxes.

ISSUE: Does Kansas law allow a trial court to refuse confirmation of a sheriff’s sale that is for an adequate purchase price for reasons not supported by law and for reasons not in conformity with equity?

HELD: Court rejected an acquiescence argument by Beneficial applying the protective measure exception. Court agreed with Beneficial and the dissenting opinion in the Court of Appeals that the plain language of K.S.A. 60-2410(a) requires a public notice before the sale of real property under a writ of execution and it is specific to the public. The plain language of K.S.A. 60-205 requires actual notice to parties in civil actions and it is specific to parties and consequently notice by publication is inadequate. Court held the public was due notice under K.S.A. 60-2410(a), and Beneficial was due notice under K.S.A. 60-205, because it had appeared as a party defendant in the foreclosure proceedings. Court held that if Beneficial had a right of redemption, there was no dispute that any such right had expired by the time the district court attempted to extend it. Court held the correct remedy for the denial of Beneficial’s statutory and due process notice of the sheriff’s sale was not a revived right of redemption but a set-aside of the sale, provision of adequate notice, and a new sale with all parties and the public free to participate or not participate as they see fit.

STATUTES: K.S.A. 60-2410(a), (b), K.S.A. 60-205(a), (b)

FORECLOSURE RIGHTS AND JUNIOR MORTGAGEE
FIDELITY BANK V. KING ET AL.
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 92,410 – JUNE 16, 2006

FACTS: Defendants James and Carolyn King assumed the debt on certain real property in Wichita in 1997. Fidelity Bank was the mortgage holder. In 2000, the Kings executed a second mortgage on the property with U.S. Bank for $32,000. The Kings defaulted and Fidelity sued to foreclose its mortgage on the property. Although properly served, U.S. Bank did not appear or file an answer or otherwise participate in the foreclosure. The district court foreclosed and ruled that Fidelity held a first and prior lien to the property for $65,321.25. The court did not recognize an interest in any other party and set a three-month redemption period. The sheriff’s sale netted $93,500 for the property. The district court paid Fidelity $73,092.71 in full satisfaction and held the remaining proceeds of $20,407.29. River City filed a motion for distribution of sale proceeds, claiming they had acquired all right, title, and interest of the King’s prior to the sheriff’s sale. U.S. Bank objected and requested the proceeds as well. The trial court held that by failing to respond to the petition and asserting its lien rights in the property, U.S. Bank waived its redemption rights as junior lien holder, had no rights in and to the subject property, including redemption rights, and had no claim to the excess sale proceeds. Court of Appeals affirmed the district court.

ISSUE: Foreclosure rights and junior mortgagee

HELD: Court held that the proceeds resulting from a sheriff’s sale under an order of foreclosure are not cash separate from the land, and a court does not have unfettered equitable power to distribute surplus proceeds to any party it deems deserving regardless of whether any party attempted to protect its rights. Court held that a junior mortgagee who fails to appear and assert its position in a senior mortgagee’s foreclosure action waives any payment priority it might otherwise have had to surplus proceeds from a sheriff’s sale. Neither law nor equity requires otherwise. Court agreed with the trial court and the Court of Appeals that River City as holder of the owner’s rights of redemption and right to excess proceeds is entitled to the surplus proceeds as compared to U.S. Bank and its note against the Kings.

STATUTES: No statutes cited.

SETOFF, SUBROGATION, PUNITIVE DAMAGES, AND ATTORNEY FEES
HAYES SIGHT & SOUND INC. V. ONEOK INC.
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 92,704 – JUNE 16, 2006

FACTS: The Hutchinson businesses Hayes Sight & Sound Inc., dba Woody’s Furniture (Woody’s), and Decor Party Supplies of Kansas Inc. (Decor) were destroyed on Jan. 17, 2001, when natural gas migrated from underground storage caverns and ignited. In the negligence action brought by Woody’s and Decor against ONEOK Inc. (ONEOK) and its wholly owned subsidiary, Mid Continent Market Center Inc. (MCMC), a jury found each defendant 50 percent at fault. The compensatory damages awarded to Woody’s were $955,636.76 and to Decor were $755,251.40. The jury also found that punitive damages should be awarded against MCMC. The trial judge awarded punitive damages in the amount of $5.25 million for the two consolidated cases. ONEOK and MCMC did not appeal the jury’s findings of liability or its findings that MCMC’s wanton conduct warranted an award of punitive damages. They appealed the trial court’s denial of their requests for setoff of subrogation claims and the amount of punitive damages award.

ISSUES: (1) Setoff of subrogation claims, (2) due process (3) statutory cap of K.S.A. 60-3702(e), and (4) attorney fees

HELD: Court held that the purpose of the tort law is to make an injured party whole. Here, the judgment against defendants compensates the plaintiffs for their loss. Absent a setoff, the plaintiffs will be made more than whole, and the defendants will pay more than the amount of plaintiff’s damages. Court stated that the collateral source rule does not bar a setoff based upon the defendant’s settlement of the plaintiff’s insurer’s subrogation claim. Nor does it allow the plaintiff to recover where the defendants have paid the full amount of plaintiff’s damages. Court held that it disagreed with the defendants that the setoff should be in the amount of the insurer’s subrogation claim. To do so would allow the defendants to escape paying the full amount of plaintiff’s damages. Court held the defendants were entitled to a setoff in the amount they paid to the plaintiff’s insurers to settle the subrogation claim and the district court erred in denying the setoff in favor of the defendants. Court remanded for determination of the subrogation claim. Applying the multifaceted guideposts of the U.S. Supreme Court decision in BMW of North America Inc. v. Gore, 517 U.S. 559, to the facts of this case, the

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Court held it does not lead to the conclusion that the punitive damages awarded to the plaintiffs was grossly excessive so as to violate MCMC’s substantive due process rights. In addressing the statutory cap issue, the Court stated that if the same misconduct can give rise to multiple punitive damages awards in multiple cases, no reason presents itself why the same misconduct cannot give rise to multiple punitive damages awards in consolidated cases. Court stated that the separate actions brought by Woody’s and Decor no doubt were consolidated to promote judicial efficiency and economy, and there is no reason to discourage that practice by deeming the punitive damages awarded to plaintiffs in separately filed, consolidated cases to be a single award that is subject to the statutory cap. Court held the statutory cap applies separately in each case, thus the $5.25 million award was within the $10 million limit. Court held that plaintiffs are entitled to attorney fees pursuant to the underground gas storage statutes in K.S.A. 55-1210(c)(3) and the Court remanded for determination of reasonable amount of attorney fees under this statute.

STATUTES: K.S.A. 20-3017; K.S.A. 55-1210(c)(3); K.S.A. 60-3702(e); K.S.A. 65-170d; and K.S.A. 66-104, -176

TORTS, DUTY TO WARN, AND LIGHTNING STRIKE
SALL ET AL. V.
T’S INC., D/B/A SMILEY’S GOLF COMPLEX
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 93,013 – JUNE 23, 2006

FACTS: Sall was hit by lightning on a golf course (SGC) on his return to clubhouse after warning sounded and he putted through the hole. Sall’s guardians filed lawsuit alleging SGC staff had duty to warn Sall of danger it knew or should have known about, claiming negligence in failing to properly monitor weather and sound timely warning, and in failing to utilize lightning detection equipment. Defendants filed motion for summary judgment, claiming no breach of duty, and claiming any duty owed to Sall was satisfied with timely warning to leave golf course. Based on lack of foreseeability of lightning strike, and finding facts insufficient to invoke Restatement (Second) of Torts § 323, district court granted defendants’ motion. In a split decision, the Court of Appeals affirmed the district court concluding that SGC owed no duty to protect its patrons from lightning strikes.

ISSUES: (1) Duty to warn of lightning strikes and (2) Restatement (Second) of Torts § 323

HELD: Court held the Court of Appeals sits not as a factfinder but as an appellate court. In this case, the conclusion of the majority of the Court of Appeals that if a duty existed under Restatement (Second) of Torts § 323 (1964) it was not breached was based upon its own fact finding; therefore, is inconsistent with its function as an appellate court. Moreover, its conclusion was erroneous since it did just the opposite of what an appellate court must do in reviewing the grant of summary judgment: resolve all facts and inferences, which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. Court stated the question to be asked in regard to an analysis under Restatement (Second) of Torts § 323 is not one concerning whether the facts of the case establish or fail to establish negligence but rather whether there are facts in the record to warrant application of Restatement (Second) of Torts § 323. Court concluded that under the facts of this case, material factual issues remain on the issue of whether SGC negligently performed the duty it assumed under Restatement (Second) of Torts § 323 to monitor weather conditions and warn its patrons to come in off the golf course when the manager on duty deemed it prudent.

STATUTE: K.S.A. 60-258a(b)
FACTS: For actions against family in their home where each was tied up, one was shot and killed, and jewelry was stolen, Pham convicted of first-degree felony murder, aggravated kidnapping, five counts of kidnapping, six counts of aggravated robbery, aggravated burglary, conspiracy to commit kidnapping, and conspiracy to commit aggravated burglary. Pham appealed, claiming: (1) error to strike two Hispanic venirepersons on basis of race, (2) error to admit Pham made to police without an interpreter, (3) error to admit photographs from store surveillance camera without proper foundation, (4) six counts of aggravated robberies were multiplicitous, (5) two conspiracy charges were multiplicitous, (6) aggravated kidnapping and felony murder convictions were multiplicitous, (7) error not to instruct jury on attempted aggravated kidnapping and attempted kidnapping, and (8) consecutive sentences of life plus 1,036 months were excessive. Co-conspirator's appeal at State v. Nguyen, 281 Kan. __ (2006).

ISSUES: (1) Batson challenge, (2) statements without interpreter, (3) foundation for photographs, (4) aggravated robbery, (5) conspiracy, (6) aggravated kidnapping and felony murder, (7) jury instructions, and (8) sentence

HELD: Although Pham made prima facie showing that two Hispanic venirepersons were struck on basis of race, no abuse of discretion by district court in determining that state's strikes were constitutionally permissible where one venireperson failed to answer any questions, and second was uncomfortable with her ability to explain her opinions to others in English.

Under totality of circumstances, including absence of interpreter, Pham's statements were freely and voluntarily made with full knowledge of Miranda rights.

No Kansas case directly on point. Guided by State v. Suing, 210 Kan. 363 (1972). Under circumstances, officer's testimony was sufficient foundation to show photographs were accurate reproductions of video stills, and assistant store manager's testimony was sufficient foundation to show videotape accurately depicted the store. Also, any error was harmless.

Under facts, because only one person was relieved of items of property belonging to different persons, there was only one victim. Multiplicitous to convict of more than one count of aggravated robbery. Sufficient evidence of aggravated robbery where actions of one robber can be used to prove elements of the crime against the other, and state did not have to find stolen items to prove they were stolen. Five counts of aggravated robbery are reversed, and case remanded for resentencing.

Two conspiracy convictions are multiplicitous because only a single continuing conspiracy to rob family in their home. Conviction of conspiracy to commit kidnapping is reversed. Case remanded for resentencing on remaining conspiracy conviction.

Convictions of aggravated kidnapping and felony murder based upon underlying felony of aggravated burglary are not multiplicitous.

No error to deny instruction on lesser-included offenses of aggravated kidnapping and kidnapping. Under Kansas law, a victim's escape does not mean the act of kidnapping was not committed.

Maximum consecutive sentences imposed were no departure from the presumptive sentences.

STATUTES: K.S.A. 2005 Supp. 21-3436 and K.S.A. 21-3302, -3420, -3421, -3426, -3427, -3716, -4721(e)(1), 22-3601(b), 60-261, 75-4351(c)

Appellate Practice Reminders . . .

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References to Certain Parties

Supreme Court Rule 7.043 has since 1985 protected the identity of certain individuals in appellate proceedings. Children are to be referred to by initials in case captions as well as pleadings and opinions in child in need of care, juvenile offender, or adoption cases. Victims of sex crimes or parties to an adoption are also to be referred to by initials or first name and last initial only in pleadings and opinions.

Supreme Court Rule 7.043, as amended effective Sept. 6, 2005, expands those protections. If a party could be identified based on the identities of other parties involved in a matter, then all such parties must be identified by initials or familial relationship. An example would be that the last name of Sally S. could easily be deduced from her parents being named John and Kathy Smith. Thus, the rule now requires that either the parents be identified in pleadings as J.S. and K.S. or birth parents of S.S. or Sally S.

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.
Civil


FACTS: State charged Berry with violations of Kansas Consumer Protection Act (KCPA) in separate transactions involving sale of animals. After presentation of evidence by both sides, district court granted state's motion for directed verdict on two charges that Berry engaged in deceptive acts and practices in selling horses, and on charge that Berry committed unconscionable acts in sale of cattle. Summary judgment also based on Crandalls' failure to attempt mediation prior to filing suit. Crandalls appealed.

ISSUES: (1) Breach of contract, (2) fraud by omission and duty to disclose, and (3) KCPA

HELD: Given clear directive in disclosure statement that buyer was to indicate which representations she was relying on or agree to rely on none of them, her failure to do so waived right to rely on seller's representations in the disclosure statement. Buyer could not prove damages resulting from any alleged breach of contract by sellers because buyer's acknowledgment did not impose any obligation on the sellers. District court correctly found that buyer failed to provide evidence of justifiable reliance on seller's communication, or that buyer's agent and sellers had a duty to disclose. Summary judgment also based on Crandalls' failure to attempt mediation prior to filing suit. Crandalls appealed.

ISSUES: (1) Duty and breach; (2) causation, and fraud by silence, fraudulent concealment, justifiable reliance, and negligent misrepresentation; (3) KCPA; and (4) mediation

HELD: District court correctly interpreted Grbic's duties as defined by the documents and statute, and correctly found Grbic properly executed same. Grbic advised Crandalls to get professional inspections, which they did. Under K.S.A. 58-30,107(b), this absolved Grbic of any liability as to matters covered in the inspection. Summary judgment to Grbic on this issue is affirmed.


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Land Investment Co. LLC. Quigley assigned his interest in the real estate to Veach and Francis (Veach) for $10,000, the amount of earnest money Quigley paid under the contract. Midwest and Veach entered into a participation agreement for development of the real estate. However, the bankruptcy trustee advised that objections to the real estate sale had been filed and Veach was the highest bidder at an auction with a bid of $275,000 and the court confirmed the sale. Veach advised Midwest that the participation agreement was void because they acquired the property not through Quigley, but through the auction. The trial court granted summary judgment in favor of Midwest finding the participation agreement was valid.

ISSUE: Was the participation agreement valid?

HELD: Court stated that there was sufficient consideration for the agreement as it was entered into as an inducement for Quigley to assign to Veach the real estate sales contract and thus eliminated Quigley as a competing potential buyer of the property. Court also found there was no mutual mistake in the language of the agreement concerning consummation of the sale at $155,000. Court held the participation agreement was valid.

STATUTES: No statutes cited.

**FORFEITURE**

**STATE V. 1997 CHEVROLET MONTE CARLO**

**PRATT DISTRICT COURT – AFFIRMED**

**NO. 94,025 – JUNE 23, 2006**

FACTS: The district court found that Christina Winke's 1997 Chevrolet Monte Carlo was not subject to forfeiture under the Kansas Standard Asset Seizure and Forfeiture Act because it was not used in a manner, which facilitated the conduct giving rise to forfeiture, i.e. the sale of marijuana.

ISSUE: Burden of proof

HELD: Court held under the facts of this case, the district court did not disregard undisputed evidence or exhibit bias, passion, or prejudice in finding the state failed to meet its burden of proof to show that a vehicle was used or intended for use in any manner to facilitate the sale of marijuana, where: (1) the vehicle's owner drove to the location in question to pick up her son, who was in gymnastics class; (2) as the owner waited outside of her vehicle for her son, she saw the informant driving by and waived at him to stop; (3) at that moment, the informant was on his way to the owner's home to complete a drug transaction, which he had already prearranged with the owner's cousin; and (4) the owner and the informant had a brief conversation, after which the owner picked up her son and returned to her home, where the sale of marijuana was completed.

STATUTES: K.S.A. 60-4102(d), -4104(b), -4105(b)(2), -4124 and K.S.A. 65-4101 et seq.
resulted. No administrative regulation prohibits sequential hearing for different inmates on charges arising out of same set of facts.


**NEGligence AND KANSAS UNDERGROUND UTILITY DAMAGE PREVENTION ACT**

**SOUTHWESTERN BELL TELEPHONE V. APAC-KANSAS**

**LYON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS**

**NO. 95,551 – JULY 21, 2006**

FACTS: Southwestern Bell Telephone (SBT) sued APAC for negligence under the Kansas Underground Utility Damage Prevention Act (KUUDPA) after APAC damaged two of SBT’s telephone cables while performing excavation work. The trial court found that the damaged 1,800 pair telephone cable was properly marked by SBT. The trial court also found there was a rebuttable presumption of negligence on the part of APAC concerning the 900 pair telephone cable.

ISSUES: (1) Substantial competent evidence, (2) rebuttable presumption of negligence, and (3) reasonable care

HELD: Court held that the trial court never made a clear finding whether SBT properly marked the location of the tolerance zone of the 1,800 pair telephone cable. Court stated that because such a finding was necessary to establish liability under the KUUDPA, court reversed and remanded for the trial court to determine whether SBT properly marked the location of the tolerance zone of the 1,800 pair telephone cable. Court found there was substantial evidence to support the trial court’s decision that APAC failed to use reasonable care in its excavation concerning the 900 pair telephone cable. However, court remanded for the trial court for further findings on whether APAC used reasonable care in excavating the 1,800 pair telephone cable. Court remanded for the trial court to determine whether the location of the tolerance zone was properly marked. If properly marked, the trial court should then make further findings about whether APAC used reasonable care in its excavation work of the 1,800 pair telephone cable.

STATUTE: K.S.A. 66-1801 et seq., -1802(g), (p), -1803, -1804, -1806(a), (d), -1809(a), -1811(a), (b)

**NEGLIGENCE AND TRESPASS**

**SEITZ AND THE ESTATE OF BECK V. THE LAWRENCE BANK**

**DOUGLAS DISTRICT COURT – AFFIRMED**

**NO. 95,051 – JULY 21, 2006**

FACTS: Beck, an 81-year-old man, was found lying in the drive-through area of The Lawrence Bank at one of the busiest intersections in Lawrence. The bank’s video surveillance showed Beck walking up to and standing near the top of a retaining wall on the bank’s property and then the next image is Beck lying in the drive-through. The retaining wall was 30-38 inches high and Beck was found five to six feet from the wall. Beck was not a customer of the bank. Seitz speculated that Beck was on his way to Hy-Vee to purchase cigarettes. Beck was taken to the hospital for head and hip injuries. After one month in the hospital, he was transferred to a nursing home and died several days later from pneumonia. Seitz sued the bank on theories of negligence, negligence per se, nuisance, and strict liability. The district court granted summary judgment on the bank's property was that of a trespasser.

STATUTE: K.S.A. 60-256(e)

**INTEREST**

**D.A.N. JOINT VENTURE III V. TURK**

**HARVEY DISTRICT COURT – AFFIRMED**

**NO. 94,697 – JULY 28, 2006**

FACTS: Default judgment entered in favor of D.A.N. Joint Venture III (DAN) in their suit against Brad and Peggy Turk for failing to make monthly payments on a promissory note. Upon garnishment for collection of judgment, Brad’s attorney complained that DAN was charging “interest on interest” in violation of Uniform Consumer Credit Code (UCCC) by assessing 21.5 percent contract rate on entire judgment rather than assessing post-judgment interest on outstanding principal balance. District court agreed, awarded payment of over garnishment, and awarded attorney fees. DAN appealed.

ISSUES: (1) Statute of limitations, (2) acquiescence, (3) jurisdiction, (4) UCCC and “interest on interest,” and (5) attorney fees

HELD: Statute of limitations issue not preserved for appeal and is not addressed.

Even if issue was properly raised in district court, under facts, Brad did not acquiesce in the UCCC violation.

Brad’s motion for sanctions did not constitute an improper collateral attack on a final judgment.

No merit to claim that UCCC has no provision that prohibits judgment creditor from assessing “interest on interest.” K.S.A. 16-205(b)(1) is examined. If calculation of prejudgment interest is set forth in journal entry, the judgment creditor must charge post-judgment interest only on unpaid principal balance of the contract or note. DAN violated 16-205(b)(1) by calculating interest at contract rate on entire amount of the judgment. K.S.A. 2005 Supp. 16a-2-510(2) incorporates provisions of K.S.A. 16-205(b)(1) into UCCC.

Brad’s motion for attorney fees was sufficient. No separate civil action was required to recover attorney fees for the alleged UCCC violation. District court’s award of attorney fees was mandatory under K.S.A. 16a-5-201(8). No abuse of discretion in the amount awarded.

STATUTES: K.S.A. 2005 Supp. 16a-2-510(2) and K.S.A. 16-205(b)(1), 16a-2-101 et seq., -5-201(1) and (8)

**PARENT AND CHILD**

**IN RE J.D.C.**

**SHAWNEE DISTRICT COURT – AFFIRMED**

**NO. 95,610 – JUNE 23, 2006**

FACTS: State removed J.D.C. from home after she reported sexual abuse by stepfather. In child in need of care proceeding, trial court found J.D.C. was available and subject to cross-examination as to anything J.D.C. said during taped interview. Over mother’s objection, district court found J.D.C. was a child in need of care. Mother appealed, claiming insufficient evidence supported district court’s finding because testimony by counselor, Social and Rehabilitation Services (SRS) investigator, sheriff’s detective, and J.D.C.’s taped statement were inadmissible hearsay because state did not call J.D.C. to testify.

ISSUE: Admission of hearsay testimony
HELD: Evidentiary safeguards guaranteed in a criminal case do not apply to this civil proceeding. Plain language of K.S.A. 60-460(a) requires only that declarant be present and available for cross-examination. No denial of due process in this case because state was not required to call J.D.C. to testify. Error to admit hearsay testimony of counselor, SRS investigator, and sheriff's detective because trial court essentially found J.D.C. unavailable to be cross-examined as to what she told these witnesses. Record on appeal does not support finding this was reversible error.

STATUTE: K.S.A. 38-1554, -1585(a)(3), 60-460(a), -460(d)(1), -460(i)(2), -460(dd)

PARTITION
SHEETS V. SIMS
REPUBLIC DISTRICT COURT – AFFIRMED
NO. 94,704 – JULY 28, 2006

FACTS: Grandchildren filed partition action to receive value of their one-third interest in jointly owned 480 acres. Court-appointed partition commission inspected the property, concluded partition in kind was not practicable, and determined fair market value of the real estate. Relatives holding the remaining two-thirds interest wanted 80-acre irrigable tract to be set aside as grandchildren’s interest, and to allow cattle operation to continue on remaining acreage. Court declined to modify the commission’s report. Relatives appealed.

ISSUE: Partition of joint interests in property

HELD: Record demonstrates no error in refraining from ordering in-kind partition. Court correctly concluded the commission properly performed their duties. No abuse of discretion by trial court in not modifying the report.

STATUTE: K.S.A. 60-252(a), -1003, -1003(c)(1)-(3), -1003(d)

PUBLIC UTILITIES
KANSAS INDUSTRIAL CONSUMERS GROUP INC. V. KANSAS CORPORATION COMM’N
KANSAS CORPORATION COMMISSION – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 96,228 – JULY 7, 2006

FACTS: Kansas Industrial Consumers Group Inc. (KIC) appealed provisions in Kansas Corporation Commission’s (Commission) order in Westar’s application to change electric utility rates. KIC challenged the Commission allowing Westar to (1) include a retail energy cost adjustment (RECA) in its rates, (2) include an environmental cost recovery rider (ECRR) in its rates to recover expenses associated with installation of new pollution control equipment, (3) include a transmission delivery charge (TDC), (4) depreciate its facilities using “terminal net salvage” costs adjusted for inflation for all its steam generation facilities, and (5) assess all its utility rate case expenses to ratepayers.

ISSUES: (1) Energy cost adjustment (ECA), (2) ECRR, (3) TDC, (4) terminal net salvage depreciation, and (5) assessment of expenses

HELD: History of RECA and merger of Kansas Power and Light Co. and Kansas Gas and Electric Co. is discussed. Permitting a RECA was not unreasonable, arbitrary, or capricious. Commission’s interpretation of its authority to permit ECA clauses is consistent with plain language of statutes, and use of ECA clauses is long-standing agency practice that neither courts nor Legislature have questioned, limited, or abrogated.

Permitting an ECRR did not exceed Commission’s statutory authority.

Westar is first public utility to attempt to include a TDC in its rates. Based on record and circumstances, permitting a TDC violated K.S.A. 66-117 and K.S.A. 2005 Supp. 66-1237, and is reversed.

Permitting Westar to include a terminal net salvage depreciation adjusted for inflation was not supported by substantial competent evidence and is reversed.

Permitting assessment of rate case expenses to ratepayers was not unreasonable, arbitrary, or capricious.

STATUTES: 15 U.S.A. § 717(c), 16 U.S.C. §§ 824 and 824d(e) (2000); K.S.A. 2005 Supp. 66-1237, -1237(a), 77-529; and K.S.A. 66-101, 101g, -117, -117(c), -117(f), -118b, -118c, -1233

REAL PROPERTY AND EASEMENT
CITY OF ARKANSAS CITY V. BRUTON
COWLEY DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 94,893 – JULY 7, 2006

FACTS: In 1935, the Brutons’ predecessors in interest granted the city certain rights to construct and maintain a dike across their 5.4-acre tract of realty adjacent to the Arkansas River. The instrument of conveyance gave a right of way and easement. In 2000, the city and the U.S. Army Corps of Engineers sought to make improvements to the dike and brought an action against the Brutons, who had purchased the realty in 1994, alleging that the Brutons “hindered and obstructed” the planned improvements and seeking declaratory and injunctive relief together with damages for delay. The Brutons counterclaimed, alleging a trespass and an unlawful taking of their land and seeking declaratory and injunctive relief together with damages. The district court granted summary judgment in favor of the city finding the main purpose of the easement is to protect the city and its inhabitants from flood waters and that it is reasonable to assume that the grantors of the 1935 easement reasonably foresaw that the size and configuration of the levee might change and the scope of the easement would encompass that potential change. District court found the change in the levee making it higher and wider was within the easement’s stated purpose.

ISSUES: (1) 1935 easement and (2) summary judgment

HELD: Court held the district court erred in finding the instrument ambiguous, focused exclusively on the stated purpose and ignored the specific express restrictions imposed on the scope and location of the easement, and failed to recognize that a genuine issue of material fact precluded summary judgment. Court stated deviations, changes, alterations, or modifications thereafter in the dike must be examined for consistency with the 1935 plans and specifications and with the expressed purpose that the dike protect the inhabitants of the city from flood damage. Court held summary judgment was improper because whether the improvements of 2000 were within the express scope of the subject easement is a question of fact to be addressed by the court after a trial on the merits.


REAL PROPERTY AND RESTRICTIVE COVENANTS
JEREMIAH 29:11 INC. V. SEIFERT
MONTGOMERY DISTRICT COURT – REVERSED AND REMANDED WITH INSTRUCTIONS
NO. 94,224 – JUNE 30, 2006

FACTS: The Jordans sold property to the Dallingas in 1978 for $25,000. The warranty deed had a restrictive covenant that no commercial enterprise was allowed on the property. The Jordans signed the warranty deed, but the Dallingas did not. Several transfers of the property occurred. Jeremiah 29:11 purchased the property in question by general warranty deed in 1999. The Seiferts now own the property surrounding the property in question as previously owned by the Jordans. The case started as a boundary line dispute, but then turned into one to enforce the restrictive covenant against Jeremiah’s use of the property as a leadership-training center for pastors and leaders of nonprofit corporations and a boyscout camp. Jeremiah claimed the restrictive covenant was void and unenforceable; because, the Dallingas had not signed the warranty deed in 1978. The trial court agreed with Jeremiah and held the 1978 transfer was
a mutual or indentured deed requiring both signatures and since the Dallings did not sign the deed, then they did not accept the restrictive covenants.

ISSUE: Restrictive covenants

HELD: Court agreed with the trial court that the 1978 deed between the Jordans and the Dallings was intended to be an indentured deed, not a deed poll, and correctly conveyed title. The 1978 deed met all the requirements for a valid warranty deed. Court stated that the lack of a signature by the Dallings did not void the restrictive covenants and that acceptance of the deed is presumed unless proven to the contrary. Court stated there was no evidence that the 1978 deed was not properly filed. Consequently, court stated the Kansas courts charge parties with constructive notice of public records and held that the restrictive covenants were enforceable against Jeremiah. Court found no implication of the statute of frauds. Court remanded for the trial court’s consideration of the effect of the “Release of Covenants” signed by the Jordans to release the restrictive covenant after Jeremiah had purchased the property.

DISSENT: J. Greene concurred in the decision, but stated that a remand was unnecessary because the Release of Covenants was of no legal moment.


TAXATION
IN RE TAX APPEAL OF GARDEN CITY MEDICAL CLINIC
BOARD OF TAX APPEALS – REVERSED
NO. 93,091 – JULY 14, 2006

FACTS: In November 2002, Garden City Medical Clinic sought relief from erroneous taxation of clinic’s computer application software from 1998 through 2000. Pursuant to K.S.A. 2003 Supp. 79-213(d), Board of Tax Appeals limited tax refund to the year immediately preceding the year the clinic filed its refund application, and rejected clinic’s claim for refunds for taxes paid in 1998 through 2000. Clinic appealed, claiming retroactive application of the amended statute violated constitutional rights to due process and equal protection.

ISSUES: (1) Due process and (2) equal protection

HELD: No Kansas case has considered possible impact of retroactive legislation on taxpayer’s claim of vested right to tax refund. Under facts, retroactive application of 2003 amendment of K.S.A. 79-213(k) to taxpayer’s refund claim deprived taxpayer of property without due process of law.


STATUTES: K.S.A. 2003 Supp. 79-213(d), (k), and (n) and K.S.A. 79-213(k)

TAXATION
IN RE TAX APPEAL OF YELLOW FREIGHT SYSTEM INC.
JOHNSON DISTRICT COURT – REVERSED
NO. 94,927 – JULY 14, 2006

FACTS: Yellow Freight System Inc. (YFS) objected to the valuation of its corporate headquarters from 1999 to 2002. Board of Tax Appeals (BOTA) found in favor of Johnson County. In YFS appeal for judicial review, district court found BOTA’s decision was not supported by substantial evidence, and reduced YFS’s property values. County appealed, claiming district court erred in (1) finding evidence was insufficient to support BOTA’s valuation, (2) holding that county failed to determine highest and best use of the property, and (3) applying YFS’s proffered value for 2000 as value of the property for 2001 and 2002.

ISSUES: (1) Sufficiency of evidence, (2) highest and best use, and (3) property value for 2001 and 2002

HELD: BOTA’s decision supported by substantial evidence. Uniform Standards of Professional Appraisal Practice and county’s computer assisted mass appraisal (CAMA) are discussed. The CAMA appraisal that was produced and introduced by county fits within definition of written appraisal specified in K.S.A. 79-504(b).

District court erred in finding county presented no evidence on highest and best use of the property. BOTA weighed testimony from county and YFS witnesses and chose to rely on county’s witnesses.

District court erred in adopting YFS’s proffered value for 2000 as value for 2001 and 2002. County’s figures for 2001 and 2002 were the only evidence and should have been accepted by district court.

STATUTES: K.S.A. 2005 Supp. 79-503a and K.S.A. 77-601 et seq., -621(a)(1), -621(c) subsections (4), (5), (7) and (8), 79-501 et seq., -504, -504(b)

TERMINATION OF PARENTAL RIGHTS, PRESUMPTION OF UNFITNESS, AND JURISDICTION
IN RE E.T.
ATCHISON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 95,509 – JULY 7, 2006

FACTS: T.M., the natural mother, and M.T., the natural father, appeal the trial court’s decision terminating their parental rights in E.T. T.M. gave birth to E.T. in 2004 in Kansas City, Mo. T.M. and M.T. were living in Kansas. E.T. was taken into protective custody and placed with foster parents in Missouri. The petition for termination of parental rights indicated that T.M. had previously been convicted of aggravated battery for slitting the throat of her 3-year-old daughter and that T.M.’s parental rights in her three other children had been terminated. M.T. had previously been convicted of several felonies and served time in prison and a child in his custody, J.T., had been adjudicated a child in need of care. The Missouri courts ruled that Missouri was not E.T.’s home state, was an inconvenient forum, and Kansas was the appropriate state for jurisdiction. The trial court found T.M. was presumptively unfit due to the prior abuse and prior child in need of care proceedings of her other children. The trial court found M.T. was presumptively unfit due to the prior child in need of care adjudication. The trial court terminated the parental rights of T.M. and M.T.

ISSUES: (1) Trial court lack of jurisdiction and (2) presumption of unfitness

HELD: Court affirmed the trial court’s ruling on jurisdiction. Court stated that although it appears that Missouri had jurisdiction under K.S.A. 38-1348(a)(2), the Missouri court declined to exercise jurisdiction on the ground that Kansas was the more appropriate forum. Therefore, a Kansas court could assume jurisdiction under K.S.A. 38-1348(a)(3). Concerning T.M.’s termination, the court held that based on the evidence presented by the state at the termination hearing, the presumption of unfitness was a K.S.A. 60-414(b) presumption that was rebutted by T.M.’s evidence. Therefore, the state still had the burden to prove T.M.’s unfitness by clear and convincing evidence and it failed its burden. However, court determined that T.M.’s abusive conduct towards E.T.’s older sibling in 1996, coupled with the previous terminations of her parental rights in three children, furnished substantial competent evidence to support the trial court's determination that E.T. was a child in need of care. Concerning M.T.’s termination, the court held the evidence presented at the termination hearing was insufficient to establish a presumption of unfitness under K.S.A. 38-1585(a)(3). Additionally, the court stated that based upon the trial court’s findings, there was not substantial evidence supporting the trial court’s decision that M.T. was an unfit parent.

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CONCURRENCE: J. Johnson concurred in the majority’s opinion. However, Johnson would restrict the holding on jurisdiction to find that Kansas obtained child-custody jurisdiction when Missouri declined to exercise jurisdiction.


TORTS
CHAMBERLAIN AND CARABETTA V. FARM BUREAU
MUT. INS. CO.
MIAMI DISTRICT COURT – AFFIRMED
NO. 94,558 – JULY 14, 2006

FACTS: Chamberlain injured in 1996 accident. She sued her insurer (Farm Bureau) for breach of contract and violation of Kansas Automobile Injury Reparations Act by denying personal injury protection (PIP) benefits, discounting physicians’ (including Carabetta’s) charges on PIP claims, and denying or discounting lost wages claim. Chamberlain also sued other driver (Snow). In 1999, she settled that tort action, executed full release, and dismissed all claims against Snow with prejudice. In 2000, district court granted Chamberlain’s and Carabetta’s motions for class certification, regarding Farm Bureau’s practice of denying and discounting PIP claims, and regarding discounted health care provider bills, late PIP payments without interest, and PIP claims denied without physician review. In 2005, district court granted Farm Bureau’s motion to decertify the two classes, and preserved plaintiffs’ individual claims. Chamberlain and Carabetta filed interlocutory appeal.

ISSUE: Class action and decertification

HELD: Discussion of all class action and individual claims asserted by Chamberlain and Carabetta, and of mootness and loss of standing that resulted from Chamberlain’s settlement with Snow. Under facts, no abuse of discretion in decertifying the classes. Because Chamberlain and Carabetta lost standing before class certification, no error in district court’s refusal to appoint substitute class representatives.

STATUTE: K.S.A. 40-3101 et seq., -3103(q), -3104, -3107, -3107(f), -3110(b), -3111, -3113a, -3113a sections (a)-(c), 60-223(a)(2)

TORTS – LIMITATIONS
MOSS V. MAMALIS
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 94,379 – JULY 14, 2006

FACTS: District court revoked Moss’s probation in 2001 and imposed post-release supervision terms of 24 months. After Department of Corrections (DOC) alerted court of error, nunc pro tunc orders were entered for no post-release supervision to be served. Because nunc pro tunc orders were never received by plaintiff or DOC, Moss served illegal post-release supervision. In 2003, Moss sued Mamalis for legal malpractice and sued parole officer (Jones) and DOC/Kansas for negligence and violation of civil rights. District court granted summary judgment to all defendants, finding legal malpractice claim was barred by statute of limitations, District court also found Jones summary judgment to all defendants, finding legal malpractice claim for legal malpractice and sued parole officer (Jones) and DOC/Kansas served illegal post-release supervision. In 2003, Moss sued Mamalis for legal malpractice claim did not accrue until 2001 when Moss was released from prison and injured by having to serve illegal post-release supervision term. Summary judgment to Mamalis based on statute of limitations bar is reversed.

District court properly found negligence claim failed for lack of duty. In Kansas, the district court, not DOC, imposes applicable term of post-release supervision. Parole officer possesses no discretion in setting term of post-release supervision. Parole officer relying upon facially valid paperwork from DOC has no duty to person on post-release supervision to investigate claim that sentence imposed was invalid.

No violation of Moss’s constitutional rights. District court properly granted summary judgment to Jones and Kansas.


TORTS – WORKERS’ COMPENSATION
JERBY V. TRUCK INS. EXCHANGE
DOUGLAS DISTRICT COURT
REVERSED AND REMANDED
NO. 94,863 – JULY 14, 2006

FACTS: Jerby’s widow (Virginia) received workers’ compensation benefits related to her husband’s death in auto accident. Virginia and children settled with company that insured the other driver. Family filed action for judicial declaration that settlement proceeds were not subject to statutory lien or setoff of workers’ compensation benefits. District court granted summary judgment to Jerby family, finding settlement proceeds was not duplicative because settlement did not exceed amount of Jerby’s actual lost wages. Workers’ compensation insurance carrier (Truck Insurance Exchange) appealed.

ISSUE: Statutory lien and settlement proceeds

HELD: Cases construing the rights of holder of a lien for payment of PIP benefits under Kansas Automobile Injury Reparations Act are considered and applied in construing rights of holder of a lien for payment of workers’ compensation benefits. District court is reversed and case is remanded for evidentiary hearing to apportion settlement proceeds among Virginia and children, and to determine issues relative to whether Virginia’s portion of settlement is duplicative to workers’ compensation benefits.

STATUTES: K.S.A. 40-3101 et seq., -3102, -3113a, 44-504, -504(b) and K.S.A. 1992 Supp. 44-504(b)

WORKERS’ COMPENSATION AND GOOD FAITH EFFORT
MAHAN V. CLARKSON CONSTRUCTION CO.
& ACIG INSURANCE

WORKERS’ COMPENSATION BOARD – REVERSED AND REMANDED WITH DIRECTIONS
NO. 95,811 – JULY 21, 2006

FACTS: Mahan injured his back during his employment with Clarkson Construction, but he tested positive for cocaine in the post-accident drug test. Mahan was terminated for drug use, but instructed that he could return to Clarkson if he completed drug rehabilitation. Mahan made no effort to complete drug rehab. The administrative law judge concluded that Mahan failed to make a good faith effort to obtain employment but determined that he suffered a 50 percent wage loss and gave Mahan 46.5 percent permanent partial general disability. The Workers’ Compensation Board increased the award to 63 percent permanent partial general disability, concluded that Mahan did not make a good faith effort to retain his employment or find other employment, but that Clarkson did not meet its burden to show that Mahan would have been accommodated, thus imputing a post-injury wage loss of 75 percent.

ISSUE: Permanent partial general disability compensation

HELD: Court held that where the employee has failed to make a good faith effort to retain his or her current employment, a showing of the potential for accommodation at the same or similar wage

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rate precludes an award for work disability. Court stated it would be unfair under circumstances where the employee has refused to make himself or herself eligible for re-employment to require the employer to show that the employee was specifically offered accommodated employment at the same or similar wage rate.

STATE V. CHAMBERS
OSAGE DISTRICT COURT
REVERSED AND REMANDED
NO. 94,218 – JULY 14, 2006

FACTS: Jury convicted Chambers of burglary and attempted second-degree murder, and attempted voluntary manslaughter. On appeal, Chambers argued his acquittal of attempted murder invalidated his burglary conviction, and alleged error in jury instruction for aggravating kidnapping and trial court’s response to jury’s question about underlying crime for aggravated kidnapping.

ISSUES: (1) Sufficiency of evidence and (2) aggravating kidnapping instruction

HELD: Sufficient evidence supports the aggravating kidnapping conviction. Conviction of a compound offense is not automatically reversible if there is no conviction on the predicate offense. If jury’s verdicts seem inconsistent, that inconsistency alone is not grounds for reversal of a conviction of the compound offense. Forcible taking not disputed in this case. Although jury acquitted Chambers of attempted first-degree murder and lesser-included charges, there was sufficient evidence to support conclusion that Chambers possessed requisite intent for aggravated kidnapping.

Chambers charged with aggravated kidnapping with intent to facilitate the commission of murder in second degree. Jury acquitted Chambers of attempted murder charges and questioned whether it could consider a crime other than charged as predicate offense. Although state not required to charge a defendant with the predicate crime, i.e. attempted murder to prove kidnapping with intent to commit murder, it cannot charge a defendant with aggravated kidnapping to facilitate murder and then convict the defendant of kidnapping to facilitate a crime different from that identified in the information. Here, trial court’s response to jury’s question and the failure to set forth elements of any other crime in the instruction was not harmless error.

STATE V. CHAFFEE
FRANKLIN DISTRICT COURT – AFFIRMED
NO. 94,953 – JULY 28, 2006

FACTS: Chaffee charged with involuntary manslaughter while driving under the influence of alcohol. Jury found him guilty of lesser-included offense of driving under the influence of alcohol. State appealed on question reserved, claiming trial court erroneously instructed jury on proximate cause.

ISSUES: (1) Jury instruction and (2) proximate cause for involuntary manslaughter

HELD: Based on holdings in State v. Greater, 26 Kan. App. 2d 914 (2000), and State v. Chastain, 265 Kan. 16 (1998), involuntary manslaughter while driving under the influence of alcohol, K.S.A. 2005 Supp. 21-3442, defines a strict liability crime, which requires evidence that defendant’s conduct was the cause of the victim’s death. How to instruct jury when causation is at issue in such a case is discussed.

STATE V. CHAMBERS
BUTLER DISTRICT COURT
AFFIRMED IN PART AND REVERSED IN PART
NO. 93,626 – JULY 21, 2006

FACTS: Brent Chambers plead guilty to two counts of burglary of a dwelling with the intent to commit theft and to steal women’s lingerie. The district court found Chambers’ crimes were sexually motivated and ordered that he register as a sex offender. The district court also ordered Chambers to pay a total of $1,225 in restitution, which included the cost of a security system installed by one of the victim families and also the cost to replace the stolen lingerie.

ISSUES: (1) Constitutionality of the Kansas Offender Registration Act (KORA), (2) sexually motivated crimes, and (3) restitution

HELD: Court found KORA was constitutional and that Apprendi does not apply to a sentencing judge’s finding beyond a reasonable doubt that an offense was sexually motivated, which results in imposition of the provisions of the KORA. Court stated that the sentencing judge’s finding of sexual motivation did not increase the terms of Chambers’ underlying prison sentences beyond the maximum sentence provided for burglary. Court also affirmed the district court’s determination that Chambers’ crimes were sexually motivated. Court stated the uncontested evidence at sentencing proved that Chambers, by his own admission, entered homes with the sole intent to steal women’s lingerie in order to facilitate masturbation. Court reversed the district court’s restitution order in part. Court stated the security system purchase was an example of a tangential cost incurred as a result of a crime and it was not caused by the crime. Court stated the used lingerie had no readily ascertainable market value, and the sentencing judge’s consideration of the replacement value evidence was not an abuse of discretion in the valuation of restitution. Court also stated the sentencing court did not abuse its discretion in ordering restitution to a victim who was not present or represented at the restitution hearing.
STATE V. STEVENS
CRAWFORD DISTRICT COURT – AFFIRMED IN PART
REVERSED IN PART, AND REMANDED

FACTS: Stevens convicted of driving or attempting to drive under influence of alcohol, K.S.A. 2005 Supp. 8-1567(a)(3). On appeal he claimed: (1) error to deny motion for new trial based on admission of deficient breath test results, (2) error to admit breath test results on morning of trial without granting continuance for defense review, (3) state failed to prove crime was committed in Crawford County, (4) error to not require state to elect either operating or attempting to operate as its theory of prosecution, (5) error to admit Stevens’ statement that he was driving the vehicle, (6) cumulative error denied him a fair trial, and (7) trial court erred in assessing amount of attorney fees to reimburse State Board of Indigents’ Defense Service (BIDS).

ISSUES: (1) Motion for new trial, (2) admission of breath test results, (3) venue, (4) unanimous jury verdict, (5) suppression of statements, (6) cumulative error, and (7) attorney fees

HELD: Under plain reading of unambiguous K.S.A. 2005 Supp. 8-1567(a)(3), a deficient sample breath test, while not conclusive evidence that individual was committing crime of driving under influence of alcohol, can be used in conjunction with variety of circumstances to establish DUI violation. Whether this renders K.S.A. 2005 Supp. 8-1567(a)(1) meaningless is issue for Legislature and not the courts.

Defense counsel established no prejudice in the admission of breath test result paperwork without further opportunity for defense to review this evidence.

Sufficient evidence that Stevens committed crime of driving or attempting to drive under influence of alcohol in Crawford County.

This is alternative means case rather than multiple acts case, with sufficient evidence to support either theory of “driving” and “attempting to drive” under influence of alcohol.

Stevens’ self-incrimination claim fails. Under facts, his statement that he was driving the vehicle was voluntary.

No error in case supports cumulative error claim.

Reasoning in State v. Robinson, 281 Kan. 538 (2006), is applied. Trial court’s order concerning attorney fees to be reimbursed to BIDS is reversed and remanded for trial court to tax a specific amount of attorney fees claimed by BIDS and to determine the amount and method of payment of such sum that the defendant is able to pay.

DISSENT: J. Johnson questions whether State v. Kendall, 274 Kan. 1003 (2002), intended to treat operating and attempting to operate theories as alternative means of committing DUI, but if analyzed as alternative means, evidence not sufficient under facts in this case to support Stevens’ DUI conviction based on attempting to operate vehicle. Would reverse and remand for retrial on sole means of committing DUI by operating a vehicle while under the influence. Also, disagrees that Stevens was not in custody when he made incriminating statement, but finds Stevens failed to preserve this issue for appeal.


STATE V. THOMPSON
MCPHERSON DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 94,254 – JULY 21, 2006

FACTS: Thompson was stopped for a faulty headlight. Thompson had no warrants out for him and officers returned Thompson’s identification documentation and the police tape showed that the officer never disengaged Thompson before the officer asked if Thompson would answer a few more questions. Thompson eventu-
HELD: Court held there was sufficient evidence to support the trial court’s ruling that the officers could lawfully arrest Vandevelde for interference with a city law enforcement officer. Court stated the trial court failed to determine whether any of the circumstances under K.S.A. 22-2501 (to protect an officer from attack, to prevent escape, or to discover fruits of the crime charged) were present to justify a search incident to a lawful arrest contrary to express direction by the Kansas Supreme Court. Court stated the trial court only focused on the six factors that are helpful when considering the reasonableness of the scope of the search. Court held that where a defendant had been handcuffed, searched, held in custody, and placed in the back seat of a patrol car by police before his or her vehicle was searched, the search of the vehicle could not be justified as a search incident to arrest of the purpose of protecting the officers from attack. Court also held there was not probable cause to believe that Vandevelde had purchased and possessed drugs. Consequently, the search of Vandevelde’s truck could not be justified under the probable cause with exigent circumstances exception to the search warrant requirement. Court also held the inevitable discovery rule did not apply because there were no reasonable grounds for impounding Vandevelde’s truck.

STATUTES: K.S.A. 8-1548(b), K.S.A. 22-2501, and K.S.A. 65-4160(a)

STATE V. VOSS
JOHNSON DISTRICT COURT – REVERSED
NO. 94,089 – JULY 14, 2006

FACTS: In sentencing, district court found out-of-state bonds were covered by rationale and logic of K.S.A. 2005 Supp. 21-4603d(f), and considered Voss’s out-of-state bond for an outstanding felony in Kentucky. Voss appealed, claiming district court improperly imposed prison sentence for presumptive probation offense. Voss served his Kansas sentence, and was released to Kentucky detainer in October 2005.

ISSUE: Out-of-state bonds and sentencing

HELD: Case is moot but issue is considered as capable of repetition and of public importance. District court’s interpretation is directly contrary to clear and unambiguous language in statute. An out-of-state bond does not bring K.S.A. 2005 Supp. 21-4603d(f) into play.


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