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Spendthrift Trust Clauses and Kansas Divorces: Does a Settlor’s Intent Still Matter?
By Calvin J. Karlin and Anna Smith

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Modesty, Humility,
and What We Can
Learn from Our
Senior Attorneys
By Matt Keenan

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Kansas Bar Association, Topeka, Kan.
Four terrific local bar association meetings this month. I began with travel to McPherson County where I was warmly welcomed by our friends there. Among those attending were Bret Christiansen, Jamie Karasek, David Page, Brian Bina, John Klenda, Tim Karstetter, Bill Gusenius, Jill Breymyer-Archer, Bob Wise, and President Amie Bauer. I have found that I have left many local bar meetings thinking to myself I would love to practice with these lawyers. The McPherson County Bar Association is one of those groups. We had a general discussion, and I got to give Bob Wise his 50-year pin. In presenting these honors at these local bar meetings I always make a few calls in advance in order to personalize my remarks. Not surprisingly, Bob, KBA president for 1990-91, is well respected and liked by his colleagues. He is such a courteous fellow, his law partners report that he has developed a language of his own, “Bob speak.” “Bob speak” goes something like this … Bob’s partner presents a cockamamie idea … Bob replies, “why don’t we table that.” Oh, but it would be a much gentler existence if we all adopted “Bob speak.”

On to the general membership luncheon of the Women Attorneys Association of Topeka (WAAT) where I was able to see many good friends and enjoy a program developed by Mary Feighny. Angel Zimmerman, the president of WAAT was on hand to welcome me as was the Hon. Evelyn Wilson. Then we were treated to “Beginnings: Women in the Legal Profession, a script focused on the attempts of women to gain access to the legal profession. Hon. Marla J. Luckert, Mary Feighny, Hon. G. Joseph Pierron Jr., and Camille Nohe made the presentation, which was based on historical stories and excerpts from historical documents. Great meeting.

Jason McClasky, president of the Johnson County Bar Association (JCBA), welcomed me to the monthly meeting (Con’t. on next page)
where about 150 were in attendance. When you become a member of the JCBA, your lunch is included, and that certainly encourages attendance at the monthly meetings. JCBA has many projects underway; the members are hosting a charity golf tournament to benefit Habitat for Humanity, they are working in cooperation with the Kansas Women Attorneys Association on a food drive, and are working on a foundation fundraiser called checkered flags for charity. During the meeting, I was fortunate to honor G. Taylor Hess, a World War II veteran who served in Europe as a surgical technician before returning to obtain his degree from the University of Pennsylvania. I was also able to give Hon. Sheldon M. Crossette his 50-year KBA pin. I did manage to gather some wonderful stories about Judge Crossette from Hon. Karen Arnold-Burger and Hon. Keith Taylor. As expected, many compliments were made; he is a gentleman, a dear friend, a compassionate lawyer, and judge, but I was particularly tickled by the story where he was paid back a prank by his staff sewing the sleeves of his robe shut. The meeting concluded with the presentation of the Justinian Award to Richard “Dick” Bond, who made a beautiful acceptance speech and received a standing ovation from those at the meeting.

The last meeting of the month was in Ellsworth with the bench and bar, where the entire bar showed up and even a few carpetbaggers from Barton County, which would be you, Joel Jackson and Donald Anderson. My thanks to Judge Ronnie Svaty; who I was told directed all the lawyers to attend the lunch. John Sherman hosted me, and the meeting was attended by Roger Peterson, John Kasper, Greg Hoffman, Joe Shepuck, Carey Hipp, Patrick Hoffman, P.J. Kasper, and Theresa Staudinger. For those of you who have not been to Ellsworth, make the time. It is a charming old town, rich in our cowtown roots. On John's website, www.shhlawyers.com, you will find a history of his firm beginning with an excerpt from Ira E. Lloyd, an attorney who came to practice in Ellsworth in 1873. The account is entertaining and it ends as Mr. Lloyd is asked to read a passage from the bible at Happy Jack's funeral – Happy Jack, a crooked lawman, threatened to rip Mr. Lloyd's guts out and shoot him, simply because he advocated for his client – to which Mr. Lloyd replied “if I thought anything I could say would render [Happy Jack's] abode in hell hotter and more painful, I would be pleased to attend.” This was such an engaging meeting that I forgot to take photos, so John Sherman, being a gracious host, rounded up his partners for a picture in front of their downtown Ellsworth office.

Many thanks to my friends and colleagues across the state for making this a fantastic month of bar meetings.

KBA President Rachael Pirner may be reached by email at rpirner@ksbar.org, by phone at (316) 630-8100, or by posting a note on our Facebook page at www.facebook.com/ksbar.
Perspective is an important thing to consider with each and every case that we handle as attorneys. I believe that as we go through our careers, our perspectives change. We must carefully account for these perspectives at all times. An attorney should always ask himself or herself three questions: (1) What perspective am I bringing to this case? (2) What perspective is the client bringing to this case? and (3) Am I on the same page as to the concerns of the client in this case? All of these questions are vital to consider at the beginning of a new attorney-client relationship.

In law school, we learn the law from cases in textbooks. In my experience, when we discussed these cases, we were almost completely detached from the impact the cases had on the parties involved. Approaching a case in this manner does have its advantages. It allows one to consider the strengths and weaknesses of the case, and analyze the applicable law, without distraction from the human element. However, an attorney can rarely, if ever, approach a case in this manner in the real world.

After law school, it didn’t take long for me to get a dose of reality and to learn lessons in perspective. A particular experience early in my career comes to mind. I was just starting work on a case, and had a meeting with my clients to go over some discovery responses. This was our first face-to-face meeting. When they arrived at my office, I greeted them, introduced myself, and took them to the conference room. We proceeded to have a 30-minute meeting to prepare the discovery responses. The clients were visibly concerned about the lawsuit and by the fact that they were being sued. Their insurance company was providing their defense, so in my mind they had little to worry about. This was where I lacked perspective. The clients were named in a lawsuit. In their minds, their livelihood and assets were on the line.

Compounding the problem that day was my lack of sensitivity to the clients’ perspective of me. They probably entered my office that day with a mental image of someone entirely different than the lawyer they were faced with. They had probably conjured-up images of Matlock or Jack McCoy. Instead, they were greeted by a baby-faced 26-year-old. Instead of being sensitive to the differing perspectives that were brought to the meeting that day, I forged along through the meeting, like it was a case in a textbook. I’m sure I did a poor job of comforting and counseling the clients, and I did little to ease their concerns.

I have learned since that time to try to be sensitive to the differing perspectives of myself and my clients. I try to sense the impact that the issues at hand are having on my clients’ lives. I also try to be sensitive to the clients’ perspective of me. By doing this, I am more successful in communicating with clients, and understanding their needs. As young attorneys, we need to remember that the cases we are dealing with on a daily basis are not something out of a textbook. They affect people’s lives in very real ways.

On the other hand, I think as we become more experienced in our legal careers, there is a danger of approaching a client as “just another case.” There is a certain level of hardening of attitudes that occurs after you spend enough time practicing law. If a client is “just another case,” that client is not receiving the full benefit of the attorney’s efforts. Both young attorneys, and not so young attorneys, can fall into the trap of not fully appreciating the impact that cases are having on their clients. We must always strive to provide not only legal counsel to our clients, but also to some extent, counsel based upon a deeper appreciation of how cases are affecting our clients’ lives.

About the Author

Vincent M. Cox is an associate with the Topeka firm of Cavanaugh & Lemon P.A., where he maintains a civil litigation practice. He received his bachelor’s degree from Benedictine College in 2002 and his juris doctorate from Washburn University School of Law in 2005, where he was a member of the Washburn Law Journal. Cox is a member of the Topeka and Kansas bar associations and is past president of the Topeka Bar Association Young Lawyers Division.
The Attorney Diversion Program

By Stanton A. Hazlett, Kansas Disciplinary Administrator, shazlett@kscourts.org

The attorney diversion program went into effect on September 18, 2001, pursuant to Supreme Court Rule 203(d). The program was tailored after a similar program in Arizona, which was the first state to adopt such a program. Kansas was one of the first 10 states to institute a diversion program. The purpose of the program is to provide an alternative to traditional disciplinary procedures.

A respondent is notified of the attorney diversion program at the time of the filing of a complaint. The respondent must request a referral to the diversion program prior to the disciplinary administrator’s report to the review committee. The review committee consists of three Kansas lawyers, and it decides whether probable cause exists to conclude that the attorney has violated the Kansas Rules of Professional Conduct. If a finding of probable cause is made, the review committee determines whether the respondent should have a hearing, be informally admonished, or be admitted into the attorney diversion program.

In determining whether a respondent is eligible for diversion, the review committee must decide if diversion can reasonably be expected to alter the respondent’s behavior and to minimize the risk of similar future misconduct. The review committee will certainly consider the complainant’s position regarding diversion, but the opposition of the complainant does not prevent the granting of a diversion. If the review committee grants a request for diversion, a meeting is then scheduled between the Disciplinary Administrator’s Office and the respondent to negotiate an agreement to address the misconduct and the problems being experienced by the respondent. The respondent must agree to a stipulated set of facts and agree that rules have been violated. If the respondent cannot agree that the Kansas Rules of Professional Conduct have been violated or to a stipulated set of facts, then he is entitled to a hearing. The failure of the respondent to participate in the attorney diversion program cannot be considered as an aggravating factor in a subsequent disciplinary proceeding.

The diversion agreement will be set up to address problems experienced by the respondent. For example, the respondent may have issues with law office management or an impairment. Either problem may have caused the respondent to not promptly attend to his cases or fail to maintain adequate communication with his clients. The respondent may be required to submit to an evaluation to see if any mental health issues such as depression exist. Additional relevant CLE may be an option. The respondent may be assigned a mentor or supervisor and could be required to cooperate with the Kansas Lawyers’ Assistance Program (KALAP). Anne McDonald, executive director of KALAP, and her staff have been invaluable in assisting respondents in the diversion program.

If the respondent is eligible for the attorney diversion program, entering into a diversion agreement with the respondent is the preferable way of handling a disciplinary case from the perspective of the Disciplinary Administrator’s Office. A diversion agreement can be set up quickly to remedy whatever problems the respondent may have without the stigma of public discipline. From the respondent’s perspective, it is important to note that any information regarding the successful completion of a diversion agreement remains confidential and would not be available to the public. However, the information from a successfully completed diversion agreement can be considered in any future disciplinary case involving the respondent and may be cited as prior discipline. If the respondent does not successfully complete the terms of the diversion agreement in a timely fashion, the respondent will be removed from the attorney diversion program and the case will be returned to the formal disciplinary process.

Since its inception, 274 Kansas lawyers have entered the attorney diversion program. Six lawyers have been unsuccessful and the diversion agreement has been revoked; 208 lawyers have successfully completed the program; and 66 diversion agreements remain active. A Kansas lawyer should seriously consider the attorney diversion program, if he or she is eligible to participate.

About the Author

Stanton A. Hazlett, of Topeka, received his Bachelor of General Studies from the University of Kansas and his Juris Doctor from Washburn University School of Law. From 1977 through 1986 he was engaged in private practice in Lawrence. He has been with the Disciplinary Administrator’s Office since 1986. In September 1997, he was appointed disciplinary administrator.
Asian-Pacific American Heritage Month

By Nancy Morales Gonzalez, Office of the General Counsel, Social Security Administration, Kansas City, Mo.

Among many diverse observances, May is designated as Asian-Pacific American Heritage Month — a celebration of Asians and Pacific Islanders in the United States. In this designation, Asian-Pacific includes the entirety of the Asian continent and the Pacific Islands of New Guinea, New Caledonia, Vanuatu, Fiji, Solomon Islands, New Zealand, Hawaiian Islands, Rotuma, Midway Islands, Samoa, American Samoa, Tonga, Tuvalu, Cook Islands, French Polynesia, Easter Island, Marianas, Guam, Wake Island, Palau, Marshall Islands, Kiribati, Nauru, and the Federated States of Micronesia. Also, as the largest continent, Asia covers approximately 30 percent of the world’s landmass, 44 countries, and various islands and dependencies.

In Kansas, according to the U.S. Census Bureau, 2.3 percent of residents are Asian and 0.1 percent of residents are Pacific Islanders. Both percentages are half the national average. The Kansas counties of Sedgwick, Johnson, and Douglas maintain the highest percentage of Asian and Pacific Islander residents at approximately 4 percent, followed by Wyandotte, Riley, and Shawnee counties.

Asian-Pacific American Heritage Month originated in 1977 when a U.S. House of Representatives resolution called upon the president to proclaim the first week of May as Asian-Pacific Heritage Week. A similar resolution shortly thereafter was introduced in the Senate, and both resolutions were passed. In 1978, President Carter signed a Joint Resolution designating the annual celebration. Since 1992, May has been designated as Asian-Pacific American Heritage Month. May was chosen for the observance of Asian-Pacific American heritage to commemorate the first Japanese immigration to the United States in May 1843 and the anniversary of the completion of the transcontinental railroad in May 1869.

In each year since 1978, the American President has issued a proclamation regarding the Asian-Pacific contribution to our country. For example, 30 years ago, President Reagan stated: “The United States is a Nation comprised almost entirely of immigrants and their descendents. The interaction of different cultures, each of which has become a vital part of a culture uniquely American, constantly revitalizes our national spirit and heritage. ... Among the most significant components of the American cultural blend are the ancient Asian-Pacific cultures. Asians have brought to the United States values and traditions that profoundly enrich American life. ... The United States owes a debt of gratitude to Asian and Pacific Americans for their contributions to the culture, heritage and freedom of the Nation we together love and serve.”

Twenty years ago, President G.H.W. Bush noted: “With characteristic clarity and force, Walt Whitman wrote: ‘The United States themselves are essentially the greatest poem. ... Here is not merely a nation but a teeming nation of nations.’ Those immortal words eloquently describe America’s ethnic diversity – a diversity we celebrate with pride during Asian/Pacific American Heritage Month. The Asian/Pacific American heritage is marked by its richness and depth. The world marvels at the wealth of ancient art and philosophy, the fine craftsmanship, and the colorful literature and folklore that have sprung from Asia and the Pacific islands. ... Time and again throughout our Nation’s history, Asian and Pacific Americans have proved their devotion to the ideals of freedom and democratic government.”

Ten years ago, President G.W. Bush stated: “As we move into the 21st century, the United States continues to greatly benefit from the contributions of its diverse citizenry. Among those who have influenced our country, Asian/Pacific Americans merit special recognition. Their achievements have greatly enriched our quality of life and have helped to determine the course of our Nation’s future. ... Today, Asian/Pacific Americans are one of the fastest growing segments of our population, having increased in number from fewer than 1.5 million in 1970 to approximately 10.5 million in 2000. Asian/Pacific Americans bring to our society a rich cultural heritage representing many languages, ethnicities, and religious traditions. ... Diversity represents one of our greatest strengths, and we must strive to ensure that all Americans have the opportunity to reach their full potential.”

Additionally, as President Obama found: “The vast diversity of languages, religions, and cultural traditions of Asian Americans and Pacific Islanders continues to strengthen the fabric of American society. From the arrival of the first Asian American and Pacific Islander immigrants 150 years ago to those who arrive today, as well as those native to the Hawaiian Islands and to our Pacific Island territories, all possess the common purpose of the fulfilling the American dream and leading a life bound by the American ideals of life, liberty, and the pursuit of happiness. ... From the beaches of the Pacific islands and the California coast, the grasslands of Central Asia and the bluegrass of Kentucky, and from the summits of the Himalayas and the Rocky Mountains, the Asian American and Pacific Islander community hails from near and far. This is the story of our more perfect union: that it is diversity itself that enriches, and is fundamental to, the American story.”

About the Author

Nancy Morales Gonzalez practices in the Office of the General Counsel, Social Security Administration in Kansas City, Mo. She served as a judicial law clerk at the U.S. District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals. Gonzalez is also active in the Missouri Supreme Court’s Gender and Justice Council, the Missouri Bar Association’s Client Security Fund, a board member for the O’Connor Inn of Court, KBA Board of Governors, and a past president and active member of the Hispanic Bar Association of Greater Kansas City.
Jim Collins, in his best-selling book, “Good to Great,” identifies leadership styles that typify the most successful corporate leaders in America. One trait that Collins describes caught some off-guard – humility. Collins wrote that the most effective leaders had personal qualities described as “modest, shy, quiet, self-effacing, understated, and humbled.”

Collin’s finding was shared by another well-known expert on leadership – Bill Taylor. Taylor wrote, “Practically Radical: Not So Crazy Ways To Transform Your Company, Shake Up Your Industry, and Challenge Yourself.” Taylor profiled an IBM executive who used the term “humbitious” to describe her style – a blend of humility and ambition.

While Collins’ and Taylor’s work is drawn from the business world, their findings are nevertheless instructive for our profession. There can be little doubt that the most successful lawyers share those same qualities. Whether it’s building a law firm, working to make the profession better, winning clients, or gaining the trust of a jury, all of us are attracted to those personalities who deflect credit and share successes with other team members.

Humility is found in our military veterans. Tom Brokaw’s book, “The Greatest Generation,” describes how this generation felt they were not owed anything for their contributions. And they made the most of what little they had. In my own fact gathering with our KBA veterans, I was reminded of this trait – my question – “are you a veteran, and if so, explain” typically earned a brief reply – “Yes. Navy. Injured, POW.”

A more extensive follow-up would reveal significant military service, distinctions, awards. Another example – when pressed for photographs of their service – many had none. Those who eventually found a photograph – it was not something taken at a photo studio. Getting a glamour shot while posing in uniform wasn’t a priority. Beating the Nazis? Uh, yes.

Last month the Wichita Bar Association members had the occasion to see first-hand all these truisms. With the assistance of Wichita attorney Jennifer Magana and Karin Kirk, executive director of the WBA, the bar scheduled a luncheon to honor those living veterans who were able to attend.

And on Tuesday, April 10 it happened. The honorees were 14 attorneys and one spouse: Russel N. Barrett, Vincent L. Bogart, Aubrey J. Bradley Jr., Ralph R. Brock, Donald B. Clark, Bruce Fitts, Wilbur D. Geeding, Jack Glaves, J. Francis Hesse, Albert L. Kamas, Ernest McRae, Arnold C. Nye, Richard Render, and Hon. Keith Sanborn and his wife, Wanda.

These men included some who joined the services as young as 17 (Arnold Nye), were awarded the Purple Heart (Aubrey Bradley and Francis Hesse), were one of the first Americans to Hiroshima after the atomic bomb (Bruce Fitts). Others were interrogated as a prisoner of war (Bradley and Hesse). Al Kamas went to Iwo Jima with the Marines, and Ernest McRae piloted B-24s in the South Pacific. Rick Render was a POW at Nuremberg, and Keith Sanborn served in the Navy where he met his wife, who was also at the Navy base.

At the conclusion of the luncheon we asked them – how did your military experience help make you a better attorney? The responses were insightful and inspirational – and all had one thing in common – diminishing what they did for our country.

“This was a one-of-a-kind program that our members treasured. We were humbled, and honored, and awed by their presence. I think we all hung on every word these men spoke. I keep thinking ‘what if we had never had this event?’ We would have never known these stories,” said Jennifer Magana.

WBA Executive Director Karin Kirk added this: “The WBA was thrilled and honored to be able to identify 15 World War II veterans within our legal community and to have 11 of them as our guests at the luncheon on April 10. Over 125 attorneys attended and joined in recognizing the veterans for their service and thanking them for their sacrifices. We owe all of our veterans a debt of gratitude that can never be repaid.”

Indeed.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Be Easy on the Court: Get Your Law in Order

By Ellen Byers, Washburn University School of Law, Topeka, ellen.byers@washburn.edu

Knowing the law and presenting it effectively are two different things. Most lawyers recognize that it is inadvisable to present law in a raw or “undigested” form. Most understand, for example, that presenting case law seriatim for a judge to read in his or her limited time is unhelpful and also likely to irritate rather than persuade the judge. But how does one transform what seems like a bulky unhelpful and also likely to irritate rather than persuade the law seriatim for a judge to read in his or her limited time is

form. Most understand, for example, that presenting case

easier, but merely makes it more convenient for the criminal.

laws.

Second, if statutory language is involved, set forth in your analysis only the relevant language (you can always include the full text of a statute in a separate section or an appendix). Introduce it by a phrase such as “the statute provides in pertinent part,” then excerpt the specific language at issue, using ellipses – three periods separated by spaces – to indicate where you have eliminated words. See Bluebook R. 5.3 (19th ed. 2010).

Third, synthesize the relevant case law. The goal of case law synthesis is to identify patterns in a court’s treatment of an issue. Remember that a court might not have had an opportunity to revisit a line of cases; therefore, collecting, analyzing, and succinctly summarizing precedent can be of substantial benefit.

Synthesizing Case Law

To avoid the pointless seriatim description of cases mentioned above, spend time dissecting them to see how they fit together. Begin with the assumption that cases are consistent and reconcilable. Seemingly conflicting cases can often be harmonized by seeing them in a new light, with the aid of a

table. Below is an example using cases interpreting the Kansas kidnapping statute, K.S.A. 21-3420(b) (2007) (repealed 2010), superseded by K.S.A. 21-5408(a)(2) (2011). The issue in each case was whether the defendant’s movement of the victim “facilitated commission of a separate crime, such as rape or robbery, or was merely incidental to the primary crime’s commission.

Identify patterns in the holdings and generalize accordingly.

Sample Synthesis

Kansas courts have held that movement of a victim is incidental to a crime, and therefore insufficient to support a separate kidnapping charge, where the movement is unnecessary for successful commission of the crime and does not make it easier, but merely makes it more convenient for the criminal.

<table>
<thead>
<tr>
<th>Case</th>
<th>Facts</th>
<th>Holding: Kidnapping?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Buggs (1976)</td>
<td>Ds moved V from parking lot to inside store, raped V.</td>
<td>Yes. Movement facilitated rape by reducing risk of detection.</td>
</tr>
<tr>
<td>Nelson (1978)</td>
<td>D put Vs in fridge during robbery of restaurant.</td>
<td>Yes. Movement designed to make robbery easier and avoid detection.</td>
</tr>
<tr>
<td>Richmond (1992)</td>
<td>D moved V away from front door, tied her to bed, raped her.</td>
<td>Yes. Movement away from front was to avoid detection; tying to bed made rape easier.</td>
</tr>
<tr>
<td>Fisher (1995)</td>
<td>D moved V through several rooms to get key to register.</td>
<td>No. Movement for D’s convenience; did not make robbery easier or less detectable.</td>
</tr>
<tr>
<td>Kemp (2002)</td>
<td>Ds moved one V from living room down hallway to join other occupants in bedroom.</td>
<td>No. Movement “shepherding” victims together was for convenience of robbers rather than to avoid detection.</td>
</tr>
</tbody>
</table>

D=defendant; V=victim

See Fisher, Richmond. For example, in Fisher, though the defendant moved the robbery victim through several rooms to get a key to the cash register, he did so only because he needed the key, and found it easier to move the victim than have the victim describe where the key was. Other examples of a defendant moving a victim for his own convenience rather than to facilitate commission of a crime include a defendant moving a victim down a hallway to join other victims, Kemp, or a rapist moving a victim from room to room inside an empty house. Buggs (dictum).

(Cont’d. on Page 27)
2012 Economics of Law Practice in Kansas Survey

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, kslpm@larryzimmerman.com

M y law school experience included Law and Accounting from Professor Maydew. Our firm manager, my wife, had harassed me into the course hoping to make me into a boring businessman. We explored the mysteries of double-entry accounting but I was more intrigued that those cloistered CPAs had quietly accumulated a vast store of statistical data about various businesses and could wield it to diagnose and predict a venture’s health.

Kansas attorneys are not so diligent observing our own data making it difficult to diagnose business issues as easily as our accountants might. We have opportunity to change that with the 2012 Economics of Law Practice Survey in Kansas. Every attorney in the state now or will soon get information to participate in an anonymous survey of their practice. The results of the statewide survey will release later this year and will provide the most complete diagnostic tool available anywhere for Kansas attorneys.

Arizona’s 2010 Survey

Arizona conducted a similar survey for Arizona attorneys in 2010 looking at the same things we want to know for Kansas:

• Current demographics of practicing attorneys;
• Attorney net income by practice category, gender, field of law, office location, work status, years in practice and firm size;
• Associate, legal assistant, and secretary compensation by years of experience and office location;
• Prevailing average hourly billing rates for attorneys by a variety of indicators, and legal assistants by years of experience, firm size, and office location;
• Job satisfaction;
• Gender gap variations;
• Attorney time allocated to billable and non-billable professional activities;
• Overhead expenses associated with maintaining a private practice by office location and firm size; and
• Other law office management practices.

(Quoted from 2010 Arizona Economics of Law Survey, www.azbar.org/membertools/economicsreport)

Arizona’s survey discovered that the average hourly billing rate reported in 2010 was $250 compared with $238 in 2007 – a modest increase. However, billable work over the same period declined as well from 40 hours/week to 35 hours/week and average gross revenues per attorney declined from $250,803 to $206,993. Total office expenditures per attorney did go down by about $10,000 also while earnings were in the tank. Obviously the numbers confirm what we knew – the economic bubble that burst in 2007/2008 has been bad for lawyers. Having tangible numbers does not make the scene any more rosy but can provide key barometers for planners.

Invaluable Data, Free?

The sorts of issues and questions in the 2012 Economics of Law Practice Survey are invaluable to any Kansas attorney. Newly minted lawyers ask these types of questions as they evaluate firm offers or hang their own shingle. Established lawyers use the data to study how to hire quality legal staff, retain associates, compensate partners, enter new markets or close existing practice areas, and at least one lawyer I know uses the surveys to evaluate how and when he will retire from solo practice. The survey data is a goldmine of management information.

Access to this goldmine of data is not free. Attorneys expecting to use it should expect to pay and pay dearly. The cost? Simply take 25 minutes to honestly answer the survey in its entirety. Invest that much in bettering the profession and your own practice and the results of the survey will be free to you. Incredible. (Attorneys who do not participate in the survey will have access to the results but will have to pay for that access.)

The CPAs have good models for the businesses they watch because they have extensive data from lots of sources. The last time lawyers asked each other these questions, only 600 in the entire state felt it important enough to participate. That is embarrassing. In the preamble to the Kansas Rules of Professional Conduct, we are reminded that “A lawyer … is a public citizen having special responsibility for the quality of justice.” It is not a stretch to suggest that building statistical models which help attorneys stay in business and improve their practices contributes to the overall quality of justice in Kansas. More than 3,000 lawyers need to complete the survey; all reading this should participate and recruit colleagues to participate. If you have not gotten a link to the survey, contact the KBA.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.
When I chose a Kansas law school, I knew there were some risks in going to a state where I had no connections to help me get a job after school. But I accepted Washburn with the plan of making Kansas my permanent home. Everything I was told about finding a good job after law school could be summed up in one word: “networking.” I decided that to convince people that I desired to stay in Kansas required getting involved in the local legal community (LLC). Little did I know that the “LLC” was chock-full of such opportunities.

The first week of law school exposes students to many opportunities to get involved locally. While several people gave us advice about “networking,” as I got out my sketchpad and magic markers to plan my networking strategy I suddenly realized that I had no idea what to do. Luckily, Washburn got the ball rolling through its first year mentoring program. That program paired me up with a recent graduate who had also come to Kansas from another state and had decided to stay. Now I was feeling pretty good; I had a mentor who practiced in Kansas and nothing could stop me. But my introduction was in no way complete. My mentor suggested several ways I could become involved. To be honest, the concept of networking with local lawyers and judges was a little intimidating to me as a first-year law student. But as I would soon learn, the LLC in Kansas, and the Topeka area in particular, could not have been more welcoming. I never have had so many people willing to spend time with me and to offer me advice.

For many law students, the first real exposure to the LLC comes from something every first-year student stresses about: internships. There is no better way to get to know the people and practices of the local legal community than through one’s first summer internship. I set my sights on an internship in Topeka and, through the help of the Washburn Government Careers Forum, I got it! Spending my first summer working in Kansas was an invaluable step toward getting involved in the community. Working for both the attorney general’s office and the Shawnee County District Attorney’s Office exposed me to many area professionals. It was a great experience but I hungered for more opportunities.

Washburn’s lunchtime presentations provided another great opportunity. I’ll admit I went for the food, but I stayed for the experience. Those presentations not only gave me the opportunity to get to know more local attorneys, but they also uncovered two more venues for student involvement in the “LLC” – the Kansas Bar Association and the Topeka Bar Association. These local bar organizations offer free membership to law students and immediate rewards for joining. Having been a member of one of the organizations I can attest to the their wonderful benefits, such as monthly newsletters, magazines, lunch-n-learns, social gatherings, access to databases, and my tangible symbol of being a part of the community – a membership card. Again, all free for law students!

At the beginning of my third year of law school, I was introduced to yet another chance to get involved with the LLC: the American Inns of Court. The Inns of Court is a huge organization with chapters throughout the country. Typically membership requires a fee, but through the generosity of the Honorable Sam A. Crow, it is free for a select number of third-year law students. My first meeting was intimidating. All I could imagine was a group of lawyers and judges who were less than thrilled to have a bunch of law students intruding. Once again, I was pleasantly surprised by their warmth and openness. I felt not like a student, but like one of them. Meeting once a month with local lawyers and judges has been a wonderful way to feel like I am a part of the community rather than just an observer.

Involvement in the “LLC” can start immediately in law school through the plethora of student organizations. These groups provide many opportunities to hear from local attorneys as well as activities that introduce students to different areas of the law and the tips on practicing in those areas.

I have touched on only a few of the many ways that a law student can become involved with the “LLC.” As an early and active member, I am sure of two things. First, there is no shortage of ways to get involved immediately. Second, you will be hard pressed to find a single person who is not willing to take the time to help you get involved and feel welcome. Getting involved locally has been an amazing experience. It has provided me education about the life of a lawyer and has also provided many good friends. If there is one piece of advice I can pass on to fellow or future law students, it is to seek out ways to dive into the “LLC” – beyond the kind you learned about in your business associations class.

About the Author

Brady Burdge is a third-year law student at Washburn University School of Law. He received his Bachelor of Science in criminal justice from Utah Valley University in 2008. Burdge is an intern for the Shawnee County District Attorney’s Office in Topeka. He may be reached at brady.burdge@washburn.edu.
Welcome Spring 2012 Admittees to the Kansas Bar

Alexander Aguilera
Genevra Wenonah Alberti
Courtney Jean Archdekin
Riley W. Baber
Katie Bray Barnett
Randall John Barron
Jonathan T. Beeman
Jordan Scott Benningfield
Nicholas Steven Billman
Joshua J. Boehm
Karrigan Shepherd Bork
Megan Jean Boyd
Mark Quentin Brinkworth
Jessie Ann Brotherton
Andrew Paul Campbell
Jane Marianne Campbell
Robert David Chisholm
Mark Allan Cole
Daniel J. Coughlin
Tracey Elizabeth Damon
Allison Ann Danna
Angela Renee Dudley
Maryam Safiyah Fakhraeen
Jane Ellen Francis
David Blaine Fye
Vincent James Garcia, Jr.
Elizabeth A. Gillespie
Richard Gavin Gunn
Rachel Elizabeth Hall
Clayton Samuel Harper
Austin B. Hayden
Ashley R. Heidrick
Christine Diane Herron
Joseph Edward Hershewe
Tiffany Anne Hetland
Nicholas Adam Hinrichs
Nicholas R. Hoffman
Joseph Glenn Hofflander
Patrick M. Hunt
Jack Thomas Hyde
Joseph Mark Jarvis
Milos Jekic
Courtney Suzanne Johnston
Lily Grace Jones
Timothy M. Kane
Jill Erin Kunshek
Evan M. Lange
Kristle Ashley Lee
Yvette Young Leonard
Paul McKie Lewis
Matthew Joseph Limoli
Carrie Mae Lindenberg
Christopher Logan
James Michael Luce II
Lucinda Housley Luetkemeyer
Daniel Robert Luppino
Rachelle Lynn
Landon Wade Magnusson
Kathleen Elizabeth Mannion
Joshua I. Marrone
Daniel Derek Martin
David L. McCain, Jr.
Ian Patrick McDonald
Monique Marie McElwee
Noah D. McGraw
Jessica Paige Meredith
Emmalee Michelle Miller
Whitney S. Miller
David C. Murdick
Brendan J. Murphy
Courtney Elizabeth Noll
Priscilla J. Orta-Wenner
Ty A. Patton
Tricia Patten Petek
Daniel Michael Porazzo
Denise Marie Portnoy
Jason Patrick Roach
Michael Abbott Rost
Alexis Kate Rothenberg
Lindsey Marie Russell
Adam L. Sales
Krystle Marie Scherling
Kimberly Jean Scheuerman
Heather Lynn Schrick
Jill Denise Sechser
Heather D. Sicks
Franklin Murray Siler
Christopher Philip Simpson
Joshua Warren Skles
Brandy Owens Snead
Matthew Taylor Swift
Todd Byron Thomason
Gregory J. Trum, Jr.
Krista Deann Turner
Marshall Joel Turvey
Ryan Shane VanFleet
Samantha Jo Wenger
Trent Howard Wetta
Katie Jo New Wheeler
Rachel Conrad Whitsitt
Ashley Lynn Wiechman
Jan Timothy Williams
Benjamin James Wilkins
Jaime L. Wilson
Amanda Leigh Yoder
Members in the News

Changing Positions
Tyler C. Hibler has joined Ogletree, Deakins, Nash, Smoak & Stewart P.C., Kansas City, Mo., as an associate.
Deena B. Jenab and Kimberly A. Jones have joined Seyfarth布拉门考 & Harris LLC, Kansas City, Mo., as members.
Jennifer R. Johnson has been promoted to member at Hinckle Law Firm LLC, Overland Park.
Stephen M. Johnson has joined Schlager Kinzer LLC, Olathe.
Alicia M. Kirkpatrick has joined Polsinelli Shughart P.C., Kansas City, Mo., as an associate.
Francis E. Meisenheimer has been appointed by Gov. Sam Brownback to the 30th District Court.
Kori C. Trussell has joined Kaufman & Eye Firm, Topeka.

Changing Locations
Jessica A. Gregory has started her own practice, Gregory Law Office LLC, 3111 Strong Ave., Kansas City, MO 66106.

Miscellaneous
The Douglas County Bar Association elected officers for 2012-13: Cheryl L. Denton, president; Jody Meyer, president-elect; Curtis G. Barnhill, secretary; Sarah E. Warner, treasurer; Anne B. Hall, YLS president; Leslie M. Miller, membership committee; Matthew B. Todd, continuing legal education; and John C. Chappell, webmaster.
Jeff Kennedy, Wichita, was re-elected as managing partner for a two-year term of Martin, Pringle, Oliver, Wallace & Bauer LLP and will also continue to serve on the 2012 Executive Committee along with Jeff C. Spahn, Stanford J. Smith Jr., and B. Scott Tschoody.

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.

Obituaries

Jennifer Arnett
Jennifer Arnett, 31, of Kansas City, died January 30. She was born May 24, 1980, to Karen Anselmi and Ray Raley in Harrison, Ark., and grew up in North Kansas City, where she graduated from NKHS High School in 1998. Arnett attended William Jewell College and the University of Kansas School of Law.

She was preceded in death by her grandparents, Wayne and Dotty Walton. She is survived by her father, Ray Raley, of O’Fallon, Mo.; mother, Karen Anselmi, of Merriam; brother, John Russell Gore; sisters; Mindy Ellington and Keri Ann Johnson; grandparents, Wallace and Mary Lou Raley; and special aunt, Sheila Krueger.

Robert C. Bates
Robert C. Bates, 89, of North Kansas City, Mo., died January 6 in Cameron, Mo. He was born May 1, 1922, in Excelsior Springs, Mo., to Leslie and Bessie Cauthorn Bates. He moved to North Kansas City in 1933, where he lived most of his life. He was a 1940 graduate of North Kansas City High School, attended the University of Missouri-Columbia, and was a 1950 graduate of the Kansas City School of Law. Bates served in the Air Force with Patton’s army during World War II from 1942-47 and the Korean Conflict from 1950-52.

Bates began his professional career in 1952 with Kansas City Title Insurance and retired in 1982 as executive vice president and general counsel for Chicago Title and Trust Co. He served as president of the North Kansas City School Board from 1956-64 and was a founding member of the Old Pike Country Club. Bates served on the original board of General Hospital, which became Truman Medical Center. In Chicago, he served as chairman of Hull House and following his retirement, he served as chairman of the International Visitors Council of Kansas City from 1983-90.

He was preceded in death by his wife, Claudia; his parents; and seven siblings, Leslie, Emily, Mary, Bill, Mildred, Anabelle, and Juliet. Survivors include his children, Jeff Bates, Cambridge, Mass., Greg Bates, Leawood, Sue Lowder, Mahopac, N.Y., and Tom Bates, Kansas City; 12 grandchildren; and seven great-grandchildren.

Vincent L. Bogart
Vincent L. Bogart, 89, of Wichita, died March 26. He was born June 28, 1922, on the family farm near Kirwin and graduated from Kirwin High School in 1939. In 1942, he enlisted in the Army Air Force cadets and was commissioned as a first lieutenant, single engine pilot. In 1944, he was assigned to the Aleutian Islands and decorated with the Asiatic Pacific Ribbon and Victory Medal before being transferred to Waycross, Ga., where he trained combat pilots.

In 1955, he graduated from Washburn University School of Law with his juris doctorate. After law school he joined the law firm of Jochems, Sargent, and Blaes in Wichita before starting his own firm in 1961. He ended his career in 2000 with the law firm of Klenda, Mitchell, Austerman, and Zuercher.

He joined the West Side Democratic Club in 1961, where he was elected precinct committee man. From 1957-59, he served as a representative in the Kansas legislature, and in 1960 he was elected president of the West Side Democratic Club and chairman for the Sedgwick County Democratic Committee. Bogart served on the Wichita City Commission from 1961-67 and as mayor from 1964-65. He also served as chairman of the state Democratic Platform Committee, was appointed to the Wichita State University Board of Trustees, and served as a legislative representative by Gov. Robert Docking.

Bogart served on the Kansas Board of Regents in 1969, and in 1972-74 and again in 1976-77, he served as the special assistant to the Kansas attorney general. He was a member of
Obituaries

local, state, and national bar associations; and was a member both the state and local trial lawyers associations.

Survivors include his wife, Judy; children, Candace Miller, Lee Bogart, Celeste Racette, and Cynthia Sandin; and seven grandchildren.

Donald E. Hill

Donald E. Hill, 61, of Wichita, died February 26. He was an attorney with the Adams Jones Law Firm.

He was preceded in death by his father, Lawrence Hill. Survivors include his wife, Carol; sons, Brain Hill and Brent Hill; grandson, Brody; mother, Evelyn Hill; sister, Marilyn Morian; and brother, Rodney Hill.

David A. Rameden

David A. Rameden, 55, of Overland Park, died February 26 near Boulder City, Nev. He was born January 20, 1957, in Minot, N.D., and then moved to Minnesota, graduating from Forest Lake High School in 1975. He graduated from the U.S. Military Academy at West Point in 1980 and served in the U.S. Army as an infantry officer. He later received a degree in operations research from Stanford University, returning to West Point as an associate math professor. Rameden ended his Army career in 1992 as an operations research and systems analyst at TRADOC Analysis Command at Fort Leavenworth. He graduated from the University of Missouri-Kansas City’s joint law school and master’s program in 1995 and then joined Shook, Hardy & Bacon LLP, where he became a partner.

Rameden was past president of the Kansas Association of Defense Counsel, a member of the Defense Research Institute, and past president of the Earl E. O’Connor American Inn of Court.

He is survived by his wife, Jaime Theobold; three sisters, Theresa Rameden, of League City, Texas, Mary Daly, of Hudson, Fla., and Karen Glonson, of Ewa Beach, Hawaii; and many nieces and nephews.

The Hon. Laurence Reynolds Smith

The Hon. Laurence Reynolds Smith, 97, of Kansas City, Mo., a retired judge of the Circuit Court of Jackson County, died January 18. He was born in Paola on November 14, 1914, to Jennie Alice Heinselman Smith and Levi Brown Smith.

Smith attended Park College and the University of Kansas, receiving a combined degree in liberal arts and law. He worked as a legal editor in Oklahoma and New York, and served as a sergeant in the Army from 1941-45. He then moved to Kansas City, Mo., where he lived for the rest of his life. He worked in a private law firm before becoming commissioner of the probate court in 1964 and the being appointed circuit court judge in Division 12 in Independence, Mo., in 1970. In 1978, Smith was elected presiding judge and following his retirement in 1984, he sat as a senior judge for the Jackson County Circuit Court. He also served as one of the original members of the Jackson County Ethics Commission, worked in the volunteer attorney project of the Kansas City Bar, was an ambassador at St. Joseph’s Medical Center, and taught courses at Shepherd’s Centers.

He was preceded in death by his first wife, Rosemary Diermann Smith; brother, Paul; sister, Frances; and infant sister, Faye. He is survived by his wife, Jan Neubert Smith; daughters, Sylvia Smith Anderson and Marcia Smith Pasqualini; three stepchildren; eight grandchildren; and one great-grandson.

William H. Stowell

William H. Stowell, 92, of Phillipsburg, died February 19 in Kensington. Born August 26, 1919, in Oberlin, he was the son of Samuel O. and Fern L. (Marvin) Stowell. After graduating from Oberlin High School, he attended Fort Hays State University for two years before transferring to the University of Kansas. He entered into KU’s law school before he was drafted into military service, where he spent more than three years in the Army during World War II.

After his honorable discharge, Stowell resumed law school and passed the bar in 1947. He and his wife, Doris Dixon, moved to Phillipsburg and started their own law practice that same year.

He was preceded in death by his parents and sisters, Merriam and Millie Esther. He is survived by his wife, Doris, of the home; daughters, Susan Bittner, of Long Beach, Calif., and Sarah Ruhlen, of Phoenix; and four grandchildren.

William A. Taylor III

William A. Taylor III, 66, of Winfield, died March 7. He was born August 1, 1945, in Winfield, the son of William A. and Suzanne (Martin) Taylor. He was raised and received his education in Winfield, graduating from Winfield High School in 1963. He attended Washburn University in 1968 and then graduated from Washburn University School of Law in 1971. Taylor served as Cowley County counselor for more than 37 years and was an attorney with the firm of Taylor Krusor & Soule LLP.

Taylor was preceded in death by his mother, Suzanne Martin Taylor. Survivors include in wife, Marilyn Taylor, of the home; his father, William A. Taylor Jr., of Winfield; son, Stephen Taylor, of Denver; daughter, Adriene Marks, of Overland Park; brother, Marty Taylor, of Colorado Springs, Colo.; sisters, Lexy Pfeifley, of Tuscon, Ariz., and Ze McDowell, of Philadelphia; and four grandchildren.
Spendthrift Trust Clauses and Kansas Divorces: Does a Settlor’s Intent Still Matter?

by

Calvin J. Karlin & Anna Smith

Endnotes begin on Page 22.
oes a spendthrift clause protect trust assets from property division or claims for maintenance or child support? Is a divorcée treated like any other creditor? Does public policy demand that the family be assured adequate resources despite a settlor’s ability to restrict the disposition of his or her own property?21 What is the effect of the Kansas legislature omitting the sections of the Uniform Trust Code (UTC) regarding this from the Kansas Uniform Trust Code (Kansas UTC)? This article will provide background and analysis of these issues.

This article addresses only Kansas law. Consequently, there is no discussion of offshore trusts or domestic asset protection trusts in those states that protect trust settlers from creditor claims.3 Also beyond the scope of this article are the exemption trusts in those states that protect trust settlors from creditors.18

I. Background

A. K.S.A. 58a-502

The Kansas UTC recognizes the validity of a spendthrift provision in a trust.4 Stating that a beneficiary’s interest is held subject to a “spendthrift trust” or using words of similar import “is sufficient to restrain both voluntary and involuntary transfer of the beneficiary’s interest.”5 A spendthrift provision thus not only prevents a trust beneficiary from withdrawing or transferring an interest in the trust but also precludes a creditor or assignee of the beneficiary from reaching trust property or distributions prior to receipt by the beneficiary.6 Additionally, a creditor cannot compel a distribution that is subject to the trustee’s discretion.7 That is so “whether or not a trust contains a spendthrift provision.”8 That means that with discretionary trusts, the nature of the beneficiary’s interest is considered more determinative than the settlor’s intent to restrain alienation. With a spendthrift trust, the beneficiary may have an absolute right to distributions of income, principal, or both, whereas the beneficiary of a discretionary trust does not have a right to distribution until the trustee exercises discretion.9 Consequently, courts are more likely to allow claims for spousal maintenance and child support against spendthrift trusts than against discretionary trusts.10

B. In re Watts

A divorced spouse seeking alimony (now called “maintenance”)11 could not reach the corpus of a discretionary testamentary trust according to the Kansas Supreme Court in In re Watts.12 The Court distinguished a discretionary trust from a spendthrift trust.13 In Watts, the beneficiary could not compel distributions from the trust, which were subject to the trustee’s determination that the beneficiary had “sufficient business judgment” to handle them.14 That the Watts decision involved the trust’s principal (corpus)15 should not preclude its application to a divorcée’s claim against discretionary income payments from a trust, as the Kansas Supreme Court quoted the Restatement provision that recognized that a transferee or creditor of the beneficiary could not overcome the trustee’s discretion and compel distributions of income or principal.16 Consequently, no creditor, including a divorced spouse, should be able to compel a distribution of principal or income from a discretionary trust in Kansas.

C. Restatement (Third) of Trusts

The Restatement (Third) of Trusts firmly takes the position that a beneficiary’s children, spouse, or former spouse can reach his or her beneficial interest in a spendthrift trust to satisfy an enforceable claim against the beneficiary for support and maintenance.17 That is based upon a public policy of not permitting the beneficiary to enjoy benefits while neglecting the support of a dependant.18

The UTC takes the same position as the Restatement.19 Both reflect the majority rule.20 Twenty-four states have adopted the UTC.21 However, most states have modified the sections that relate to spousal attachment (Sections 503 and 504) to conform to their own common law.22

D. The Law Outside Kansas

The United States Supreme Court has noted “the basic principle that a beneficiary's interest in a spendthrift trust ... can be reached in the context of divorce and separation.”23 Considerable case law from many states supports an exception allowing a child or dependent spouse to reach the accrued trust income and trust income to accrue in the future.24 A few of those courts have reached that decision only if the creator of the trust intended that the dependents be supported out of trust income.25 On the other hand, there are some states that have refused to allow a spouse to reach the trust assets when there is a spendthrift clause.26 The Illinois Supreme Court and the Alabama Court of Appeals have created a hybrid rule, in which the spendthrift interest can be reached for child support but not alimony.27

E. Kansas Uniform Trust Code

When the Kansas legislature adopted the Kansas UTC, it omitted Sections 503 and 504 of the uniform act. Sections 503 and 504 address the effect of spendthrift provisions and discretionary trusts on claims for child support and spousal maintenance. Section 503(b) of the UTC states that, “A spendthrift provision is unenforceable against ... a beneficiary’s child, spouse, or former spouse who has a judgment or court order against the beneficiary for support or maintenance.”28 Such claimant “may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary.”29 The comment to that section notes that distributions subject to attachment include distributions required by the express terms of the trust, such as mandatory payments of income, and distributions that the trustee has otherwise decided to make, such as through the exercise of discretion.30 However, Section 503(b) does not purport to authorize a spouse or child claimant to compel a distribution from the trust. Furthermore, Section 503(b) is limited to a court order for support or maintenance and thus does not apply to the division of property in a beneficiary’s divorce.31

Section 504 of the UTC creates an exception to the general rule that creditors may not reach a beneficiary’s interest in a discretionary trust, but only for a creditor who is a spouse, former spouse, or child of the beneficiary with a judgment or court order for support or maintenance and the trustee has either not complied with a standard for distribution or has abused the trustee’s discretion.32 That section applies regard-
less of whether the trust contains express provisions to guide the trustee in exercising its discretion. However, the UTC provides little help on what a spouse or child claimant would have to show to establish an abuse of discretion or failure to comply with a standard for distribution, an especially difficult task when the trust provides no standards for distributions. If the claimant can establish the trustee’s abuse or failure, the comment to Section 504 notes that the court must direct the trustee to pay the claimant an equitable amount under the circumstances but not in excess of the amount the trustee was otherwise required to distribute to the beneficiary, keeping in mind that the family court has already considered the respective needs and assets of the family in setting the support award.

The impact of the Kansas legislature’s omission from the Kansas UTC of UTC Sections 503 and 504 on a divorced spouse’s ability to attach a beneficiary’s interest in a spendthrift trust is not entirely clear. The Kansas Judicial Council supported adoption of UTC Sections 503 and 504, but the Kansas Bar Association objected.

Before the enactment of the Kansas UTC, the Kansas Supreme Court, in *State ex rel. Secretary of SRS v. Jackson*, followed the Second Restatement of Trusts’ spendthrift exception for “the United States or a state to satisfy a claim against the beneficiary,” which is also a part of UTC Section 503. The Jackson Court quoted all of the Restatement’s exceptions to spendthrift provisions, which may indicate that it would have approved the other exceptions, including the spousal exception, had those matters been before it. In addition, the Kansas Judicial Council has suggested that the Jackson Court approved all of the exceptions (including the spousal exception, although it was not actually before the Court).

The Kansas Judicial Council concluded that UTC Section 504(c) would modify existing Kansas law on discretionary trusts as set forth in *Watts v. McKay*. Instead of adopting UTC Section 504, the Kansas legislature left it out, but added a provision to Section 502 providing:

Whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee’s discretion even if: (1) the discretion is expressed in the form of a standard for distribution; or (2) the trustee has abused the discretion.

In *Watts*, the Kansas Supreme Court had noted an existing conflict of authority on whether a former spouse could reach the interest of a beneficiary of a spendthrift trust to satisfy a judgment for alimony. However, because the Watts court concluded that the trust before it was discretionary, it did not reach the spendthrift question. The Watts opinion approvingly cited the Restatement as to discretionary trusts, however.

Did the Kansas legislature’s intentional omission of UTC Sections 503 and 504 signify a rejection of the Restatement principles set forth therein? Does that mean that a spousal creditor cannot attach trust distributions even after the beneficiary receives them? It clearly would have been allowed if Section 503 had been adopted, but its omission may suggest that it is not the legislature’s intent.

II. Trust Parties

A. Settlor

Under Kansas law, a spendthrift provision does not protect the property of a revocable trust from claims of the settlor’s creditors. Kansas law also provides that with respect to an irrevocable trust, a creditor can reach the maximum amount that can be distributed to or for the settlor’s benefit. The Kansas Statute of Frauds also provides that “All gifts and conveyances of goods and chattels, made in trust to the use of the person or persons making the same, shall to the full extent of both the corpus and income made in trust to such use, be void and of no effect, regardless of motive, as to all past, present or future creditors ...” Based upon the “full extent” and “void and of no effect” language, that long-standing statutory provision appears to provide more complete relief to a creditor as to a self-settled irrevocable trust than that of the Kansas UTC.

B. Beneficiary with Power of Withdrawal

The Kansas UTC treats a beneficiary with a power of withdrawal the same as the settlor of a revocable trust to the extent of the property subject to the power.

C. Trustee

A trustee getting divorced does not have trust property exposed to spousal claims under the Kansas UTC. Unless the trustee is also the settlor or a beneficiary, all he or she has is legal title without a beneficial interest.
D. Distribuee

In dicta, the Kansas Supreme Court (in a prior appeal of Watts) stated that, “It may be conceded that if the trust created is a spendthrift trust many cases may be found holding that the income may be subjected to claims for maintenance of the wife or child, and some that it may be subjected to the satisfaction of alimony.”54 In the absence of any subsequent case law on the issue, that suggests that the Court may follow the Restatement and recognize an exception for spousal maintenance and child support claims at least as to income to be distributed to a trust beneficiary.

Mandatory trust distributions are available to pay spousal claims (as well as other creditors and assignees) regardless of any spendthrift provision.55 That includes overdue mandatory distributions that are not made within a reasonable time.56

III. Remedies

How does a divorcée enforce rights against trust distributions? Presumably the divorce court can compel the other party to exercise his or her rights as settlor or beneficiary and exercise its contempt powers for failure to do so.57 Thus, spouses and children can collect overdue maintenance and support by attachment, garnishment, and execution, the same as any other judgment creditor.58 In addition, they may pursue all available remedies against a trustee who violates a duty owed to a beneficiary.59

As to the trustee, while it has been recognized in some states that a court having the power to apply income of a spendthrift or support trust to satisfy an obligation for maintenance or support also must have the power to order the trustee to make payments,60 it is not the case in Kansas. In successive appellate decisions in the Watts case, the Kansas Supreme Court first held that a court, in an action for alimony without a divorce, cannot order the trustee to dispose of the corpus of a trust unless the trustee is a party to the action.61 Four years later, the Court noted that a Kansas court has no statutory authority to join a trustee as a defendant in a divorce case.62

Subsequently, however, the Kansas Supreme Court disavowed Watts. In Cadwell v. Cadwell,63 the Court allowed a third party who claimed ownership of property to intervene in a divorce action when the wife claimed that the divorcing couple owned the same property. The Supreme Court indicated that Watts had not addressed this issue and was “not intended to be, and is not, a binding adjudication of a plaintiff’s right to join a third party as a defendant or of a third party’s right to intervene in a divorce action for the sole purpose of obtaining a determination of property rights.”64 Although the Supreme Court has generally indicated that a “husband and wife are the only proper parties to an action for divorce,”65 it has also stated:

[T]he right of a wife to name as defendants third parties to whom the husband has conveyed his property in fraud of her rights, or third parties having, or claiming to have an interest in property involved in a divorce action, is universally accepted as the prevailing rule on the ground that the court, in the exercise of its duty to determine a reasonable amount of alimony to be awarded the plaintiff, must determine whether the property is in fact owned by the husband or by the third parties defendant.66

Another question is whether the court can and should consider the value of trust funds in dividing property in a divorce.67 That would seem to be appropriate only to the extent that the beneficiary had a clear right to receive it.68

IV. Summary

An obligation to pay maintenance or support differs from ordinary debts.69 It is subject to modification for changed circumstances.70 It ceases to be effective upon the death of either party.71 It can be enforced by contempt proceedings.72 Maintenance and support obligations cannot be attached or garnished by judgment creditors,73 nor are they dischargeable in bankruptcy.74

Though statutory and case law continues to evolve in Kansas and elsewhere, the paramount public policy in a divorce setting seems to dictate that one party not starve while another lives in comfort. On the other hand, if the trust beneficiary cannot control distributions from the trust, then his or her children and former spouse should not be able to do so either.

In addition, shouldn’t the interests of other trust beneficiaries also be considered? Why should the current beneficiary’s family benefit to the detriment of subsequent vested or contingent trust beneficiaries? That is certainly a reason to limit assignment in a divorce context to distributions actually made or required.
Must a settlor specify in the trust that a beneficiary’s ex-spouse is not to receive the beneficiary’s share? Isn’t that an intent we all presume? When the Kansas Supreme Court first approved the doctrine of “spendthrift trusts” in 1915 it stated that, “It deprives the creditor of no security to which he has the right to look, and it recognizes the right which the owner of property has to dispose of it, either by an absolute gift or by a conditional one ...” Creation of exceptions to spendthrift clauses undermines the ability of a settlor to have his or her intent fulfilled. Kansas courts have consistently recognized that the intent of a testator or settlor is paramount. This was most specifically addressed in the spendthrift trust context in In re Estate of Sowers. Courts and legislatures should thus be reluctant to use public policy to subvert personal decisions as to one’s private property.

So what is a drafts-person to do? The best approach is to draft trust distributions as discretionary and to provide to the trustee specific guidance regarding such discretionary distributions. Including co-beneficiaries or successor beneficiaries who may be affected would seem to be helpful.

An attorney engaged in estate planning or family law will need to consider these issues in the context of each client’s situation. It will not be easy, but our work rarely is.

ENDNOTES
1. See Nichols v. Eaton, 91 U.S. 716, 727, 23 L. Ed. 254, 257 (1875) (observing that a spendthrift provision supports owner’s right to dispose of property as he or she desires). A spendthrift clause is designed to protect the beneficiary from himself and his creditors, 76 Am. Jur. 2d, Trusts § 94 (2005).
2. An excellent summary as to offshore trusts can be found at Christopher M. Reimer, Asset Protection: Then and Now, 150 Tkr. & Est., Aug. 1, 2011, at 58, 60-61.
3. See John E. Sullivan III et al., Fraudulent Transfer Claims, Tr. & Est. Dec. 1, 2011, p. 43, 43-49, for a discussion of the Alaska statute and the recent court rulings in regard thereto. Other states permitting self-settled spendthrift trusts include Delaware, Hawaii, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. All but one of these states (Oklahoma) require the trust to be irrevocable. Reimer, supra note 2, at 61.
4. K.S.A. 58a-502(a). K.S.A. 2010 Supp. 58a-103(15) defines a spendthrift provision as “a term of a trust which restrains either voluntary or involuntary transfer of a beneficiary’s interest.” The Kansas legislature specifically rejected the UTC definition’s requirement that the trust term restrain “both voluntary and involuntary transfer of a beneficiary’s interest,” UTC 103(16) (emphasis added). The UTC’s premise is that if a beneficiary can sell, encumber, or otherwise transfer the interest, then the beneficiary’s creditors should be able to reach it. By using the disjunctive “or,” Kansas accepts either restriction (“voluntary” or “involuntary”) as a spendthrift provision. See David M. English, The Kansas Uniform Trust Code, 51 U. Kan. L. Rev. 311, 333-34 (2003). See also C. Dessin, Feed a Trust and Starve a Child: The Effectiveness of Trust Protective Techniques Against Claims for Support and Alimony, 10 Georgia St. L. Rev. 691 (1994), for a review of case law as to spendthrift and discretionary terms in a divorce setting. Recognition of spendthrift provisions is consistent with longstanding Kansas case law. Watts v. McKay, 160 Kan. 377, 383, 162 P.2d 82, 87 (1945); Everett v. Haskins, 102 Kan. 546, 549, 171 P. 632, 633 (1918); Sherman v. Havens, 94 Kan. 654, 659, 146 P. 1030, 1032 (1915).
5. K.S.A. 58a-502(b). This seems to expand the ability to infer a spendthrift provision beyond the guidance in In re Estate of Sowers, 1 Kan. App. 2d 675, 680, 574 P.2d 224, 228 (1977) (noting that a requisite to the creation of a spendthrift trust is the settlor’s clear manifestation of intent to create the trust with spendthrift effect). But see Everett, 102 Kan. 546, 171 P. 632 (1918) (“It is not necessary that an instrument creating spendthrift trust should contain an express declaration that the interest ... shall be beyond the reach of his creditors ...” (quoting Am. & Eng. Encyclopaedia of Law 141, 142 (David S. Garland et al., eds. 2d. ed. 1896))).
6. K.S.A. 58a-502(c).
7. K.S.A. 58a-502(d). This is so even if (i) the distribution is to be based upon a standard for distribution or (ii) the trustee has abused the discretion. Id. A 2005 amendment to the UTC that Kansas adopted in 2006 excludes from the K.S.A. 58a-506 definition of a “mandatory distribution” those with a “support or other standard” that the trustee “may” or “shall” follow. See UNIF. TRUST CODE § 506 (amended 2005), 7C U.L.A. 541 (2006); K.S.A. 2010 Supp. 58a-503(a). Consequently, creditors, including divorced spouses and their children, cannot compel distributions from such trusts.
8. Id.
9. Dessin, supra note 4, at 707-08.
10. Dessin, supra note 4, at 707.
13. Id. at 384, 385, 162 P.2d at 87. In Wilcox v. Gentry, 18 Kan. App. 2d 356, 853 P.2d 74 (1993), rev’d, 254 Kan. 411, 867 P.2d 281 (1994), the Court of Appeals considered a discretionary trust that did not contain a spendthrift provision and held that neither the beneficiary nor a creditor of the beneficiary could compel the trustee to distribute income or principal to the beneficiary or a creditor and that the beneficiary had no vested right to a distribution until a disbursement was made. Id. at 360, 853 P.2d at 78.
14. Watts, 160 Kan. at 378, 385, 162 P.2d at 84, 88. See Myers v. Kan. Dept. of SRS, 254 Kan. 467, 476-78, 886 P.2d 1052, 1058-59 (1994), which treats a trust requiring that the trustee “shall ... pay over so much or all of the net income and principal to my son as my trustee deems advisable for his care, support, maintenance, emergencies, and welfare” as a discretionary trust from which the beneficiary or a creditor could only require the trustee to distribute funds if the trustee abused its discretion by acting arbitrarily, dishonestly, or improperly.
16. Id. at 384, 87.
17. RESTATEMENT (THIRD) OF TRUSTS § 59 (2003). Both prior editions

About the Authors

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of the Restatement also recognized those exceptions to the general effect of a spendthrift provision. Restatement (Second) of Trusts § 157 (1959); Restatement (First) of Trusts § 152 (1935).

18. Restatement (Third) of Trusts § 59, cmt. b. Some courts state that support for a spouse or child is a common-law obligation that does not establish a debt. Keller v. Keller, 284 Ill. App. 198, 202-06, 1 N.E.2d 773, 776 (Ill. App. Ct. 1936); Marsh v. Scott, N.J. Super. 240, 248, 63 A.2d 275, 279 (N.J. Super. Ct. Ch. Div. 1949). The Restatement does not question that conclusion (as did Section 157 of the prior Restatement (Second of Trusts) by stating that public policy (not the absence of a debtor-creditor relationship) removes support obligations from the effect of a spendthrift provision. It is not due to an inability to construe a spendthrift clause as intentionally excluding the beneficiary's dependents. Domestic support obligations are also not dischargeable in bankruptcy under 11 U.S.C. § 523(a)(5).


22. See Millard, supra note 20, at 61-64 (detailing the changes to UTC Sections 503 and 504 that each state has made). Those changes include omitting the sections entirely, omitting certain subsections, replacing the text to say there are no exception creditors, omitting children and spouses as exception creditors, allowing former but not current spouses as exception creditors, retaining the exception for only children's claims, limiting the exception to trusts allowing distributions for the beneficiary's support or providing mandatory distributions, limiting the exception to those court orders that expressly specify an amount attributable to the most basic needs, allowing children to reach the trust principal, excluding the exception from applying to special needs trusts, and allowing the settlor to explicitly exclude the beneficiary's child or spouse from benefitting from the trust, and creating a “wholly discretionary trust” unreachable by any creditors. Id.

23. Boggs v. Boggs, 520 U.S. 833, 850, 117 S. Ct. 1754, 1765, 138 L.Ed. 2d 45, 60 (1997); see also Ridgway v. Ridgway, 454 U.S. 46, 74, 102 S.Ct. 49, 64, 70 L.Ed. 2d 39, 60 (1981) (“[I]t is widely held, however, that even where such trusts are generally valid, the interest of the beneficiary as a spendthrift clause as intentionally excluding the beneficiary's dependents. Domestic support obligations are also not dischargeable in bankruptcy under 11 U.S.C. § 523(a)(5).”).


standards for distribution, and might even resign as trustee, for creditor protection purposes. See also K.S.A. 59-1703; Kline v. Orebaugh, 214 Kan. 207, 519 P.2d 691 (1974). Property in which the trustee holds legal title as trustee is also not part of a trustee’s bankruptcy estate. 11 U.S.C. § 541(d).


55. K.S.A. 2010 Supp. 58a-506(b). Conversely, stated, the rights of one spouse to collect from a trust for the other spouse should not be greater than the rights of the beneficiary to receive distributions.


56. K.S.A. 2010 Supp. 58a-506. The UTC does not define what is a “reasonable time” to make a distribution. Absent a spendthrift provision, payments made by a trustee to a beneficiary are subject to creditor claims. K.S.A. 2010 Supp. 58a-501. See also Wilcox, 254 Kan. at 413-16, 867 P.2d at 283-285.


58. K.S.A. 2010 Supp. 58a-506. The UTC does not define what is a “reasonable time” to make a distribution. Absent a spendthrift provision, payments made by a trustee to a beneficiary are subject to creditor claims. K.S.A. 2010 Supp. 58a-501. See also Wilcox, 254 Kan. at 413-16, 867 P.2d at 283-285.

59. See K.S.A. 58a-1001.

60. See supra note 24, § 8(a).


62. The Supreme Court indicated that a wife seeking support for herself and her child should first ask the trustee to pay her a portion of the trust income, and if the trustee refuses, should petition the court to order payments in the trust administration proceedings. Watts v. Watts, 158 Kan. 59, 64, 145 P.2d 128, 133 (1944).

63. 162 Kan. 552, 783 P.2d 122, 125 (1989). The UTC provides that a court order attaching present or future distributions is higher, however. 15 U.S.C. § 1673; The maximum amount subject to wage garnishment is higher, however. 15 U.S.C. § 1673; The UTC provides that a court order attaching present or future distributions is higher, however. 15 U.S.C. § 1673; The maximum amount subject to wage garnishment is higher, however. 15 U.S.C. § 1673; The UTC provides that a court order attaching present or future distributions is higher, however. 15 U.S.C. § 1673; The maximum amount subject to wage garnishment is higher, however. 15 U.S.C. § 1673; The UTC provides that a court order attaching present or future distributions is higher, however. 15 U.S.C. § 1673; The maximum amount subject to wage garnishment is higher, however. 15 U.S.C. § 1673; The UTC provides that a court order attaching present or future distributions is higher, however. 15 U.S.C. § 1673; The maximum amount subject to wage garnishment is higher, however. 15 U.S.C. § 1673.
tracts of land, which made the federal estate a trust, but vested remainder interests in two did not involve McCain mistaken, however, as that party controls the Kansas approach to trust valuation. That is considered to be on the economic ledger sheet recognized “in other contexts that an asset is properly (2010), the New Jersey Superior Court recog- discretionary) distributee. In that party controls the settlor or a mandatory (not beneficiary is the settlor or a mandatory (not edent as to valuing trust interests (except per- income stream might be used for spousal main- tenance or child support purposes.” See also Annotation, Divorce Property Distri- bution - Treatment and Method of Valuation of Future Interest in Real Estate or Trust Property Not Realized During Marriage, 62 A.L.R. 4th 107 (1988). 68. That is the case, for example, when the beneficiary is the settlor or a mandatory (not discretionary) distributee. In Tannen v. Tannen, 416 N.J. Super. 248, 263, 3 A.3d 1229, 1238 (2010), the New Jersey Superior Court recog- nized “in other contexts that an asset is properly considered to be on the economic ledger sheet of one divorcing party if that party controls the asset.” The Tannen court cited Mey v. Mey, 79 N.J. 121, 125, 398 A.2d 88, 89 (1979) for its holding that a husband’s interest in trust principal was available for equitable distribution purposes only when “he acquired unimpaired control and totally free use and enjoyment.” Tannen, 416 N.J. Super. at 264, 3 A.3d at 1238. The Tannen court also cited cases from Colorado and Iowa. Id. at 267, 1240. In In re Marriage of Jones, 812 P.2d 1152, 1156-57 (Colo. 1991), the Colorado Supreme Court held that a wife, who was beneficiary of a discretionary sup- port trust, had no current enforceable right to compel distribution and therefore it could not consider the trust an asset subject to equitable distribution. In In re Marriage of Rhinehart, 704 N.W.2d 677, 681 (Iowa 2005), the court held that it could not consider as a current source of financial support, which would alleviate her need for alimony, undistributed trust income to which the wife had no current right. The Tannen court indicated that, “We have come across no reported case that considered § 50 of the Restatement (Third) of Trusts in the context of recognizing a beneficiary’s enforce- able interest to trust income or corpus for pur-poses of alimony, child support, or equitable distribution.” 416 N.J. Super. at 272, 3 A.3d at 1243.

The New Jersey Superior Court held that it was error for the trial judge to order the divorce case plaintiff to file an amended complaint naming the trusts as third-party defendants because the court could not compel trust disbursements to defendant (so there was no rea- son for the trusts to be parties to the divorce litigation). Id. at 273, 1244. See also Cross, supra note 24. 69. Although some commentators and judge- es have indicated that family members differ from ordinary creditors, who have only them- selves to blame if they extend credit without de-termining the limitation on available resources due to a spendthrift clause, it actually seems that a spouse is more like a lender (who has a choice) and that children are similar to involuntary tort victims (who do not have a choice). See Vitullo, supra note 46, which proposes extending spendthrift clause exceptions to involuntary tort creditors.

In Garretson v. Garretson, 306 A.2d 737 (Del. Ch. 1973), the court rejected the suggestion that a payee under a separation agreement becomes a creditor.


72. See supra note 57.
73. K.S.A. 60-2308.
75. See Schwager v. Schwager, 109 F.2d 754 (7th Cir. 1940), in which a will stated that upon notice of an attempt to reach the beneficiary’s interest, the trustees were to apply the income only to the beneficiary and his dependents but specifically excluding his ex-wife and any of his children by her. The public policy approach set forth in Section 59 of Restatement (Third) of Trusts would presumably override such a clear expression of a settlor’s intent as that in Schwager. In the frequently cited case of In re Moore- head’s Estate, 289 Pa. 542, 551, 137 A. 802, 806 (1927), the court stated that an interpretation to exclude support for the wife would be “in direct antagonism to every recognized claim of morality and to every purpose of public policy.” See Scott and Ascher on Trusts § 15.5.1 for split of authority nationally regarding recognition of settlor’s intent versus public policy.

In a non-divorce situation, the Kansas Su- preme Court rejected public policy as a reason to keep intact a devise of real estate by a testa- tor’s will that clearly provided for a forfeiture if the devisee had any creditor attempting to collect against the property. Hinshaw v. Wright, 124 Kan. 792, 794, 262 P. 601, 603 (1928).

The ability to specify that certain creditors should not be permitted to take trust assets has an analogy in special needs trusts (whereby government resources are not to be displaced by trust resources).

77. The relevant Latin maxim of “Cujus est dare, ejus est dispone” translates to “whose it is to give, his it is to dispose.” 78. 1 Kan. App. 2d 675, 680, 574 P.2d 224, 228 (1977).
79. Kansas courts should avoid the tempta- tion to consider the historical record of pay- ments in determining the need (or other discre- tionary standard) for payments as was suggested in Tannen v. Tannen, 416 N.J. Super. 248, 278, 3 A.3d 1229, 1246 (2010). The Tannen court stated that the trial judge “should not turn a blind eye to this reality. To do so would clearly result in a windfall to defendant and be entirely inequitable to plaintiff.” Id. The authors of this article maintain that such a “blind eye” is re- quired to fulfill the testator’s or settlor’s intent as to his or her own property. When a creditor enters the scene, the circumstances applicable to prior distributions change, and a blind eye cannot be turned to the testator’s or settlor’s in...
tent. Otherwise, it will only open the door in an unpredictable manner to established Kansas Supreme Court precedent as in the Watts v. McKay case.

80. E.g., “The trustee shall also consider whether distributions the trustee makes will benefit the intended beneficiary or will instead benefit a creditor of the intended beneficiary with no apparent benefit to the beneficiary in determining whether a distribution is appropriate.” There are an infinite number of permutations of such a provision. They may include only certain beneficiaries, certain creditors, certain types of distributions, (income, principal, specified amounts, or percentages, etc.). See Simpson v. Kan. Dept. of SRS, 21 Kan. App. 2d 680, 684, 906 P.2d 174, 178 (1995), rev. denied, 259 Kan. 928 (1996), where a trust provided “absolute discretion” to make unequal payments among a group (or even exclude some).

K.S.A. 58a-814 would appear to support a trustee being allowed to exercise such specified discretion to adjust distributions due to a creditor being the actual recipient. K.S.A. 58a-814 provides that, “the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries.” This is consistent with the Simpson decision, which stated as follows: “Where the trust instrument establishes a discretionary trust as defined by Restatement (Second) of Trusts § 155 (1) and comment (b) (1957), a beneficiary may not be required to take legal action to force the trustee to make distributions because the probability of such an action being successful is minimal, at best.” Simpson, 21 Kan. App. 2d, 906 P.2d at Syl.

2. The Simpson court also rejected the SRS’s position that the beneficiary had to seek the trustee’s removal. Id. at 698-99, 179-180. Discretionary trusts “are normally not subject to control by the beneficiary, the creditors of a beneficiary, or a trial court.” Id. at 688, 181 (citing Myers v. Kan. Dept. of SRS, 254 Kan. 467, 866 P.2d 1052 (1994); Wilcox v. Gentry, 254 Kan. 411, 867 P.2d 281 (1994); State ex rel. Secretary of SRS v. Jackson, 249 Kan. 635, 822 P.2d 1033 (1991)). The trustee’s exercise of discretion should not be disturbed absent bad faith. Jennings v. Murdock, 220 Kan. 182, 201, 553 P.2d 846, 862-63 (1976).

The marital and trust laws of every state that may be applicable to a particular divorcée at some future time are impossible to anticipate. Although the Restatement (Third) of Trusts and the UTC are designed to reflect generally the applicable law, they too are evolving and far from being universally accepted.

A trust settlor might try to require a beneficiary to maintain residence in a particular state, but the laws of that state might change and there could be constitutional challenges to such a restriction. Michael Diehl, The Trust in Marital Law: Divisibility of a Beneficiary Spouse’s Interest on Divorce, 64 Tex. L. Rev. 1301, 1356-57 (1986). Providing for distributions directly to third parties (e.g., medical providers, educational institutions) for the benefit of a beneficiary (so as to bypass distributions to the beneficiary) apparently would not be helpful in Kansas. See Wilcox v. Gentry, 18 Kan. App. 2d at 360-61, 853 P.2d 74, 77 (1993), rev’d, 254 Kan. 411, 867 P.2d 281 (1994) for the Kansas Supreme Court’s rejection of such an approach.
On the other hand, a defendant facilitates a crime, thus qualifying for a kidnapping charge, when the movement of a victim makes detection less likely. When a defendant moves victims into small structures, for example, the movement constitutes kidnapping because the resulting confinement helps avoid detection. See Alires (combine); Nelson (refrigerator). Similarly, it is sufficient for kidnapping when a defendant moves a victim away from a public area to a less visible place. See Buggs; Alires.

About the Author

Ellen Byers holds a Juris Doctor from Georgetown University Law Center and an Master of Fine Arts from the Iowa Writers’ Workshop. She practiced law as a trial attorney at the Department of Justice and as an assistant U.S. attorney in San Antonio before beginning a career as a law professor. She first taught at St. Mary’s University School of Law and currently teaches in the Legal Analysis, Research and Writing Program at Washburn University School of Law.

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ORDER

RULES RELATING TO DISTRICT COURTS

Supreme Court Rule 804 is hereby amended to read as follows, effective date of this order.

RULE 115A: LIMITED REPRESENTATION

The new Supreme Court Rule 115A is hereby adopted, effective the date of this order.

BY ORDER OF THE COURT this 15th day of March, 2012.

FOR THE COURT

Lawton R. Nuss
Chief Justice

(a) Written Consent Required. An attorney may limit the scope of representation if the limitation is reasonable under the circumstances, and the client gives informed consent, confirmed in writing.

(b) Limited Appearance. An attorney, pursuant to this rule, may make a limited appearance on behalf of an otherwise unrepresented party.

(1) Notice of Limited Entry of Appearance Required. An attorney making a limited appearance must file a notice of limited entry of appearance. The notice is sufficient if it is on the judicial council form. The notice must:

(A) state precisely the court proceeding to which the limited appearance pertains; and

(B) if the appearance does not extend to all issues to be considered at proceeding, identify the specific issues covered by the appearance.

(2) Scope and Number of Limited Appearances. An attorney may file a notice of limited entry of appearance for one or more court proceedings in a case. At any time—including during a proceeding—an attorney may, with the client's consent, file a new notice of limited entry of appearance.

(3) A Paper Filed In a Limited Appearance.

(A) Statement Required on Signature Page. A pleading, motion, or other paper filed by an attorney making a limited appearance must state in bold type on the signature page of the document: "Attorney for [party] under limited entry of appearance dated ____.”

(B) Filing Outside Scope of Limited Appearance Constitutes General Appearance. If an attorney files a pleading, motion, or other paper that is outside the scope of a limited appearance without filing a new notice of limited entry of appearance, the attorney will be deemed to have entered a general appearance in the case.

(4) Service. When service is required or permitted to be made on a party represented by an attorney making a limited appearance under this rule:

(A) for all matters within the scope of the limited appearance, service must be made on both the attorney and the party;

(B) the party must be served at the party's address stated in the notice of limited entry of appearance, but if the party's address has been made confidential by court order or rule, service on the party must be made in accordance with the court order or rule; and

(C) service on the attorney is not required for matters outside the scope of the limited appearance.

(5) Restrictions on Limited Appearances.

(A) An attorney may not enter a limited appearance for the sole purpose of making evidentiary objections.
(B) An attorney making a limited appearance and the litigant for whom the attorney appears may not argue on the same legal issues during the period of the limited appearance.

(6) Withdrawal.

(A) On Completion of Limited Appearance. On completion of a limited appearance—including completion and filing of an order or journal entry resolving the court proceeding for which the attorney was retained—an attorney must withdraw by filing a notice of withdrawal of limited appearance and serving the notice on the client and parties. The notice must state that the withdrawal is effective unless an objection is filed not later than 14 days after the notice is filed. The notice is sufficient if it is on the judicial council form and—unless otherwise provided by law—must include the client’s name, address, and telephone number. The attorney must file a notice of withdrawal of limited entry of appearance for each court proceeding for which the attorney has filed a notice of limited appearance. The court may impose sanctions for failure to file a notice of withdrawal under this paragraph.

(B) Before Completion of Limited Appearance. If an attorney wishes to withdraw from a limited appearance before it is completed—including before completion and filing of an order or journal entry documenting the court proceeding for which the attorney was retained—the attorney must comply with Rule 117.

(c) Document Preparation Assistance. An attorney may help a party prepare a pleading, motion, or other paper to be signed and filed in court by the client. The following rules apply:

1. The attorney or party preparing a pleading, motion, or other paper under this rule must insert at the bottom of the paper the notation “prepared with assistance of a Kansas licensed attorney”;
2. The attorney is not required to sign the paper; and
3. The filing of a pleading, motion, or other paper prepared under this rule does not constitute an appearance by the preparing attorney.

Comment:
Making a legal form available to a self-represented litigant to complete for themselves, whether in person, by mail, electronically, or through the Internet (at no cost), is not considered document preparation assistance and is not covered by this rule.

[CAPTION]

NOTICE OF LIMITED ENTRY OF APPEARANCE

Pursuant to Supreme Court Rule 115A, the undersigned attorney hereby enters a limited appearance on (date) for (name of client), (petitioner/respondent/plaintiff/defendant) in this case.

1. This attorney, (name) and the (petitioner/respondent/plaintiff/defendant) have executed a written agreement whereby the attorney will provide limited representation to the (petitioner/respondent/plaintiff/defendant).

2. This attorney’s appearance in this case is limited in scope to the following matter(s):

[Identify all matter(s) that are applicable and provide a detailed description of services, including any scheduled appearances, as needed.]

3. This is Attorney of Record and available for service of a document ONLY for the court events described above. For all other matters, the party must be served directly, unless otherwise ordered by the court. Service on this attorney for any issue not named above shall not be deemed service on the party. The party's name and, unless it is confidential, address where service will be accepted are provided below for that purpose.

4. A party or the party's counsel may contact the party represented by this attorney directly regarding matters outside the scope of this limited representation without first consulting this attorney.

5. This attorney's representation of (petitioner/respondent/plaintiff/defendant) will terminate after an order or journal entry resolving the matter subject to limited representation has been filed and a Notice of Withdrawal of Limited Appearance has been filed and served on the client and parties.
NOTICE OF WITHDRAWAL OF ATTORNEY ON CONCLUSION OF LIMITED APPEARANCE

In accordance with the agreement between the undersigned attorney and __ (name of client), (petitioner/respondent/plaintiff/defendant) for limited representation, the undersigned attorney withdraws as an attorney of record in this case.

1. I was retained for the following limited scope services:
   [Provide a detailed description as was included in the Notice(s) of Limited Entry of Appearance.]

2. I have completed all services within the scope of my representation.

3. The last known service address for __ (name of client) __ is:
   [insert address unless confidential by court order or rule]

4. The last known phone number for __ (name of client) __ is:
   [insert address unless confidential by court order or rule]

   My withdrawal pursuant to this Notice will be effective unless an objection is filed not later than 14 days after this Notice is filed.

(Attorney’s Signature)
Attorney’s Name
Supreme Court Number
Address
Telephone Number
[Fax Number]
[E-mail Address]

*Provide if nonconfidential

[CAPTION]

CERTIFICATE OF SERVICE

The undersigned certifies that on the ____ day of __________________, 20___, a copy of the above Notice of Withdrawal of Attorney on Conclusion of Limited Appearance was served as follows:

[List name and nonconfidential address of each person served.]

__________________________ (Signature)
IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

ACCREDITATION OF PROGRAMMING

Supreme Court Rule 804 is hereby amended to read as follows, effective date of this order.

RULE 804

(a) Provider Traditional Programming Approval. A provider sponsoring a continuing legal education program by traditional program or an attorney, before attending a CLE program by traditional program, may request prior accreditation of the CLE program for CLE credit. The Commission recommends the provider or attorney requesting prior accreditation must submit to the Commission, at least 60 days before the program, an application for approval of CLE activity and any other information required by the Commission. An application by a provider must be accompanied by a $25 nonrefundable filing fee. The Commission must notify the applicant of the status of its review of the application not later than 30 days after the Commission receives it. A program is not approved until the applicant is notified of approval. The program must be advertised only as pending approval, as required by Rule 805(a), and may not be advertised as approved until a notice of accreditation/affidavit is received. The time limit in this subsection does not apply to an in-house CLE program, which is governed by Rule 806(i).

(b) Individual Attorney Traditional Course Approval. An attorney seeking CLE credit for attendance at a traditional CLE program that was not previously accredited under subsection (a) must submit to the Commission a request for approval, which must include a description of the activity, dates, subjects, instructors and their qualifications, the number of credit hours requested, an application for approval of CLE activity and any other information required by the Commission. The Commission must notify the applicant of the status of its review of the request not later than 30 days after the Commission receives it. A program is not approved until the applicant is notified of approval.

BY ORDER OF THE COURT this 22nd day of February, 2012.

FOR THE COURT

Lawton R. Nuss
Chief Justice
ATTORNEY DISCIPLINE

DISBARMENT
IN RE LESLIE C. SCHAEFER
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 10,407 – MARCH 1, 2012


HELD: Court found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred. Schaefer was disbarred from the practice of law in Kansas, and her license and privilege to practice law were revoked.

ORDER OF DISBARMENT
IN RE MARC A. SCHULTZ
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 20,319 – MARCH 7, 2012

FACTS: Marc A. Schultz, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas. At the time Schultz surrendered his license, there was a panel hearing pending in accordance with Supreme Court Rule 211 (2011 Kan. Ct. R. Annot. 334). The complaint alleged that Schultz violated Kansas Rule of Professional Conduct 8.4(b) (2011 Kan. Ct. R. Annot. 618).

HELD: The court examined the files of the disciplinary administrator and found that the surrender of Schultz’ license should be accepted and that Schultz should be disbarred. Schultz was disbarred from the practice of law in Kansas, and his license and privilege to practice law were revoked.

ORDER GRANTING RESPONDENT’S MOTION TO MODIFY THE TERMS OF RESPONDENT’S PROBATION
IN RE KEVIN PETER SHEPHERD

ORIGINAL PROCEEDING IN DISCIPLINE
NO. 102,925 – MARCH 1, 2012

FACTS: In an order dated May 2, 2011, Court granted Shepherd’s motion to suspend the imposition of the remaining two years of his three-year suspension from the practice of law and ordered reinstatement of Shepherd’s license to practice law in Kansas. However, Shepherd’s reinstatement was subject to several terms and conditions of supervised probation, including the condition that Shepherd continue to maintain professional liability insurance. On December 8, 2010, Shepherd filed a motion to modify the terms of his probation, specifically requesting that this court “lift the requirement that he carry professional liability insurance.” In support of the motion, Shepherd attached an affidavit asserting that despite his good faith efforts to obtain professional liability insurance, he had been unable to do so and had resumed the practice of law without insurance in May 2011. Shepherd further represented that he remains in compliance with all of the other conditions of his probation and that he continues practicing law under the supervision of his practice supervisor.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator responded to the motion, taking no position regarding Shepherd’s requested modification. Instead, the disciplinary administrator indicated he would “be prepared to continue monitoring Shepherd’s compliance with the conditions as imposed by the Court.”

HELD: In light of the stated neutrality of the office of the disciplinary administrator regarding disposition of Shepherd’s motion as well as that office’s willingness to continue monitoring Shepherd’s probation, a majority of the members of the Court granted Shepherd’s motion to modify the terms of his probation to remove the requirement that he carry professional liability insurance. However, a minority of the court would find that Shepherd has been engaged in the unauthorized practice of law since May 2011 based upon his failure to first obtain relief from the requirement in the probation order that he maintain professional liability insurance prior to resuming the practice of law.

CIVIL

EMINENT DOMAIN
MANHATTAN ICE AND COLD STORAGE INC. V. CITY OF MANHATTAN
RILEY DISTRICT COURT – AFFIRMED
NO. 102,235 – MARCH 23, 2012

FACTS: Jury awarded $3.5 million to landowner in City eminent domain proceeding on three tracts of land that included meat processing plant. Landowner appealed, claiming district court
The 57.38-acre property underlies the main mall structure and four outbuildings, including a dental office, taking was June 20, 2007. The 57.38-acre property underlies the main mall structure and four outbuildings, including a dental office, taking was June 20, 2007. The 57.38-acre property underlies the Park West Business Center by KC Mall. The date of the landowner's award of $7.5 million for the Indian Springs Shopping Center, 232(a)(3)(B), -405, -419, -456(a), -456(b)(1), -460(c)(1)

No error in trial court's refusal to instruct jury as landowner requested. Special use PIK instructions requested by landowner are outdated. Current wording of K.S.A. 26-513(e) and instructions based upon it adequately provide for jury consideration and valuation of a unique or highly unusual property.

STATUTES: K.S.A. 26-513, -513(d), -513(e); and K.S.A. 60-232(a)(3)(B), -405, -419, -456(a), -456(b)(1), -460(c)(1)

EMINENT DOMAIN
KANSAS CITY MALL ASSOCIATES INC. V. THE UNIFIED GOVERNMENT OF WYANDOTTE COUNTY, KANSAS CITY, KANSAS

FYANDOTTE DISTRICT COURT – AFFIRMED NO. 102,163 – MARCH 16, 2012

FACTS: KC Mall initiated review of the court-appointed appraisers’ award of $7.5 million for the Indian Springs Shopping Center, renamed Park West Business Center by KC Mall. The date of the taking was June 20, 2007. The 57.38-acre property underlies the main mall structure and four outbuildings, including a dental office that once housed Brotherhood Bank, an old Franklin Bank building, and two auto repair shops. KC Mall filed a motion in limine to exclude 2005 tax appeal documents filed by Joseph Kashani, the president of KC Mall, for four of five parcels that make up the subject property. In the tax appeal, Kashani estimated the value of the main mall at $1.5 million, the value of the former Dillard’s that was part of the main mall at $1 million, the former Franklin Bank building at $100,000, and the former Brotherhood Bank building at $50,000. KC Mall’s motion argued that it had filed the 2005 appeal only to force the Unified Government to abide by a Neighborhood Revitalization Plan. The plan was supposed to freeze property taxes for 10 years, starting in 1998; but the Unified Government raised the tax on the property in 2005. In the alternative, KC Mall argued that the “unit rule” prohibited admission of the tax appeal documents because they addressed only components of the property and not the entire tract. The trial court denied the motion and later conducted a full trial involving multiple experts and appraisals. The jury returned a verdict of $6.95 million.

ISSUE: Eminent domain

HELD: Court rejected KC Mall’s argument that the 2005 tax appeal was filed only to enforce the 10-year tax freeze. Court held the tax appeal goes to the weight of the evidence, not its admissibility and it was merely Kashani’s explanation for why he filed the tax appeal, and he was afforded the opportunity to explain his rationale to the jury. Court stated the tax appeal evidence was relevant to – both material to and probative of – the fair market value of the subject property. Court concluded that the 2005 tax appeal evidence was admissible for purpose of impeachment as well as substantive evidence because they qualified as admissions against interest of his company. Court also held that Kashani’s position on four parcels in the tax appeal did not violate the unit rule. Court also rejected KC Mall’s argument that the Unified Government’s experts’ appraisal report and testimony were inadmissible because the witnesses compared the subject property to retail malls, even though it was zoned at the time of taking as a business park. Court held that zoning is but one factor to consider in determining highest and best use, and the district court did not err by admitting the testimony and reports of the Unified Government’s expert appraisers.

STATUTES: K.S.A. 26-513; and K.S.A. 60-261, -460

EMINENT DOMAIN, ATTORNEY FEES, AND PARTIES IN INTEREST
MILLER ET AL. V. FW COMMERCIAL PROPERTIES ET AL.
RILEY DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS NO. 105,006 – MARCH 9, 2012

FACTS: In December 2009, the Kansas Department of Transportation (KDOT) filed a petition seeking to exercise the power of eminent domain over several tracts of land in Riley County, including Tract 46, which was owned by Armendariz. The petition also listed the Britts as interested parties in Tract 46 by virtue of a pending quiet title action in which the Britts claimed title to Tract 46 through adverse possession. On February 10, 2010, the court-appointed appraisers entered an award of $18,000 for Tract 46. To that point, Armendariz had not been represented by counsel in the eminent domain proceeding. After the appraisers’ award, he retained counsel Norbert Marek to represent him in an appeal of that award. Marek also represented Armendariz in the quiet title action. The Britts were represented by attorney Vernon Jarboe in the eminent domain proceeding and by attorney Jim Morrison in the separate quiet title action. After KDOT paid funds to the clerk of the district court to satisfy the court-appointed appraisers’ award pursuant to K.S.A. 26-507, the district court ordered the clerk to disburse the awards upon request. Despite the still-pending quiet title action, the Britts,
through Jarboe, filed a motion in the eminent domain proceeding seeking distribution of the appraisers’ award for Tract 46. In April 2010, the district court conducted a hearing on the Britts’ motion to distribute the award. At the hearing, Jarboe reasserted that as a result of his efforts, the appraisers’ award increased by $11,000. On behalf of the Britts, Jarboe requested he be paid 25 percent of that amount, or $2,750, in accordance with his contingency fee agreement with the Britts. Jarboe suggested the remainder of the $18,000 award be held by the court until the adverse possession action was final. In August 2010, the district court entered its order distributing the appraisers’ award, specifically noting “the claim of Vernon Jarboe, for attorney fees comes before the court.” The order contained no mention of the Britts or their claim for attorney fees based on their express contingency fee agreement with Jarboe. Instead, the court concluded the $11,000 increase in the appraisers’ award over KDOT’s original offer resulted from Jarboe’s efforts and “inure[d]” to the benefit of Armendariz. Therefore, the court awarded Jarboe $2,750 based on quantum meruit and ordered the balance of the award paid to Armendariz. Armendariz appealed.

ISSUES: (1) Eminent domain, (2) attorney fees, and (3) parties in interest

HELD: Court stated that K.S.A. 26-517 permits the district court to determine the final distribution of the appraisers’ award or amount of the final judgment in an eminent domain proceeding only when there is a “dispute among the parties in interest” as to the division of the award or final judgment and any such party in interest files a motion seeking final distribution of the award or final judgment. Court held that under the facts of the case, the district court lacked statutory authority under K.S.A. 26-517 to order that a portion of a final appraisers’ award in an eminent domain proceeding be distributed to an attorney based upon his quantum meruit claim for attorney fees when neither the attorney nor his clients were parties in interest in the eminent domain proceeding at the time of the order distributing the award.

STATUTE: K.S.A. 26-501, -507, -516, -517

**TAX APPEAL AND INTEGRAL OR ESSENTIAL PART IN RE T AX APPEAL OF LA FARGE MIDWEST/MARTIN TRACTOR CO. INC.**

**COURT OF TAX APPEALS – AFFIRMED NO. 102,852 – MARCH 2, 2012**

FACTS: LaFarge Corp. operates a Portland cement manufacturing facility on a tract of private property it owns in Fredonia, Kan. The tract includes a contiguous limestone quarry on one side at which LaFarge uses its Caterpillar equipment to load the raw material and haul it across the property to the hammermills that perform the initial step in the cement manufacturing process. LaFarge paid sales taxes to Martin Tractor Co. on the purchase of repair parts for its loaders and haulers, but then unsuccessfully sought a refund of the sales taxes from the Kansas Department of Revenue (KDR). The Court of Tax Appeals determined that the equipment, and therefore the repair parts, is exempt under K.S.A. 2010 Supp. 79-3606(kk)(2)(D) as being an integral or essential part of the integrated production operation of the cement manufacturing facility.

ISSUES: (1) Tax appeal and (2) integral or essential part

HELD: Court held that under the facts of this case, any district court failure to acknowledge and consciously follow the applicable statute was harmless error because its analysis was the functional equivalent of what was technically required by the statute. Court concluded that the magistrate court properly interpreted the statute and properly followed the Kansas Department of Revenue’s stated policy regarding sales tax exemptions. The majority held that the magistrate court properly interpreted the statute and properly followed the Kansas Department of Revenue’s stated policy regarding sales tax exemptions.

**TERMINATION OF PARENTAL RIGHTS AND DUE PROCESS IN RE K.E. AND S.D.E.**


FACTS: Minors K.E. and S.D.E. entered into state custody on April 8, 2008. Their father had been imprisoned in Georgia for cocaine-related reasons for most of their lives. In 1989, he was sentenced to life in prison, and in 2002 he received a 30-year sentence. While Father was still in prison, the trial judge terminated Father’s parental rights on February 16, 2010. But the Court of Appeals reversed and remanded the case with instructions to vacate the termination order. After remand, the state again filed motions to terminate Father’s parental rights. By the day of the termination hearing, Father had been out of prison for approximately four months and was serving lifetime parole in Georgia. That morning Father called his attorney, Mark Doty, and informed Doty that he was unable to personally attend the hearing. At the start of the 1:30 p.m. hearing, the trial judge was on the telephone with a man – identifying himself as Father – who said he was in a church in Atlanta. The judge told the man that he had been given notice of the proceeding “and I understand through your attorney you were unable to be here or just told him today you couldn’t be here.” The judge asked him to listen to the parties’ arguments in order to “make some determination as to whether [he would be] allowed to participate or not.” Both the state and the children’s guardian ad litem opposed Father’s request for a continuance, primarily because the children already had been in state custody for 32 months and a continuance was not in their best interests. The judge found that conducting the hearing on that scheduled day was in the best interests of the children and that while Father received proper notice, he failed to appear. The judge therefore denied Father’s request for a continuance. After this exchange, the state and the guardian ad litem also opposed Father’s request to testify by telephone. The judge denied Father’s request to present sworn testimony via telephone. But Father was allowed to listen to the remainder of the proceeding. After holding that Father did not rebut the statutory presumption of unfitness, the judge then concluded that it was in the best interests of the children that Father’s parental rights be terminated so the children would be eligible for adoption. A divided Court of Appeals panel reversed the trial judge. The majority held that Father’s due process rights were violated when he was deprived of the opportunity to be heard prior to the termination of a fundamental liberty interest.

ISSUES: (1) Termination of parental rights and (2) due process

HELD: Court held that under the facts of this case, any district court failure to acknowledge and consciously follow the applicable statute was harmless error because its analysis was the functional equivalent of what was technically required by the statute. Court concluded that Father was given appropriate notice of the time, place, and purpose of his parental rights termination hearing, and an opportunity to appear there and be heard in a meaningful manner. He then simply failed to carry his burden to meet the
STATE V. CARAPEZZA/STATE V. HUGHES
LYON DISTRICT COURT – AFFIRMED
NOS. 101,958/101,959 – MARCH 9, 2012

FACTS: Carapezza and Hughes charged as co-defendants in 2004 homicide and convicted in separate trials. In first appeal, Kansas Supreme Court reversed the convictions, finding admission of expert testimony relating to propensity of cocaine addicts to commit violent crimes was not relevant and was highly prejudicial under facts of case. Both were remanded for new trials, and renewed hearings pursuant to Kastigar v. United States, 406 U.S. 441 (1972), to determine what if any evidence state could prove was not derived from immunity prosecutor granted Carapezza and Hughes for their inquisition testimony. State v. Carapezza, 286 Kan. 992 (2008); State v. Hughes, 286 Kan. 1010 (2008). On remand, district court granted in part defense motions to suppress, precluding county attorney, assistants, and staff from participating in any new trial in any way, or in sharing information or participating with any substitute or special prosecutor. District court also excluded testimony of specific law enforcement and lay witnesses. State filed interlocutory appeal.

ISSUE: Derivative use of immunized testimony
HELD: District court’s decision is affirmed. Kastigar and use immunity is discussed, with no need to decide dispute over state’s burden of proof. District court conducted comprehensive Kastigar hearing and conscientiously applied principles in accord with principles set forth in remand opinions.

STATUTE: K.S.A. 22-3102, -3102(b)(2)

STATE V. GAONA
FINNEY DISTRICT COURT – AFFIRMED IN PART, REVISED IN PART, AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 98,822 – MARCH 2, 2012

FACTS: Gaona convicted of two counts of rape and two counts of aggravated criminal sodomy. Court of Appeals reversed one rape conviction, finding trial court erred in failing to instruct jury on lesser-included offense of attempted rape. Gaona petitioned for review of remaining convictions and sentence, claiming trial court erred in: (1) admitting testimony of child abuse specialist as expert witness about behavior of child victims of sexual abuse, (2) failing to instruct jury on lesser-included offense of attempted aggravated criminal sodomy, (3) excluding Gaona’s medical records from evidence, (4) failing to determine if evidence that Gaona watched pornographic movies with the victim was admissible under K.S.A. 60-455 before admitting this evidence, and (5) admitting evidence of victim’s prior consistent statements before her live testimony. Gaona also claimed: (6) cumulative error denied him a fair trial, and (7) imposition of high end of sentencing grid without submitting grounds for aggravated sentence to jury implicated his constitutional rights.

ISSUES: (1) Expert testimony, (2) lesser-included jury instruction, (3) exclusion of medical records, (4) viewing pornographic movies as K.S.A. 60-455 evidence, (5) timing of admission of victim’s prior consistent statements, (6) cumulative error, and (7) sentencing
HELD: Extensive listing of Supreme Court decisions in sex crime appeals involving testimony about child victims. State wit-
ness, who was executive director of Finding Words of Kansas, was qualified under K.S.A. 60-456(b) to testify as expert on forensic interviewing techniques used with children who allege sexual abuse, but was not qualified to testify as expert on common characteristics of sexually abused children, including delayed or piecemeal disclosure or the difficulty or frequency of coaching to produce false accusations. On record of this case, however, the erroneous admission of expert testimony was harmless.

Evidence of aggravated criminal sodomy supported only two potential outcomes—the occurrence or not of that completed offense. No real possibility that jury would have convicted Gaona of attempted aggravated sodomy.

Multiple sound legal reasons for district court’s exclusion of medical records. Even if any error, it would be harmless.

Merits of claim that pornographic viewing evidence violated K.S.A. 60-455 not reached because Gaona failed to make timely and specific objection.

No contemporaneous objection to admission of victim’s prior consistent statements. Issue not preserved for appeal.

Expert testimony error was harmless under circumstances, and instruction error identified by Court of Appeals is already being corrected. No cumulative error requires reversal of the remaining convictions.

Sentencing claim has been repeatedly rejected, and is not revisited.

STATUTES: K.S.A. 21-3301(1), -3501(2), -3502(a)(2), -3506(a)(1); K.S.A. 22-3212, -3212(g), -3414(3); K.S.A. 60-261, -404, -455, -456, -456(b), -1507; and K.S.A. 65-6319, -6404(b)(2)(C)(3)

STATE V. JOHNSON
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 100,728 – MARCH 2, 2012

FACTS: Police officers responded to a burglary in process. At the apartment, officers found Johnson and another woman packing the tenant’s belongings. The landlord confirmed that Johnson was the tenant’s girlfriend and the women did not act like a burglar. When officers began questioning Johnson she ask if she could have a cigarette and began reaching for her cigarettes in her purse. Officers grabbed the cigarette case for officer safety. Johnson continued to ask to smoke. Johnson grabbed the cigarette case. The officer grabbed the case back and looked inside and discovered a glass pipe. This led the officer to thoroughly search Johnson’s purse, where he found a prescription pill bottle with Johnson’s name on it containing cocaine. The district court denied Johnson’s motion to suppress and after a bench trial on stipulated facts found Johnson guilty of possession of cocaine. The Court of Appeal reversed Johnson’s conviction finding that the officer was not permitted to search the pack of cigarettes after removing it from Johnson’s control.

ISSUE: Search and seizure

HELD: Court held that under the facts of this case, the defendant’s insistence on reaching for a cigarette pack during an investigatory detention under Terry v. Ohio and K.S.A. 22-2402(2) gave the police officer justification to seize the cigarette pack without a warrant to safeguard himself and fellow officers. Once the threat of any weapon inside a pack of cigarettes had been neutralized by the pack’s seizure during an investigatory detention, no search of the pack is permissible under Terry and K.S.A. 22-2402(2).

STATUTE: K.S.A. 22-2402(2)

STATE V. MCCULLOUGH
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 101,041 – MARCH 2, 2012

FACTS: Cherish M. McCullough and LaShonda Callaway got into a fistfight at a Wichita convenience store. After other store patrons broke up the fight, McCullough went to her car, returned with a knife, maneuvered around another person, and fatally stabbed Callaway in the abdomen. The district court denied McCullough’s request for instructions on self-defense, reckless involuntary manslaughter, and involuntary manslaughter based on imperfect self-defense. McCullough was convicted of premeditated first-degree murder.

ISSUES: (1) Jury instructions, (2) admission of character evidence, (3) prosecutorial misconduct, (4) jury panel discrimination, (5) peremptory challenges, and (6) spectator outbursts

HELD: Court held there was no evidence in the record to support a jury instruction for self-defense, reckless involuntary man-
slaughter or involuntary manslaughter. Court stated there was no evidence — even in the form of a statement from the defendant about her purpose in stabbing the victim — to support a finding that the killing of Callaway was unintentional. The district court did not err by refusing to issue a reckless involuntary manslaughter instruction. Court also stated McCullough willingly engaged in mutual combat and she was not entitled to claim self-defense unless she made a good-faith withdrawal and did everything within her power to avoid the killing. McCullough did not take either step. She re-engaged in the conflict by returning to the store with a knife, and was not entitled to a self-defense instruction. Court held the trial court did not err in denying McCullough's motion for mistrial based on a question from the state that it was normal for McCullough to be involved in fighting. Court found the trial court properly admonished the jury and also found the exchange was insignificant. Court found no prosecutorial misconduct by intimations that evidentiary elements of premeditation and intent are the same, the prosecutor did not argue facts not in evidence, did not misstate the definition of premeditation, and that while the prosecutor misstated the definition of killing in the heat of passion, the error was harmless. Court held the district court did not abuse its discretion by overruling McCullough's Batson challenge because the juror was struck because his family member was a crime victim and other jurors were struck for the same reasons. Court held that McCullough was not prejudiced by the trial court's refusal to strike five jurors for cause and later she had to use peremptory challenges to remove the jurors. Court held there was no evidence that one of the jurors McCullough had to use a challenge could not act impartially or without prejudice. Court held McCullough did not raise the issue of outbursts from the gallery as prejudicial and it would not consider it for the first time on appeal. Court stated the spectators causing the disturbance were rarely identified, the substance and extent of the disturbance is unknown, and it is unclear whether the jury even was aware of the disturbance.

STATUTES: K.S.A. 21-3211, -3404; K.S.A. 22-3414, -3423, -3601; and K.S.A. 60-261, -401, -404, -447, -2105

STATE V. MURRAY

WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED

NO. 103,773 – MARCH 2, 2012

FACTS: Murray's conviction on charges of aggravated robbery and felony murder were affirmed in 1984. In 2009 Murray filed motion to correct an illegal sentence, claiming he never received a hearing on his pretrial motion for competency evaluation. District court summarily denied relief, believing issue had been addressed and rejected by district court and Court of Appeals in Murray's third 1507 motion. Murray appealed.

ISSUE: Motion to correct sentence imposed by court without jurisdiction

HELD: District court's summary denial of Murray's motion to correct an illegal sentence was error. Once an order to determine competency is issued, criminal prosecution is suspended until competency is determined. Failure to suspend prosecution until the defendant's competency to stand trial deprives district court of jurisdiction for trial and sentencing. Murray's motion to correct illegal sentence challenged, for first time in state court, jurisdiction to try or sentence him. After trial court found good cause for competency evaluation, record is silent on whether a hearing was then held. Remanded for evidentiary hearing in district court to determine whether competency hearing was held.

STATUTES: K.S.A. 22-3302, -3302(1), -3429; and K.S.A. 60-1507

STATE V. ROBERTS

ANDERSON DISTRICT COURT – AFFIRMED

NO. 104,983 – MARCH 9, 2012

FACTS: Roberts convicted of rape of child under 14 years of age. Life sentence and lifetime post-release supervision ordered under Jessica's Law. On appeal he claimed both aspects of his sentence violated state and federal constitutional prohibition against cruel and unusual punishment. He also claimed district court abused its discretion in denying his motion to depart from presumptive life sentence.

ISSUES: (1) Cruel and unusual punishment and (2) motion for downward departure

HELD: Constitutional claim of cruel and unusual punishment is raised for first time on appeal, and is not considered. State v. Seward, 289 Kan. 715 (2009), which remanded for additional findings, is distinguished. District court complied with duty to review mitigating and aggravating circumstances, and its recitation of facts on both factors is supported by the record. No abuse of judicial discretion.

STATUTES: K.S.A. 21-3502(a)(2), -3506(a)(1), -4643(a), -4643(d), -4643(d)(1), -4643(d)(3), -4643(d)(5); and K.S.A. 22-3102, -3102(a), -3102(b), -3102(b)(2), -3102(c), -3601(b)(1), -3603
STATE V. ROBINSON
SEDGWICK DISTRICT – AFFIRMED
NO. 101,657 – FEBRUARY 2, 2012
FACTS: Robinson convicted of capital murder, rape, aggravated kidnapping, aggravated indecent liberties with a child, and violating protection from abuse order. Fourteen-year-old victim of crimes was nine months pregnant with Robinson’s child at the time of her murder. Life prison term without parole imposed when jury unable to reach unanimous penalty phase verdict. On appeal Robinson claimed trial court erred in: (1) failing to suppress evidence of Internet searches Robinson conducted prior to murder; (2) failing to suppress statements Robinson made to police regarding disappearance and murder of victim; (3) admitting statements of victim under forfeiture by wrongdoing exception to hearsay rule; (4) admitting photos of victim’s body; (5) denying Robinson’s motion for change of judge based on judicial bias; and (6) instructing jury on state’s burden of proof. Robinson also claimed identical offense doctrine entitles him to resentencing.

ISSUES: (1) Evidence of Internet search activity, (2) suppression of statements, (3) admission of victim’s hearsay statements, (4) admission of photographs, (5) judicial bias, (6) instructing on burden of proof, and (7) identical offense doctrine

HELD: Under facts of case, Robinson lacked an objectively reasonable expectation of privacy in his Internet search activity when searches were conducted on computer owned by a third party at third party’s place of business, Robinson was not an employee of that business, Robinson was advised of monitoring and possible administrative access, and Robinson’s Internet search activity was not password protected. No error in district court’s finding that Robinson lacked standing to challenge validity of search warrant.

Totality of circumstances support trial court’s finding that Robinson’s statements were voluntary. Suppression of Robinson’s statements is affirmed.

Trial court correctly admitted victim’s hearsay statements, but for wrong reason. Error to apply forfeiture by wrongdoing exception because Confrontation Clause not implicated by nontestimonial statements. Under state statutory exceptions, victim’s statements were admissible under K.S.A. 60-460(b)(3).

While some photographs were gruesome and repetitious, they were relevant and admissible to demonstrate manner and violent nature of victim’s murder, and to corroborate testimony regarding details of murder. Fact that photographs elicited emotional responses from some jurors does not change assessment of relevancy and admissibility of the photographs.

Two-part judicial bias test applied in civil context is applied in criminal context as well. While trial judge had no duty to recuse under facts of this case, his statements regarding former membership on parole board are not condoned. Judges are expressly discouraged from referencing the personal background or experiences when ruling on matters before them.

Under facts of case, trial court did not erroneously instruct jury on state’s burden of proof.

Identical offense doctrine is reviewed, finding Robinson not entitled to be resentenced under that doctrine. Elements of aiding and abetting first-degree premeditated murder, K.S.A. 21-3205(1) and K.S.A. 21-3401(a), and capital murder based on murder for hire, K.S.A. 21-3439(a)(2), are not identical.

STATE V. SANchez-LoreDo
RENO DISTRICT COURT – REVERSED
COURT OF APPEALS – AFFIRMED
NO. 101,912 – MARCH 23, 2012
FACTS: Officers had probable cause that Sanchez-Loredo was transporting drugs, but continued to follow and stop her care once she was in Reno County. Sanchez-Loredo charged with drug offenses based on evidence found in search of car. District court granted motion to suppress, finding officers had probable cause to stop and search car when it left Dodge City, but no exigent circumstances existed as car continued and entered Reno County, and where it still remained practical to obtain a warrant. State appealed. Court of Appeals reversed, finding exigent circumstances automatically exist with a vehicle’s mobility. 42 Kan. App. 2d 1023 (2009). Review granted on narrow issue of whether mobility of vehicle provides exigent circumstances to search the vehicle regardless of circumstances.

ISSUE: Vehicle mobility as exigent circumstance

HELD: Court of Appeals’ decision is affirmed. For Fourth Amendment purposes, mobility of a vehicle fulfills the requirement of exigent circumstances, such that warrantless vehicle search is permitted based solely on probable cause. While rationale in Pennsylvania v. Labron, 518 U.S. 938 (1996), and Maryland v. Dyson, 527 U.S. 465 (1999), has been rejected by some states in interpreting their state constitutions, Sanchez-Loredo made no separate argument based on Kansas constitution.

STATUTES: None

STATE V. TUrner
SEDGWICK DISTRICT COURT – SENTENCE VACATED AND REMANDED
NO. 102,594 – MARCH 9, 2012
FACTS: Turner convicted in Illinois of rape and deviant sexual assault. He was then convicted in Kansas of two counts of rape, two counts of aggravated criminal sodomy, two counts of criminal threat, and one count of kidnapping. Sentencing court classified Turner as an aggravated habitual sex offender based on Turner’s record of sexually violent crimes, and imposed life imprisonment without parole under K.S.A. 21-4642 for rape and aggravated criminal sodomy convictions. On appeal Turner challenged his 21-4642 sentence.

ISSUE: Sentencing under K.S.A. 21-4642 or K.S.A. 21-4704

HELD: When a defendant is convicted of rape and has at least one prior rape conviction, K.S.A. 21-4642 and K.S.A. 21-4704(j)(2)(B) both apply equally and neither is more specific. The rule of lenity requires that Turner be sentenced under K.S.A. 21-4704(j), the lesser sentence. Reversed and remanded for resentencing.

COURT OF APPEALS

CIVIL

ADMINISTRATIVE APPEAL, KANSAS STATE BANK COMMISSIONER, DEBT MANAGEMENT, AND PRACTICE OF LAW
CONSUMER LAW ASSOCIATES LLC ET AL. V. THE HONORABLE JUDI STORK
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 106,115 – MARCH 23, 2012

FACTS: In July 2009, the Office of the Kansas State Bank Commissioner (OSBC) contacted Consumer Law Associates LLC (CLA) and Persels & Associates LLC (Persels) national law firms, which are located in Maryland, because OSBC had received several complaints from their Kansas customers. Following an investigation, the OSBC believed that CLA and Persels were possibly engaged in unregistered credit and debt management services that violated the Kansas Credit Services Organization Act (KCSOA) and notified CLA and Persels of the possible violations. CLA, Persels, and three of their field attorneys in Kansas, David E. Herron II, Stephen Goodwin, and Laura Simpson Redmond (Petitioners), filed a verified petition for a declaratory judgment action (petition) with the Shawnee County District Court. The Petitioners alleged they were exempt from the OSBC’s regulation, which states: “Any person licensed to practice law in this state acting within the course and scope of such person’s practice as an attorney shall be exempt from the provisions of this act.” The same day the Petitioners filed their petition, they also filed a motion for a writ of mandamus and temporary injunction (motion) to bar the OSBC from initiating administrative proceedings and from issuing a cease and desist order. The OSBC issued a summary order to cease and desist and a $8.4 million fine under the Kansas Administrative Procedure Act (KAPA). The district court concluded that the exemption in K.S.A. 50-1116(b) only applies to “those who are licensed to practice law” in the State of Kansas and who are “acting within the course and scope” of their practice and that the right to practice law may only be granted to natural persons and cannot be granted to artificial legal entities such as a corporation or a limited liability company.” Finally, the district court concluded that the Kansas legislature specifically charged the OSBC, through the KCSOA, with the authority to regulate credit service organizations in Kansas, including the authority to make an initial determination, subject to judicial review, whether a person violates the KCSOA or whether a person was entitled to an exemption and that CLA and Persels failed to exhaust their administrative remedies and dismissed the declaratory judgment petition.

ISSUES: (1) Administrative appeal, (2) OSBC, (3) debt management, and (4) practice of law

HELD: Court held the OSBC placed CLA and Persels on notice that they might be violating the KCSOA. Without first exhausting administrative remedies that could have granted relief on some ground before going to court, the Petitioners filed a petition for declaratory judgment in the district court. In the petition, the Petitioners did not attack the exemption itself; instead, they claimed the OSBC’s interpretation of the exemption statute violated the separation of powers doctrine and infringed on the Kansas Supreme Court’s exclusive authority to regulate the practice of law in Kansas. Court agreed with the district court that individuals who are licensed to practice law in Kansas are exempt from regulation by the OSBC. The OSBC exemption does not apply to a limited liability company or any other entity that is not licensed to practice law by the Kansas Supreme Court. Court held the district court did not err in finding that the Petitioners failed to exhaust their administrative remedies.


CHILD SUPPORT

IN RE MARRIAGE OF HOHMANN
ELLIS DISTRICT COURT – AFFIRMED
NO. 105,152 – MARCH 16, 2012

FACTS: As the result of a divorce, Father was required to pay Mother $426 each month for child support for their two children. In December 2007, the Social Security Administration (SSA) determined that Father was disabled and unable to work. However, because he was required to be disabled for a full five months before being entitled to disability benefits, his benefits entitlement date did not begin until June 2008. Father had been steadily falling behind on his child support payments to Mother and made his last payment, of only $25, in June 2008. With that one exception, from June 2008 through December 2008, Father neglected to make any child support payments. However, on January 28, 2009, Father received a disability payment from SSA covering the period when his disablement began – June 2008 – to December 2008. In addition, SSA made lump-sum payments to the couple’s children, again for the time period from June 2008 to December 2008, in the total amount of $3,148. In October 2009, the court trustee filed a motion to modify child support for reasons not important to this appeal. However, one of the issues identified for determination at trial was whether the SSA’s lump-sum payments to the children for the time from June 2008 to December 2008 should be credited to Father’s unpaid child support obligations for that time period. The district court determined that Father was entitled to a credit on his child support arrearages for the SSA’s lump-sum payments to his children for the time his child support payments accrued from June 2008 to December 2008. The court indicated that only the amount of his arrearages from June 2008 to December 2008 would be satisfied. Any arrearages before Father became entitled to benefits would not be satisfied by the SSA’s lump-sum payments to his children.

ISSUE: Child support

HELD: Court held that lump-sum social security disability benefits received by mother on behalf of her minor children because of father’s disability may be credited toward father’s child support arrearage that accumulated during the months covered by the lump-sum payment. If the payment is in excess of the arrearage, the excess benefit accrues to the child as a gift and may not be credited to any arrearage that accumulated prior to the months covered by the lump-sum payment.

STATUTES: No statutes cited.

CLASS ACTION, STATUTE OF LIMITATIONS, AND TELEPHONE CONSUMER PROTECTION ACT
ANDERSON OFFICE SUPPLY V. ADVANCED MEDICAL ASSOCIATES ET AL.
HARVEY DISTRICT COURT – AFFIRMED
NO. 105,868 – MARCH 16, 2012

FACTS: Advanced Medical contracted with Business to Business Solutions to send fax advertisements to other businesses in the region close to Advanced Medical. Business to Business created an advertisement and, with Advanced Medical’s approval, suc-
DUI, BREATHE TEST, AND DENTURES
BOLTON V. KANSAS DEPARTMENT OF REVENUE
MORRIS DISTRICT COURT – AFFIRMED
NO. 105,188 – MARCH 23, 2012

FACTS: Bolton was arrested in 2008 for DUI. An officer asked him to take a breath test for alcohol on the Intoxilyzer 8000; Bolton agreed. The officer testified that he inspected Bolton's mouth, didn't see anything unusual, and asked Bolton whether he had anything in his mouth. According to the officer, Bolton said no. The officer didn't ask about dentures, though Bolton testified that he was wearing removable dentures at the time. The officer kept Bolton in his presence for an observation period during which the officer didn't see Bolton put anything in his mouth. Bolton then blew 0.246 blood-alcohol content on the Intoxilyzer. After an administrative hearing, the Kansas Department of Revenue affirmed the suspension of Bolton's driver's license based on the test failure. The district court concluded that the officer had substantially complied with testing standards, and the court affirmed the license suspension.

ISSUES: (1) DUI, (2) breath test, and (3) dentures
HELD: Bolton argued that letting him blow into the machine with dentures in his mouth violated the directive not to let him "have oral intake of anything." But it certainly did not do so under the ordinary usage of the word intake: the dentures were already in Bolton's mouth, and he did not take them in during the 22 minutes the officer observed him before the test. Nor has Bolton provided any evidence that having dentures in one's mouth affects the breath-test result in any way. Court concluded that an officer need not ask a driver to remove his or her dentures to comply with the established testing procedures. Bolton did not present evidence that the presence of dentures would have affected the test result; thus, this case is not decided based upon a fact-finder's choice between competing expert witnesses.

STATUTE: K.S.A. 8-1020, -1567

EASEMENT AND INJUNCTION
BROWN V. CONOCOPHILLIPS PIPELINE CO.
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 104,280 – SEPTEMBER 9, 2011
MOTION TO PUBLISH GRANTED FEBRUARY 28, 2012

FACTS: This appeal concerns the fate of a large oak tree on the property of Brown. ConocoPhillips Pipeline Co. (Conoco), owns an easement giving it the right to "lay, maintain, operate, inspect and remove" its high-pressure gasoline pipeline which runs through Brown's property. The pipeline was laid in the 1960s, and since that time the tree has sprung up above the pipeline and now is a 60' to 70' tall pin oak that shades Brown's house and yard. In 2009, Conoco sought to cut down the tree on the basis that it interfered with its ability to maintain and inspect the pipeline. Brown eventually obtained a permanent injunction preventing Conoco from removing the tree unless an emergency arose. On appeal, Conoco argues that the court erred in finding that the tree did not constitute a material obstruction to their easement.

ISSUES: (1) Easement and (2) injunction
HELD: Court held that under the facts of this case the present easement is best classified as a blanket easement because the dominant tenant's rights are imprecise and more difficult to enforce than they would be if the instrument explicitly described the boundaries of the easement. Court also held that under the facts of this case to obtain the injunction enjoining the removal of a tree located in the easement, the servient tenant was required to show that the tree did not constitute a material encroachment that interfered with the dominant tenant's reasonable enjoyment of the easement. Court concluded that under the facts of this case, the dominant tenant has the right under its easement to maintain a pipeline. The undisputed facts show that a tree materially obstructs the dominant tenant's reasonable enjoyment of its easement. There is therefore no reason to analyze the elements the servient tenant must show in order to obtain injunctive relief, the injunction must be vacated, and Conoco is allowed to exercise the privileges it enjoys under the easement.
FACTS: Craig was a driller employed by Val Energy and was responsible for his own crew. Craig was required to pick up each member of his crew and drive them to the oil rig site. Craig used his personal vehicle to drive to and from each crew member's house and ultimately to the oil rig site and back home. Val Energy reimbursed Craig for the mileage. On July 27, 2007, Craig was working for Val Energy. In the morning, Craig picked up his son, who was also part of his crew. However, because the “draw works” for the particular oil rig that Craig was working on was broken, Val Energy sent Craig and his crew to the Val Energy shop in order fix the “draw works.” Val Energy still paid Craig mileage for the trips he made between his home, his crew members’ houses, the shop, and back home. Working at the shop was only a temporary position. After leaving the shop, while driving home, Craig and his crew member were involved in a one vehicle automobile accident. Craig was injured. The administrative law judge (ALJ) denied Craig's claim finding that Craig’s injury did not arise out of and in the course of his employment because his injury was not covered by any of the exceptions to the going-and-coming rule found under K.S.A. 2010 Supp. 44-508(f). In addition, the ALJ indicated that because the inherent travel exception to the going-and-coming rule was judicially created and not explicitly set out in the statute, it was no longer viable after our Supreme Court's ruling in Bergstrom v. Spears Manufacturing Co., 289 Kan. 605, 214 P.3d 676 (2009). Craig filed an application for review of the ALJ’s decision. The Board reversed the ALJ’s decision that Craig’s injury did not fall under the inherent travel exception to the going-and-coming rule, and also determined that Bergstrom did not contemplate K.S.A. 2010 Supp. 44-508(f) nor did Bergstrom overrule any cases that applied the inherent travel exception to the going-and-coming rule.

ISSUES: (1) Workers’ compensation and (2) going-and-coming rule

HELD: Court stated the inherent travel exception to the going-and-coming rule is not an exception to K.S.A. 2010 Supp. 44-508(f) at all, but a method to determine whether an employee has already assumed the duties of employment when he or she is going to or returning from work. The issue is the applicability of the going-and-coming rule based on the specific facts of the case, not whether the facts establish an exception to the rule. Court held that based upon the unique facts of each case, the determination of whether an employee has already assumed the duties of employment while going and coming from the work location is consistent with the clear statutory language of K.S.A. 2010 Supp. 44-508(f). Court held the Board did not err when it determined that the going-and-coming rule did not apply to the facts of the case.

STATUTES: K.S.A. 44-501, -508(f); and K.S.A. 77-621
before sentencing, Jones informed the district judge that he wished to withdraw his pleas because he had been coerced by the state’s threat to remove his son from the custody of Jones’ parents. He also claimed the state had threatened to terminate his parental rights to his son if he did not plead guilty. The state informed Jones that if he attempted to withdraw his pleas at sentencing, the state would consider the plea agreement to have been breached and the state would no longer consider itself bound to recommend a downward duration departure sentence. Following a hearing on Jones’ request, the court refused to permit Jones to withdraw his pleas. Jones requested a downward durational departure sentence. Contrary to the plea agreement, the state recommended that Jones be given the aggravated grid box sentences for his crimes and that they be served consecutively. The district judge stated that “without the recommendation by the State, I will not find that there are substantial and compelling reasons” for a downward departure. He sentenced Jones to a controlling sentence of 467 months’ imprisonment.

ISSUE: Plea agreement

HELD: Court held that under the facts presented, the fact that the state threatened to remove the criminal defendant’s child from the defendant’s parents and to terminate the defendant’s parental rights upon conviction at trial may have had some psychological influence on the defendant’s decision to plead guilty, but personal considerations of this nature do not constitute the coercion required to vitiate an otherwise voluntary plea. Court also held that under the facts presented, a criminal defendant’s unsuccessful effort to withdraw a plea made pursuant to a plea agreement does not constitute substantial breach of a plea agreement as to defeat the object of the parties in making it. Further, the purpose of the plea agreement was not frustrated by the defendant’s actions, despite the defendant’s best efforts to do so. Thus, the state remained bound by the plea agreement and at sentencing was required to recommend the departure sentence set forth in the agreement. Court vacated Jones’ sentence and remanded for resentencing with the state recommending the sentence it agreed to in the plea agreement.

STATE V. STAWSKI
GEARY DISTRICT COURT – AFFIRMED
NO. 104,349 – MARCH 23, 2012

FACTS: George Carter is a black man who was a member of the Kansas National Guard. On October 1, 2008, he opened an envelope mailed to his family residence by an anonymous sender with KKK threatening material. Carter suspected his neighbor, Stawski, of sending the anonymous mailing to his home because Carter had filed 16 complaints in 2008 with the local police department about Stawski’s dogs running at large. Following an investigation by law enforcement officers, Stawski was identified as the sender of the offensive materials after DNA recovered from the envelope matched his DNA profile. As a result, Stawski was charged with aggravated intimidation of a witness or victim and criminal threat. Later, under terms of a plea agreement, Stawski pled guilty to an amended information which charged aggravated intimidation of a victim, Carter, and criminal threat against Carter’s wife. In return, the state dismissed another count of criminal threat against Carter and agreed not to refer the case for federal prosecution. The plea agreement included an acknowledgement that the state had filed a motion for an upward dispositional departure, but Stawski was free to request probation. After a thorough inquiry, the district court accepted Stawski’s pleas and found him guilty. The district court imposed the standard terms (after upward departure) of 18 months’ imprisonment for aggravated intimidation of a witness and six months’ imprisonment for criminal threat. Both sentences were to be served concurrently with each other. Given Stawski’s overall criminal history classification of I and the Kansas Sentencing Guidelines, the presumptive sentences for both felony offenses were probation. The sentencing court, however, granted the state’s upward dispositional departure motion on grounds the offenses were motivated entirely or in part by race or skin color. Stawski was ordered to serve his sentences with the Kansas Department of Corrections.

ISSUES: (1) Departure sentencing and (2) racially motivated crimes

HELD: Court held that the unique and purposeful means by which Stawski chose to communicate his threats of violence revealed, at least in part, his underlying motivation for those threats. As the sentencing court found, Stawski engaged in “pretty invidious discrimination.” Court concluded there was substantial competent evidence to support the sentencing court’s finding that Stawski’s offenses were motivated in part by the statutory factors of the Carters’ race and color. Court also concluded that two considerations supported the sentencing court’s granting the upward dispositional departure sentences of imprisonment: (1) Given the racist nature of the offenses, Stawski caused great emotional distress to the Carters, and (2) although Stawski apologized for making “a mistake,” his denial that the offenses were related to “the prejudice thing” failed to show a simple understanding that his threats – given their racist context – were especially heinous.

STATUTE: K.S.A. 21-3419, -3833, -4704, -4716

STATE V. WENDLER
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 104,469 – MARCH 23, 2012

FACTS: Officer Youse of the Topeka Police Department stopped an RV for following another vehicle too closely on Interstate 70. Wendler was the driver, and the passengers were his girlfriend/fiancée and their infant son. During the stop, the officer noticed a “strong odor of air freshener” coming from the interior of the RV. Wendler said he was driving from San Diego to Florida. Officer Youse took about 15 minutes running Wendler’s license and registration and it came back clean. Officer Youse asked about rental papers, which were in order. When Officer Youse returned to his patrol vehicle, he learned from dispatch that Wendler “did have criminal convictions – or criminal activity of some sort in Florida and Colorado.” The DVD shows Officer Youse discussed Wendler’s criminal history with the dispatcher about 18 minutes after the stop. The officer approached the driver’s door of the RV while the assisting officer approached the passenger’s side. The officers were both in uniform and armed. The emergency lights on Officer Youse’s patrol vehicle were illuminated. Officer Youse asked Wendler to leave the vehicle. The officer then accompanied Wendler to the back of the RV, where the assisting officer joined them. The officer asked a myriad of questions and then received permission to search the RV. The district court found the search “did not take just a few minutes” and that Officer Youse was inside the RV “for more than 15 minutes,” yet “couldn’t find anything.” Next, Officer Youse used an electric screwdriver to remove some panels from the inside of the RV around the microwave and discovered 20 bundles of marijuana. The district court determined that Officer Youse had probable cause to stop the RV for a traffic violation. The district court found Officer Youse’s initial questioning of Wendler, the request for his driver’s license and registration, and the check for “wants and warrants” were lawful. However, the district court rejected the state’s argument that Wendler’s travel route to Florida by way of Kansas, RV rental, and the air freshener
The district court held Officer Youse’s search “exceeded the scope of the consent.” The district court suppressed the marijuana and dismissed the case.

**ISSUES:** (1) Search and seizure and (2) traffic stop

**HELD:** Court stated that the officer’s testimony established that the purpose of the traffic stop – to stop, investigate, and prepare a warning citation to Wendler for violating K.S.A. 8-1523 – was fulfilled about nine minutes after the traffic stop. Court found that with regard to this particular traffic stop then, any appreciable time in excess of nine minutes may be considered an improper, measurable extension of the detention and was a violation of Wendler’s Fourth Amendment rights. Next, Court held that given the totality of the circumstances known to Officer Youse about nine minutes into the traffic stop – the route of travel, the use of a rental vehicle, and the strong odor of air freshener inside the RV – there was insufficient reasonable suspicion to materially extend the traffic stop to investigate drug-related criminal activity. Last, Court held that similar to Wendler’s consent to additional questioning, his putative consent to search was temporally proximate to the prior illegal detention, there were no intervening circumstances, and the search of the RV was an exploitation of the illegality. Because the state had not shown a causal break between Wendler’s illegal detention and his consent to additional questioning and to a search of the RV, the taint of the illegal detention was not purged and the district court did not err in granting the motion to suppress.

**STATUTES:** K.S.A. 8-1523; and K.S.A. 79-5201

**STATE V . WILLIAMS**  
**JEWELL DISTRICT COURT – AFFIRMED**  
**NO. 104,909 – MARCH 2, 2012**

**FACTS:** Williams had four prior felony-theft convictions when sentenced for theft. District court used three of the prior convictions to enhance sentence to presumptive prison, and counted the fourth in Williams’ criminal-history score. Williams appealed, claiming statute providing for enhancement when “three or more” convictions means all four prior convictions were “used up” to enhance his penalty from presumptive probation to presumptive imprisonment.

**ISSUE:** Consideration of past convictions in sentencing

**HELD:** Sentencing statutes examined and compared. Judgment of district court is affirmed. When a defendant being sentenced for felony theft has three or more prior felony-theft convictions, only three of the convictions are required to trigger enhancement of the defendant’s sentence to presumptive imprisonment under K.S.A. 2009 Supp. 21-4704(p) (recodified K.S.A. 21-6804(p) effective July 1, 2011). Any other past felony-theft convictions are properly scored in the defendant’s criminal-history score.

**STATUTES:** K.S.A. 2009 Supp. 21-4704(j), -4704(p); and K.S.A. 21-3701, -3701(b)(4), -4710(d), -4710(d)(11), -4710(d)(12), -4720(b), -4720(b)(4), -6804(p), -6810(d)(9)

**STATE V . WILSON**  
**SHAWNEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**  
**NO. 98,931 – MARCH 2, 2012**

**MOTION TO PUBLISH – OPINION ORIGINALLY FILED ON DECEMBER 19, 2008**

**FACTS:** Wilson and her husband Willie were in the midst of a divorce. During a heated argument, Wilson got mad and drove her car into Wilson’s car multiple times. Then, Wilson drove at Willie but he was able to get out of the way. Willie gave a statement to the police that evening. The state charged Wilson with criminal damage to property and aggravated assault with a deadly weapon. Willie later toned down his testimony at the preliminary hearing and stated that he really didn’t feel he was in danger. At the conclusion of the preliminary hearing, the judge dismissed the charges against Wilson. The state appealed.

**ISSUES:** (1) Criminal damage to property, (2) aggravated assault with a deadly weapon, and (3) preliminary hearing

**HELD:** Court held that the district court erred when it dismissed the criminal damage to property charge. Court stated that the criminal damage to property statute covers the intentional damage to any property in which another has an interest without that person’s consent. Court found that the statute is clear and unambiguous and it covers, by its plain language, Wilson’s actions on the night in question. Other states construing similarly statutes have ruled in this fashion. Court held that Wilson did not raise the issue of whether the criminal damage statute was unconstitutionally vague in the trial court and it would not consider the issue on appeal. Court also held the district court erred in dismissing the aggravated assault charge because the state did present sufficient evidence, even if it was at two different hearings, that a person of ordinary prudence and caution would believe that Wilson was guilty of the crime.

**STATUTE:** K.S.A. 21-3408, -3410, -3720(a)(1)
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A Tradition of Credibility and Success

We are plaintiff's trial attorneys with a long tradition of credibility and success in the courtroom. Because of this tradition of success, our substantial resources and our unparalleled experience, we have maximized the value of cases referred to our firm for over 40 years and will continue to do so into the future.

If you have a client with a catastrophic injury or death case we would welcome a referral or co-counsel relationship with you.

OUR EXPERIENCE PAYS