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A Nostalgic Touch: Greensburg, Kan., and Charley Herd

By Matthew Keenan
Well, I am off and running to various local and specialty bar meetings. All of these meetings seem to have two things in common — really great colleagues and food. Since the last column, I attended a bar meeting for the 31st Judicial District in Fredonia. The 31st Judicial District is a friendly group of peers, and they get together three times each year for CLE, followed by a social event; in addition to the Fredonia meeting, the group meets in Erie and at Concreto. It was quite enjoyable to meet with new friends from that part of the state, and I must admit that I particularly enjoyed some funny stories that were told. In one, a then-county attorney, who lives across the street from the golf course, was awakened by gunshots at 2:30 a.m. After peering out of his window, he called the Wilson County sheriff to report that one or more individuals were shooting guns from a pickup truck while driving on the Fredonia golf course. He was sure that it was some local teens up to no good. Upon investigation, the sheriff discovered that one of the two culprits was the then presiding district court judge; the shooters were out to eliminate nasty little armadillos that were destroying the course greens.

Next, I went on to the annual statewide women attorneys association meeting in Lindsborg, where approximately 155 attorneys from across the state met for CLE, activities, and camaraderie over three days in July. Ironically, the theme of this year’s conference was “HOT, HOT, HOT.” Boy was it ever!

Finally, the Liberal bar is comprised of a very congenial group of lawyers, who meet every Friday, and I am told the bar association will happily buy lunch for outsiders who happen to be in town that day. Now, I do caution that I was told about an attorney from out of town who regularly began appearing on Fridays … lots and lots of Fridays. He began attending so regularly (and eating free) that he was eventually asked to join and pay his membership fee. I was also entertained with the tale of an attorney from the other side of the state line (south not west), who asked for a recess during trial. The Liberal lawyer had no objection, until three and one-half hours later when he discovered that the other lawyer had left the courtroom.

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.
the courthouse, and the state to cover a hearing in another case! Our lunch was at Billy’s BBQ, good food, good turnout, and terrific colleagues.

Lee Smithyman attended the Ottawa Bar Association, which had its regular meeting on Friday, June 24. The Ottawa Bar President, John Boyd, invited Sam Sheldon, a member of the Blue Ribbon Commission Panel on restructuring the judiciary. Sam took questions, comments, and suggestions on court restructuring, system finance, and potential technology improvements from the entire body, which included Judges Godderz, Fromme, Sachse, and Jones, virtually the entire 4th Judicial District bench.

As of this publication we will have listservs up and running for the Young Lawyers Section, the Law Practice Management Section, and the Solo and Small Firm Section. If you belong to any of those sections, I encourage you to subscribe to the listservs, and you will find resources at your fingertips, our friends and colleagues from across the state. Also, make sure to let us know how the listservs are working for you in your practice.

I will be back next month with more local lore, which no doubt has been embellished, (just wait until we get to my home-town Wichita) and updates on our Bar Association, without embellishment.

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Up to Date with the Kansas Lawyers Assistance Program

By Anne McDonald, Kansas Lawyers Assistance Program, Topeka, executive director, mcdonalda@kscourts.org

There are many exciting developments here at the Kansas Lawyers Assistance Program (KALAP), and we want you, dear Kansas lawyer, to know about them. Last year in the July issue of the KBA Journal, I presented an annual report of sorts, which included some statistics: 225 open files, 38 new files in the period July 1 to June 30, 2010, close to half male, in solo or small firms, with an alcohol problem, although depression was trending an increase. Our updated statistics for 2010-11 are: 273 open files, 44 new files, 36 male, eight female. Thirteen presented with alcohol issues, 19 with depression and/or stress, two with illegal drugs, three with both alcohol and depression; three presented with aging or physical illness situations. The majority, 23, were from solo or small firm practice, with six in government. We had six referrals from admissions and eight self-referrals from law students. There were four formal referrals (as part of a diversion) from the office of the disciplinary administrator. Rather than listing individual counties, for purposes of this article we grouped cases in four geographic regions corresponding to our congressional districts.

There is fresh information in three new areas this year: KALAP has become a part of the law student orientation program at both law schools in Kansas; the KALAP Foundation is established, with a board of trustees and 501(c)(3) status approved by the Internal Revenue Service; and, our number of CLE presentations exploded — KALAP staff and/or board members gave a total of 19, many in Topeka but also Wichita, Pittsburg, Emporia, Fredonia, Overland Park, and Kansas City on both sides of the state line. We look forward to coming to a town near you in 2011-12. The great majority of our programs are approved for ethics (now ethics and professionalism) credit and there is no charge.

The Kansas Bar Association continues to support KALAP, and its staff is very pleasant to work with. It was a great honor to receive an Outstanding Service Award at the Annual Meeting this year — in one respect because it gave added recognition and exposure to our KALAP services.

Many more of you responded generously this year to our request for new KALAP volunteers and our corps now numbers 150. Volunteers do wonderful work, one on one, with those attorneys who find themselves in crisis. Another reason I refer to KALAP as being “by Kansas lawyers, for Kansas lawyers.”

Although it is a primary objective of our program, one statistic we cannot give you is the number of ethical complaints that were avoided because, in part, of KALAP’s involvement. We at KALAP and our Board and those fine volunteers I just mentioned see reported ethics cases in a different light than most. I sometimes hear CLE presentations in which disciplinary cases are discussed and the presenter, or audience, talks about the respondent attorney as if he or she is completely stupid or wicked and wonders out loud “What were they thinking?” From our perspective that was part of the problem: many of the respondent attorneys weren’t thinking straight because they were in the grip of an impairment. The humorous tag lines “busted barfly,” “greedy GAL,” “disorderly drunk,” don’t seem as funny to us because we’ve seen the face of some of those individual attorneys and the misery they went through. Another reason those cases make us sad is because we know that an ethical case, often resulting in a temporary or permanent loss of the law license, might have had a better outcome had KALAP or some other helping entity been involved. It’s all about prevention and turning around before the edge of that cliff looms too close.

We at KALAP — staff, board, and volunteers — are grateful for a productive year, for your support and the opportunity to work with the fine lawyers of Kansas.
The KBA YLS Needs Mentors

By Vincent M. Cox, Fisher, Patterson, Sayler & Smith LLP, Topeka, vcox@fisherpatterson.com

Most attorneys can identify a mentor or mentors who played (or are still playing) an important role in their professional development. Mentors can provide guidance, advice, and knowledge regarding legal matters and the practice of law. Sometimes most importantly, mentors can provide a sympathetic and understanding ear for the trials and tribulations that are experienced in this profession. While mentors can be important at any stage in one's legal career, there is no question that mentors have the biggest impact upon new and young attorneys.

I am fortunate enough to practice law in a firm where I have a number of experienced and successful attorneys just down the hall who are always willing to listen and help me. Many of my friends who are attorneys have mentors as well. These mentor-protégé arrangements come in all forms. I know young attorneys who practice in smaller communities who have other attorneys in their town that act as mentors and provide guidance. Many attorneys in small communities also have the benefit of judges who act as mentors. Young attorneys who work in large firms often have a structured mentor-protégé program within their firm that provides excellent support. Even though many young attorneys already have mentors, there are numerous young lawyers around the state who do not have the benefit of a mentor. There's no question that young attorneys with a mentor have a decided advantage over those who do not.

Many of you may be familiar with the KBA YLS mentor-protégé program. The purpose of the program is to help provide mentors to young attorneys who cannot otherwise find a mentor, or want to find an additional mentor in a specific area of practice. In last several years, the program has been somewhat dormant. That is primarily due to a lack of interest. However, that has now changed. In the last several months, the KBA office has received several applications for young attorneys seeking mentors. Most of the applications illustrate the same scenario. These are young attorneys who are striking out on their own, opening their own solo law offices or small firms with fellow young attorneys.

In my opening column, I mentioned how young attorneys today face economic challenges that were not faced by even those who graduated from law school with me in 2005. The evidence is clear that there are simply fewer traditional law jobs available to new attorneys. Law firms are not hiring. Corporations are downsizing. State and government agencies are downsizing or are locked in hiring freezes.

I recently read an article on msnbc.com addressing the issue of the job market facing new attorneys, and the number of new attorneys going solo. The National Association for Law Placement has reported that the number of new law graduates going solo increased from 3.5 percent in 2008 to 5.5 percent in 2009. That was the biggest one year jump since 1982. In 2010, the number of new graduates going solo increased to 5.7 percent of all private practice jobs. That is the highest percentage since 1997. The recent applications from young attorneys seeking mentors, and conversations I have had with new attorneys around the state, confirm that the above-referenced numbers have now had a significant impact in Kansas.

While the KBA YLS mentor-protégé program has been dormant for lack of interest, that is no longer the case. We have young attorneys who desperately need mentors to help ease them into the practice of law. You may have seen the recent notices in the weekly KBA eJournal asking that mentors apply for the program. While there are plenty of potential protégés, we are severely lacking mentors.

The first purpose of this column is to recruit and encourage the more experienced attorneys around the state to volunteer to be a mentor in the program. Serving as a mentor is a great way to contribute and make a lasting impact upon the practice of law in Kansas. Today's young attorneys are tomorrow's leaders in the legal world. Put simply, as a mentor, you can have a positive impact on lawyers for generations to come.

The second purpose of this column is to reach out to the young attorneys out there who need a mentor. While the KBA YLS is still working to find mentors, we want to encourage anyone who wants a mentor to apply to the program. We will do everything in our power to find a mentor who will assist you.

To find the KBA YLS mentor and protégé applications, visit http://www.ksbar.org/yls. If you have any questions about the program, or want to discuss how you can get involved, please feel free to call me at (785) 232-7761.

About the Author

Vincent M. Cox is an associate with the Topeka firm of Fisher, Patterson, Sayler & Smith LLP, where he maintains a civil litigation practice, consisting primarily of insurance law and defense. 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.
Growing up in Hawaii, I was not much concerned with racial diversity. Hawaii has an assortment of nationalities and cultures living side by side. Very few people from Hawaii are of a single ethnicity. For instance, I am half Hawaiian and half Puerto Rican. My closest high school classmate was Hawaiian and Irish; his wife is Korean, German, and Portuguese. Hawaii is truly the melting pot of the world. Even our daily language, Pigeon English, incorporates words and phrases from more than 10 different cultures. Hawaii's multiculturalism is so vast that the majority of its citizens routinely identify their race simply as Pacific Islander. That racial and cultural diversity has shaped my personal point of view in many ways. It has taught me tolerance and understanding. It has made it easier to laugh at myself because I am confident in who I am and where I come from. But what I took away most from Hawaii is that race is but one factor when determining if a community is diverse. A diverse community is much more than the ratio of men to women or the number of minorities which work in a certain profession. Our traditional definition of diversity, while not obsolete, may require modification to account for factors beyond race and gender. Economics plays a significant role in our community and it should be included in our calculation of a diverse workforce.

In June’s KBA Journal Timothy Dupree discussed the attorney-client relationship. Dupree made the case that “a majority of all criminal defendants are minorities, represented by an attorney of a different race.” He went on to address the inherent mistrust that is created due to the cultural divide. The same case can be made regarding the economic realities of most of our clients. According to the U.S. Department of Justice, 91 percent of all bankruptcy filers have experienced job loss, a medical event or divorce. These individuals will become our clients and the people we serve. As a community we need to do more than simply empathize with their circumstances. We need to understand their point of view and the best way to gain an understanding is to incorporate that worldview in our law firms, public defender agencies, and county counselor offices. How we accomplish economic diversity is the true challenge because economics has a direct and immediate impact on educational opportunities. Many individuals lack the financial resources to attend college, let alone law school. My own family’s economic well being was tied to the local sugar plantation where my grandfather, father, and three uncles worked for the majority of their adult lives. Those men understood the importance of an education. My grandfather would often say that two generations of sugar cane millwrights was enough and that his only grandson would be the first Molina to graduate from college. However, a college degree is expensive. So we undertook the task of bandaging together a financial aid package to get me through undergrad. That plan included Pell Grants, Staf-

(Continued on Page 12)
Life in Transition

By Daniel J. Keating, University of Kansas School of Law, Lawrence

Changes and transitions are a part of life and are full of new emotions and experiences. For example, John C. Calhoun noted that transitioning between the old and new "must always necessarily be one of uncertainty, confusion, error, and wild and fierce fanaticism." This is especially true for law students. While the past few years of my life have been a whirlwind of change relatable to Calhoun's comments, there are, however, two main transitions that I would like to share: going from graduate to law school, and becoming a parent.

Anthropology to Law School

Before I started law school in August 2009, I was a graduate student in anthropology at KU (emphasis on geoarchaeology — a geoscience-based approach to traditional archaeological methods and analyses). I originally was going to pursue a Ph.D. after I got my masters, but I made a last minute decision to take the LSAT so I could apply to KU Law. When potential employers see my graduate work on the resume, they always ask how or why I ended up studying law and if I found the transition difficult.

There are numerous answers to the question, some easy to explain and some not. Although it might at first appear that the two disciplines are unrelated, there are many similarities between anthropology and the study of law. During my graduate work I took several cultural theory classes that really piqued my interest in the dynamic interaction between culture and the law, and how they help create, reinforce, or change one another. Furthermore, both archaeology and the law, while rooted in the past and enveloped with tradition, are open to and encourage creative modern interpretations on the data of the past, whether that be cultural artifacts or old precedents.

The public speaking aspect required of law students and lawyers was something that I did not even think would be a transition at all based on my past. Graduate school demands one to speak in class and present research in front of professors and peers. As an undergraduate at K-State, I was a teaching assistant for Introduction to Cultural Anthropology, where I lead discussions for two classes per week of about 20-25 students each. I was not nervous with these instances of public speaking, probably because I had been studying the subject matter for years and felt confident about my knowledge of the material.

Law school was different. I want to say it was a combination of the more formal nature, the complex hypotheticals, and the uncertainty or confusion of some legal applications and interpretations. But it was probably more attributed to my perception of law school from watching movies like “The Paper Chase,” and the fact that all of the methods that professors use to call on students involve ways to cause serious bodily injury or death (e.g., lighting bolt or rolling boulder).

My summer employment setting has changed as well. Before law school I would spend my summers doing archaeological fieldwork in sometimes remote places excavating artifacts, mapping sites, helping lead field schools, and so on. Archaeology has allowed me to work all over Kansas, in the sand hills of Nebraska, in caves, forests, and along rivers of south central Missouri, and even internationally in the Middle East. Now I am back at the bottom of the totem pole and working in cubicles, small windowless offices, or wherever else employers can put interns.

However, I still kind of work in a cave — Green Hall. Room 104 is cavernous. It is cold, dark during the winter month’s mornings, and easy to get lost in, especially during 8:00 a.m. civil procedure hypotheticals. Room 104 is also a great place for bats. In February 2010, I was up to speak in my early morning civil procedure class. While I responded to the professor’s hypotheticals and questions, a bat literally started flying back and forth across the classroom. A slight ruckus ensued when many of the students fled the room and refused to return unless the bat was gone. Shortly thereafter a classmate created a popular Facebook page titled, “Civ Pro Bat.”

Parenthood

The biggest and most rewarding transition of not only the past few years, but of my entire life, has been becoming a father. Having a child has changed every aspect of my life. My

(Continued on Page 12)
son has brought me renewed motivation and structure. I do the necessary work for my job and school during the day, so the evenings are all for my family. Of course, I do get selfish and pick my son up early from the sitter just for a few extra hours with him. Also, the conversations between my wife and me have changed. Our talks about the day involve, “how was work?” and now “did he poop today?”

Obviously, being a parent in school adds extra challenges to everyday life, for example, not being able to get any work done when my son is sick or when the baby sitter calls at 6 a.m. saying she cannot watch any kids that day. Another challenge is time management. When I started the first semester with my son, I thought I had everything rounded up, ready to go, and was going to be on campus by 8 a.m. However, I made the rookie mistake of putting on my dress shirt before changing his diaper. The next thing I knew he was peeing on both me and the changing table. Now I budget at least a 20-minute window of “error” in the mornings. But when the challenges and stress of school and work starts to get too heavy, my son helps lift it and lighten my heart with his belly laugh and charming smile.

Sure, transitions and changes can be full of uncertainty and mistakes; but more importantly, they are always full of positive elements such as the potential for personal and professional growth. After I finish the transition into my new career as a lawyer, I truly hope that I can continue to be just as open to transitions and changes as I am now.

About the Author

Daniel J. Keating is a third-year law student at the University of Kansas School of Law. Keating is an articles editor for the Kansas Journal of Law and Public Policy and a features writer for the Kansas Law Free Press. He grew up in Fort Scott and has spent his law school summers working for the Kansas Water Office, the Kansas Department of Agriculture, and Kansas Legal Services. Outside of law school, Keating enjoys coaching a youth baseball team in Lawrence.

The Economics of Diversity

(Continued from Page 10)

It is that type of generosity that allowed me to attend law school. I was the lucky and proud recipient of the Arthur T. Ueoka Memorial Scholarship. That scholarship was awarded to any incoming law student from Maui County, Hawaii, who demonstrated significant financial need. Ueoka graduated from Washburn Law School in 1962 and returned to Maui to open a family law practice. He later became the prosecuting attorney for Maui County before being appointed to the bench. I continue to be humbled by Ueoka’s generosity and hope to continue his good works by reaching out to the underprivileged who dream to be more than a sugar cane millwright’s son.

Diversity is a noble goal. As a profession we should always strive to include those with different life experiences. If we expand our thinking to include economic factors we only enrich ourselves further because a rising tide lifts all boats.

About the Author

Joseph N. Molina III is the director of governmental and legal affairs for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority and had previously served as an assistant attorney general, acting as the chief of the Kansas No-Call Act. Molina holds a Bachelor of Arts in political science, philosophy, and economics from Eastern Oregon University and a juris doctorate from the Washburn University School of Law.
The Kansas Bar Foundation (KBF) has set the deadline for Interest on Lawyers’ Trust Accounts (IOLTA) 2011 grant applications to Friday, October 7, 2011. Since its inception in 1984, IOLTA has given more than $3.7 million to charitable organizations across the state of Kansas.

Each year, the Kansas Bar Foundation earmarks IOLTA funds for nonprofit groups that provide support of legal services to the disadvantaged, public education about the law, and administration of justice programs. The following programs were funded for the 2011 grant cycle:

- $52,000 for direct legal and mediation services from Kansas Legal Services Inc. for victims of domestic violence, senior citizens, and low-income individuals; and administration of the Kansas Bar Association’s reduced-fee and pro bono programs.
- $10,000 for Strategic Volunteer Training to all CASA programs in Kansas.
- $6,500 for statewide law-related education projects sponsored by the Kansas Bar Association in cooperation with the Kansas Supreme Court’s Law and Citizenship Project.
- $5,000 to Douglas County Legal Aid Society Inc.
- $4,500 for coordination of the Kansas Bar Association’s Young Lawyers’ High School Mock Trial Program.
- $4,500 to the National Institute for Trial Advocacy.
- $1,000 for coordination of the Topeka-Shawnee County Youth Court.
- $1,000 for coordination of the Olathe Youth Court.

The Kansas IOLTA program is supported by more than 3,500 lawyers and 140 financial institutions statewide. The IOLTA program collects interest from trust accounts in which funds are nominal in amount or are expected to be held for a short period of time.

To learn more about the guidelines for qualifying as a possible IOLTA grant recipient, visit http://www.ksbar.org/public/kbf/packet.shtml or call Kelsey Schrempp, public services manager, at (785) 234-5696. □
Members in the News

CHANGING POSITIONS

Daryl D. Ahliquist, Erie, has been appointed by Gov. Sam Brownback as a 31st District Court judge.

Bradley S. Anderson has joined Forbes Law Group, Overland Park.

Scott W. Anderson has joined SA Legal Advisors LLC, Overland Park.

Rrachelle R. Breckenridge and Rachel N. Parr have become associates at Foulston Siefkin LLP, Wichita. Toby J. Crouse has become a partner and Mark A. Salle has become special counsel at the firm’s Overland Park office.

Scott R. Burrus, Samantha M. Heady, and Clarissa A. Howley have become summer law clerks at Martin, Pringle, Oliver, Wallace & Brown LLP, Wichita.

Brandon W. Deines, Megan L. Hoffman, and Jonathan A. Schlatter have joined Morris, Laing, Evans, Brock & Oliver, Wallace & Brown LLP, Kansas City, Mo.

Patricia K. Garringer has joined Lathrop & Gage LLP, Kansas City, Mo.

Ervin Grant has joined Cami R. Baker & Associates PA., El Dorado.

Corrine Johnson and Letifany Obozle have joined the Sedgwick County District Attorney’s Office, Wichita, as summer legal interns.

Chasen R. Katz has joined Thompson, Arthur & Davidson, Russell, as an associate.

Fred J. Logan Jr., Prairie Village, has been appointed by Gov. Sam Brownback to the Kansas Board of Regents.

Stuart S. Lowry has become the new president and chief executive officer at Sunflower Electric Power Corp., Topeka.

Derek H. MacKay has joined Kutak Rock LLP, Kansas City, Mo.

Jonathan W. McConnell has joined Monnar & Spurrier, Wichita.

Shannon M. Marcano has been appointed as city attorney for Basehor, Kansas City, Mo.

Angela R. Markley has joined BRR Architecture, Merriam, as in-house counsel.

Casey P. Murray has joined Spencer Fane Britt & Brown LLP, Kansas City, Mo.

Daniel W. Peters has joined the University of Kansas Hospital, Westwood, as general counsel.

Preston A. Pratt, Norton, has been appointed by Gov. Sam Brownback as the 17th District Court judge.

M. Kathryn Pruett has joined Polsinelli Shughart P.C., Kansas City, Mo.

Tanya M. Rodecker Wendt has joined Deacy & Deacy LLP, Kansas City, Mo.

David A. Slocum has joined the Law Office of Mark Kolich, Lenexa.

Elizabeth A. Street has joined Stinson, Laswell & Wilson L.C., Wichita.

Shea E. Stevens has joined Cordell & Cordell P.C., Overland Park.

David T. Walsh has joined Sunrise Advisors Inc., Leawood.

Catherine A. Walter has been named interim city attorney for the City of Topeka.

Jackie N. Williams has joined the Kansas Attorney General’s Office, Topeka.

Marc S. Wilson has joined White Goss Bowers March Schulte & Weisenfels, Kansas City, Mo.

Krystal K. Woodbury has joined Highlands Ranch Law Center P.C., Highlands Ranch, Colo.

CHANGING LOCATIONS


Jessica A. DeVader Law Office LLC has moved to 355 North Waco, Ste. 150, Wichita, KS 67202.

Paul K. Hentzen Law Firm P.C. has moved to 10955 Lowell, Ste. 520, Overland Park, KS 66210.

Elizabeth Hill Law Firm P.C. has moved to 7300 College Blvd., Ste. 215, Overland Park, KS 66210.

Tracey D. Johnson has started her own practice, Law Office of Tracey D. Johnson, 8730 Bourgade Ave., Ste. 102, Lenexa, KS 66219.

Jennifer S. McKinley has moved to Corporate Woods 32, 9225 Indian Creek Parkway, Ste. 1100, Overland Park, KS 66210.

Dan M. McCulley and Konza Law LLC have moved to 3003 Anderson Ave., Ste. 957, Manhattan, KS 66503.

Steven E. Mauer has started a practice, Zerger and Mauer LLP, 1100 Main St., Ste. 2100, Kansas City, MO 64105.

Vincent F. O’Flaherty Law Offices has moved to 2 Emmanuel Cleaver II Blvd., Ste. 445, Kansas City, MO 64112.

Nancy A. Ogle has moved to 245 N. Waco, Ste. 260, Wichita, KS 67201.

Jayne A. Pearman L.C. has moved to 7300 College Blvd., Ste. 215, Overland Park, KS 66210.

Rachel B. Rubin has started her own firm, Rubin Law Firm LLC, 7944 Sante Fe Dr., Historic Voights Bldg., Overland Park, KS 66204.

Andrew C. Schendel has moved to 811 Grand Blvd., Ste. 101, Kansas City, MO 64106.

Wisler & Trevino L.C. has changed to Trevino & Rockwell and moved to Free State Business Center, 1201 Wakarusa Dr., Ste. E200, Lawrence, KS 66049.

Lori S.B. Justice Family Law has moved to 100 E. Park, Ste. 8, Olathe, KS 66061.

MISCELLANEOUS

Arnold & Keck LLC has changed to Arnold Pfanstiel LLC, Olathe.

David C. Black, Johnson, has been elected to the Kansas School Attorneys Association board of directors.

Richard A. Macias, Wichita, has been appointed by Gov. Sam Brownback to the Kansas State Board of Healing Arts.

Joe L. Norton, Wichita, has been appointed by Gov. Sam Brownback to become a member of Wichita State University board of trustees.

William W. Sneed, Topeka, has been appointed by Gov. Sam Brownback to become a member of Washburn University Board of Regents.

The Wichita Bar Association Young Lawyers Association has elected new officers: Rebecca Mann, president; Rachel E. Avey, president-elect; Alene D. Aguiler, vice president; Adam R. Burrus, secretary; Stepehn M. Turley, treasurer; and J. Matthew Leavitt and Brian R. Carman, social chairs.

The Wichita Women Attorneys Association has elected new officers: Kellie E. Hogan, president; Marcia A. Wood, vice president/president-elect; Ali N. Marchant, secretary; and Nancy A. Ogle, treasurer.

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.
Oscar S. Brewer

Oscar S. Brewer, 95, of Kansas City, died April 14. He was born November 2, 1915, the son of James L. and Mertie Leah (Southworth) Brewer in Rochester, N.Y. He graduated from Rockhurst High School in Kansas City in 1931, from the University of Kansas in 1935, and from the University of Missouri School of Law in 1937 at the age of 21 with his law degree.

After passing the Missouri Bar, he joined the Warwick law firm in Kansas City before co-founding Brewer & Myers in the early 1950s; the firm would ultimately become a part of the law firm now known as Stinson Morrison Hecker through a series of merger.

Shortly after the outset of World War II, Brewer enlisted as an officer in the U.S. Navy. He was an operations officers of Landing Ship Tank Flotilla 13 and took part in the invasions of five major Japanese-held islands in the Pacific.

He is survived by his wife, Dorothy Middleton Brewer; three sons, Stephen Brewer, of Weatherby Lake, Mo., Michael Brewer, of Kansas City, Kan., and Peter Brewer, of Los Altos, Calif.; and two grandchildren.

Robert “Bob” L. Eastman

Robert L. “Bob” Eastman, of Coffeyville, died March 29; he was 71. He was born June 6, 1939, in Winfield, the son of the late William and Leah (Wells) Eastman; he had six siblings.

He graduated valedictorian from Grenola High School in 1957 and then from the U.S. Naval Academy in 1963. He served as a naval officer for five years as a pilot and flight instructor in the United States, Japan, and the Philippines, serving three tours of duty in Vietnam.

Following his honorable discharge in 1971, Eastman attended the University of Kansas School of Law, receiving his juris doctorate and began practicing law as a partner with Becker, Hildreth, Levy & Lively in Coffeyville. In the late 1980s, he started his private law practice, and in 2000, he expanded the law practice and established Coffeyville Title & Abstract Co. to serve the real estate needs of Coffeyville and the surrounding area.

Eastman’s professional memberships included the Kansas Bar Association, the Kansas Land Title Association, Coffeyville Rotary Club, and Genesis Inc.

He is survived by his wife, Donna Jean Eastman, of Coffeyville; two daughters, Jill Ewing, of Spring Hill, and Helen Angermayer, of Stilwell; stepdaughter, Grace Stephens, of Kansas City, Mo.; four grandchildren; two step-grandchildren; and siblings, Bill Eastman, of Wichita, Ann Vaughan, of Wichita, Mick Eastman, of Sacramento, Calif., Dick Eastman, of Grenola, and Jim Eastman, of Augusta. Eastman was preceded in death by his parents and infant sister, Jeanette.

Robert Martin

Robert Martin, 87, of Wichita, died July 18; he was a founding partner of the Martin Pringle Law Firm. He was born September 6, 1923, in Kansas City, Kan., and received his bachelor’s degree from the University of Kansas in 1946 and served in the U.S. Army Air Force as a B-24 pilot during World War II. Upon his return, he attended the University of Colorado and received his law degree in 1948.

He began his law career as a clerk to the Hon. Arthur J. Mellott, chief judge of the U.S. District Court for the District of Kansas, and was then recruited as a partner in the firm of Collins, Williams, Hughes & Martin in Wichita. He served as chief legal counsel for Beech Aircraft Corp. for decades and was co-author of the General Aviation Revitalization Act, which placed reasonable limits on aircraft manufacturing liability and ensured that Wichita’s manufacturers could continue to produce private aircraft. For more than 20 years, he lectured throughout the United States and internationally on product liability issues; he also wrote numerous articles addressing those issues.

He was a member of the American and Kansas bar associations, a fellow in the American College of Trial Lawyers, and a member of the board of directors of the Travel Air Insurance Companies and of Mull Drilling Co. Inc.

Survivors include his wife, Ann, of the home; sons, Marsh Martin, of Wichita, Roger Martin, of Wichita, and Illinois Blasdel, of Leawood; daughters, Carrie Trieschman, of Wichita, Oakley Blasdel, of Rowe, N.M., and Mary Alice Rush, of Wichita; seven grandchildren; and one great-granddaughter.

Robert V. Mulch

Robert V. Mulch, 70, of Scott City, died June 20 at Scott County Hospital. He was born May 22, 1941, in Scott City, the son of Vernon and Atha (Miller) Mulch. A lifetime resident of the town, he served the Scott City community for 20 years as municipal judge.

He was a 1959 graduate of Scott City Community High School, and he initially attended Fort Hays State University for two years before completing his bachelor’s degree in political science in 1963. He then went on to attend Washburn University School of Law and graduate with his law degree in 1966.

After college, Mulch was employed by the U.S. State Department and traveled the world, visiting 35 countries. He was an Eagle Scout and was involved in scouting his entire life. He was president of the Kansas Rural Center.

He is survived by his daughter, Aimee Wilson, of Wichita; three sons, Jason Biggs, of Enid, Okla., Morgan Mulch, of Denver, and Evan Mulch, of Cincinnati; and four grandchildren.

Mulch was preceded in death by his parents; wife, Glenda; and grandson, Devin Wilson.
The Greensburg tornado is now forever committed to the Kansas history books. A category 5 tornado, it took 11 lives, and seriously injured 60 in just Greensburg, while leveling 95 percent of the city. Experts say it is also the first five classification since May 3, 1999, when an EF-5 tornado ripped through Moore, Okla. Those same experts also tell us that the Kansas version was at least a mile wide, which was twice the width of the Moore tornado.

The devastation brought President George W. Bush to the city twice. The efforts of Steve Hewitt, city manager, earned him two trips to the White House, including being one of a handful of invited guests to Bush’s farewell address to the nation in January.

But if the name of Charley Herd, Esq., isn’t familiar to you, all that is about to change. You see, in a city of 1,400 people, Greensburg had just one attorney, Herd. And while with a disaster of the magnitude of Greensburg, there are countless everyday heroes, how the paths of Herd intersected with that city is a story worth retelling.

Naturally, Charley was raised in a town called Protection. Located in Comanche County, it was also the birthplace to another local, John Graue. But Graue and Herd were hardly contemporaries. John was a veteran of World War II, having served in the Pacific Theatre, then finished college and law school on the GI bill. Graue recruited Herd from Washburn University, where Herd graduated in May 1986. “My first day of work was Aug. 4, 1986. I was an associate with him until his retirement on Dec. 31, 1991, then took over his practice. John died five months later. When I came to Greensburg I was one of six attorneys. By January 2007, I was the only one left. The ironies of John and I moving from Protection to Greensburg separately, and then ending up together hasn’t been lost on me,” said Herd.

Charley met his wife, Jana Hall, while in law school. She was working for Goodell, Stratton, Edmonds, Palmer & Wright as a secretary.

And maybe it was dumb luck, or other forces were at play when on that fateful evening on May 4, 2007, Jana and their daughter, Melanie, were out of town, in Manhattan, attending Junior Day at K-State. Charley was at home with their other daughter, Lauren, when the tornado siren sounded. “Our house did not have a basement, so Lauren grabbed our dog, Shatzzi, and we went to a neighbor’s basement.”

“When the tornado came through, we huddled below the stairwell in the basement, Lauren clutching our dog. When we emerged from our neighbor’s basement, there was darkness. Flickers of lightning showed a landscape of utter devastation. No trees, no line poles, no houses, and no buildings. There were heaps of rubble and vehicles scattered in yards, some upside down. One of the first things I noticed was my pickup was in the neighbor’s yard, facing the opposite way, with its emergency flashers on. We decided the best place to go was the sheriff’s office, near my office. I walked to work most days during my 20 plus years of living in Greensburg. But without landmarks, such as light poles, houses, even the water tower was missing, it was a challenge finding the same route I could walk blindfolded before the tornado.

“As we headed that way, people pushed their way out of their homes to what was left of the street. It was like a scene from ‘War of the Worlds’ – people asking ‘have you seen so and so’ and most often, the answer was ‘no.’ When we finally made it to Main Street, we found emergency help from neighboring towns had already arrived – Kingman, Pratt, Dodge City. I was amazed they were already there, ready to help. My plan was to find a way to contact my brother, John, who lived in Protection and have him pick us up. We had just walked to a parking lot in Dillons, where they had assembled everyone. No one had phone service except one lady – her phone worked – she had service from Sprint. I called my wife and reassured her we were OK. And then, out of nowhere, I saw my brother’s pick-up truck – he was already there! Shatzzi, Lauren, and I jumped in and spent the night at my Mother’s house in Protection.

(Continued on Page 18)
New CLE Guidelines for LPM Programming

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

Law Practice Management and Kansas CLE

New Kansas continuing legal education guidelines went into effect on July 1, 2011, which provide welcome opportunities for attorneys to receive credit for their training in law practice management issues. The new guidelines also provide for CLE credit for courses provided through “nontraditional programming,” including Internet-based conferencing and podcasting. Those two changes in particular hopefully provide individual attorneys added incentive to explore management tools, techniques, and skills aimed at improving the quality and competitiveness of legal services, as well as opening new options for delivering courses to remote locations, busy solo attorneys, and out-of-state attorneys.

Law Practice Management Programming

Rule 806(k) — available at www.kscle.org — states:

An attorney may receive CLE credit for participation in an accredited CLE program as defined in the Guidelines for Accreditation of Law Practice Management Programming. Law practice management credit is limited to a maximum of 2.0 hours of general attendance credit in any compliance period.

The Guidelines for Accreditation of Law Practice Management Programming state:

Qualified programming includes: issues relating to the development and management of a law practice, including client relations and technology to promote the efficient, economical, and competent delivery of legal services.

Further:

Programming accreditable under the ethics and professionalism requirement are not subject to the 2.0-hour law practice management cap.

The benefit to attorneys is significant. As I write this very article, I am preparing to leave for the second annual Nebraska Solo & Small Firm Conference. The programming includes more traditional courses, including an “8th Circuit Update,” “Nebraska Probate Law Update,” and “Developments in Juvenile Law.” However, the courses that draw me and dozens of other attorneys are workshops like:

- Office Management for Small Firms;
- Law Office Technology for the Solo Small Firm;
- Mobile Technology in Solo and Small Firm Practice;
- Developing an Office Manual; and
- 50 Things I Wish I Would Have Learned in Law School About Running a Small Law Firm.

All of those topics consistently register as the sort of information practicing attorneys want but which CLE providers have struggled to provide when CLE credit was withheld. Compare the two-day CLE extravaganzas offered throughout the state for out-of-state, government, and procrastinating attorneys in which the full year’s requirement of 12 hours of CLE is offered. At the last one that I attended (as a speaker), the topics ranged from water law to Supreme Court updates — valuable topics but relevant to few attendees beyond fulfilling the annual CLE requirement. By contrast, the Nebraska Solo & Small Firm Conference provides a full year’s CLE but the inclusion of law practice management topic areas provides (for me at least) more relevant training options than “Perspectives on Criminal Defense.” If I attend the “Ethics and Cloud Computing” session, I can even squeak in a third credited hour directly applicable to my actual practice.

Nontraditional Programming

A serious issue for both CLE providers and attorneys trying to fulfill their requirements has been access. It is difficult to coordinate a classroom setting and presenters for smaller organizations and remote communities. It is usually difficult for attorneys to attend work-day seminars — many simply grab the most readily available and approved session whether relevant to them or not. New options for Internet conferencing, podcasts, and on-demand CLE programming are a valuable opportunity for providers to deliver content inexpensively and flexibly while giving attorneys convenient, relevant, and affordable programming.

There is some concern expressed by specialty bars that this could be the death of their programming (and revenue); they should not hop into the grave too eagerly. The new guidelines should be exploited to expand and lower costs for the bar and its members. For example, a 20-person specialty bar spread across six counties can create a CLE library of recorded podcasts available to its members cheaper than they can rent a facility, cater a meal, and bring in traveling speakers. Options provide more opportunity for revenue when organizations get creative.

Application

The primary aim (I hope) of the new CLE rules is to increase the probability that the sessions an attorney attends will be directly relevant to improving that attorney’s specific practice, professionalism, and skill. The challenge we now have is the same one my wife gives to her high school students at the end of instruction: “Go and do great things.” ■

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.
Officials quarantined Greensburg for three days after the tornado to clear streets and look for injured. For those days, I was not able to inspect my office and assess damages until the quarantine was lifted. My office was in the Greensburg State Bank building. The storm collapsed the south wall into the office area. File cabinets, desks, and credenzas were covered with three layers of brick and mortar. This kept records from being scattered and contained them in the office area. Heavy equipment was needed to remove the larger pieces of wall. The rest was removed by hand so that records were not damaged during the search.

“Friends helped me remove debris and gather records. Records were placed in storage at a nearby town. Records lost were destroyed by water, debris, and mold. Jana and I discussed moving to the Lawrence – Topeka area. In the end we decided to remain in Comanche County.

“I had an established client base there. The children were accustomed to small towns and small schools. We moved to Coldwater, the county seat, in part because it is the county seat, but also as a gesture to clients in Kiowa County that I was trying to stay reasonably close.”

And what about the support from others? “The most humbling part of the experience was the outpouring of support from the lawyers and judges. Then-KBA President David Rebein contacted me frequently. He traveled from Dodge City to Coldwater to consult about my plans. He helped me inspect potential office locations. The KBA gave me money to help set up a new office. If I tried to list all of the lawyers who called, offered support, helped me and my family, I’m afraid I would inadvertently leave someone out. Leslie Hess, attorney from Hays, gave me some furniture from her former office in Dodge City. John Bird, another Hays lawyer, was also very helpful. I did not know Mr. Bird before the tornado. He arranged, through the Ellis County Bar, to purchase a laptop computer for me. The laptop was invaluable during the period prior to establishing a new office.”

Judges in the 16th Judicial District gave him latitude to regroup on pending cases, extending deadlines, copying files as needed. “Administrative Judge Daniel Love called frequently after the tornado, not to monitor my cases, but to offer help and encouragement. Judges Leigh Hood and Van Hampton helped me in countless ways. So did Judge Bob Schmisseur of the 30th Judicial District.”

“In October 2007, I formally reopened my office in Coldwater. Jana and I bought a house across the street. Things are going well.” So, for the record, Charley Herd is open for business: Box 428, Coldwater, KS 67029; (620) 582-2020. If you call his office, you’ll likely reach his secretary. She has another title – his wife, Jana.

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IN THE SUPREME COURT OF THE STATE OF KANSAS

RULES RELATING TO THE SUPREME COURT, COURT OF APPEALS, AND APPELLATE PRACTICE

RULE 8.03

SUPREME COURT REVIEW OF COURT OF APPEALS DECISION

Rule 8.03(g)(4) is hereby amended, effective the date of this order.

(4) Oral Argument. The order of argument in the Supreme Court shall be the same as in the Court of Appeals. Unless otherwise ordered by the Supreme Court, the party whose petition for review was granted will argue first and may reserve time for rebuttal.

BY ORDER OF THE COURT, this 21st day of July, 2011.

FOR THE COURT

Lawton R. Nuss
Chief Justice
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KANSAS BAR ASSOCIATION
The Kansas Business Entity Transactions Act

By Edwin W. Hecker, Jr.
I. Introduction

Since the early 1990s, there has been a proliferation of different types of business entities, in Kansas and elsewhere. Presently, there are four major types: corporations, limited liability companies (LLCs), partnerships (including limited liability partnerships (LLPs)), and limited partnerships (including limited liability limited partnerships).

In Kansas, each has its own governing statute. The statutes applicable to corporations, limited liability companies, and partnerships authorized, and continue to authorize mergers with like entities. The statutes governing partnerships and limited liability companies authorized them to convert into some other type of unincorporated entity without the necessity of dissolving and reorganizing, but they could not convert into a corporation. Nor was there a statute that permitted a corporation to convert into any other type of entity. Kansas also had a so-called mixed-entity merger statute that broadly authorized and regulated mergers between dissimilar entities of all types. It did not, however, authorize transactions other than mergers. Finally, there was no statutory authorization in Kansas for interest exchanges or domestications with respect to any type of entity.

The Business Entity Transactions Act (BETA) seeks both to fill these voids and to rationalize prior law with a comprehensive statute that substantively recognizes four types of mixed-entity, and in many cases similar-entity, transactions, coupled with parallel procedures for the authorization and effectiveness of those transactions. BETA is based on the Model Entity Transactions Act (META), which is a joint product of the National Conference of Commissioners on Uniform State Laws and the American Bar Association. BETA consists of six parts that address: (1) definitions and generally applicable provisions; (2) mergers; (3) interest exchanges; (4) conversions; (5) domestications; and (6) execution, filing requirements, and other miscellaneous matters.

II. Definitions and Generally Applicable Provisions

A. Definitions

Because BETA applies to multiple types of entities, each with its own terminology, it is forced to employ generic terms the definitions of which are important for understanding the statute. The following are a few of the most significant.

“Entity” controls generally the applicability of BETA. It includes corporations, general partnerships (including LLPs), limited partnerships (including limited liability limited partnerships), LLCs, business or similar trusts, cooperatives, or any other persons with separate legal existence or power to acquire real property in their own names. It does not include, however, individuals, trusts other than business or similar trusts, associations that merely consist of joint ownership of property, decedents’ estates, or governments or governmental subdivisions, agencies, or instrumentalities. Note that the definition of entity is not explicitly restricted to for-profit entities, and for that reason, the statute’s title is somewhat under-inclusive.

“Interest” means a governance interest or a transferable interest in an unincorporated entity or a share or membership in a corporation. “Governance interest” means the right: to access to information about the entity or its books and records; to vote for the election of the entity’s governors; or to receive notice of or to vote on matters of internal affairs. “Transferable interest” means the right, under an entity’s organic law, to receive distributions. “Interest holder” means the direct holder of an interest. Ordinarily, in the case of for-profit entities, interest holders will have both a governance interest and a transferable interest. This may not always be true, however. For example, under the default rules of the Kansas Uniform Partnership Act (KUPA), a partner in a general partnership (or an LLP) may transfer the partner’s right to distributions but may not transfer the partner’s management and informational rights. In such a situation, the partner will continue to be an “interest holder” under BETA because of the retained governance interest even though the partner no longer has a transferable interest. The transferee’s status is more problematic. Under the default rules of KUPA, it is clear that the transferee does not become a partner unless the other partners unanimously consent. Nevertheless, the transferee now possesses a direct transferable interest in the partnership sufficient to make the transferee an “interest holder” for purposes of BETA. META’s comments confirm this analysis.

“Interest holder liability” means either: (a) personal liability of an interest holder for liabilities of an entity imposed by
statute or by the internal rules of the entity as authorized by statute; or (b) an obligation of an interest holder to contribute to the entity pursuant to its internal rules. Therefore, the term includes such things as the personal liability of a general partner of a general or limited partnership for entity obligations. It also includes the liability of a shareholder that owns stock that is partly paid and subject to call, or the obligations of members of an LLC or partners of a limited partnership to perform promises to contribute capital. It does not, however, include other types of entity-related liability, such as that of a shareholder that personally guarantees a corporate obligation.

“Governor” means a person under whose authority and direction the powers of the entity are exercised and its business and affairs are managed. Obvious examples include the Kansas General Corporation Code (KGCC), the Kansas Revised Uniform Limited Partnership Act (KRULPA), and KUPA. “Organic rules” means the public organic document and private organic rules of an entity. “Public organic document,” in turn, means the publicly filed document that creates an entity.

“Organic law” means the statutes, if any, governing the internal affairs of an entity. Obvious examples include the Kansas General Corporation Code (KGCC), the Kansas Revised Uniform Limited Liability Company Act (KRLLLCA), and the Kansas Revised Uniform Limited Partnership Act (KRULPA), and KUPA. “Organic rules” means the public organic document and private organic rules of an entity. “Public organic document,” in turn, means the publicly filed document that creates an entity. Articles of incorporation, articles of organization, and certificates of limited partnership are common examples of public organic documents. Note that although a general partnership must file a statement of qualification to achieve the status of an LLP, the limited liability partnership technically is not a new entity, but rather simply a continuation of the former partnership with limited liability for its partners. Therefore, a statement of qualification technically is not a public organic document. Finally, “private organic rules” means the rules, whether or not written, other than those in an entity’s public organic document, that govern the entity’s internal affairs and are binding on its interest holders. Examples of private organic rules include by-laws, operating agreements, and partnership agreements.

Each of the four types of transactions authorized by BETA involves its own unique terminology, but mergers deserve special mention here. Traditionally, the term “merger” is confined to a combination of two or more entities in which one of the original entities survives. A “consolidation,” on the other hand, refers to a combination of two or more entities that results in the creation of an entirely new entity. Because both types of combination are governed by the same statutory provisions, there is no particular purpose to be served by maintaining the linguistic distinction. BETA recognizes this and abolishes the distinction by means of two definitions. “Merger” means a transaction in which two or more entities combine into a single surviving entity. Importantly, “surviving entity” means the entity that continues in existence after or is created by a merger.

B. Relationship to other laws

BETA does not displace or override Kansas’s anti-takeover legislation, i.e., the Control Share Acquisition Act and the Business Combinations with Interested Shareholders Act. Public utilities continue to be subject to regulation under K.S.A. chapter 66, but are also covered by BETA to the extent it is not inconsistent. Finally, because BETA is applicable to non-profit as well as for-profit entities, special provision is made to protect property held for a charitable purpose from being diverted.

C. Appraisal rights

Statutory appraisal rights are available to interest holders of a domestic merging, acquired, converting or domesticating entity if they would have been available under the entity’s organic law in connection with a merger under that law. In other words, BETA generally extends statutory appraisal rights to all four types of transactions that it authorizes, provided that the organic law of an entity would grant statutory appraisal rights to interest holders if the transaction were a merger carried out under that organic law. Thus, for example, corporate shareholders that would be entitled to appraisal rights in a corporate merger under the KGCC, are entitled to appraisal rights in a mixed-entity merger or in an interest exchange, conversion, or domestication under BETA. Similarly, dissociated partners that would have appraisal/buyout rights in a merger under KUPA, have the same rights in a mixed-entity merger or other transaction under BETA. However, although KRLLLCA provides for mergers of limited lia-

18. K.S.A. 56-1a253(b), 56a-306(a).
21. META § 102 cmt. 20.
23. META § 102 cmt. 16.
27. K.S.A. & 2010 Supp. 56-1a01 to -1a610.
32. K.S.A. 56a-201(b).
38. K.S.A. 17-1286 to -1298.
39. K.S.A. 17-12, 100 to -12,104.
42. K.S.A. 2010 Supp. 17-78-104(c).
43. An “acquired entity” is an entity the interests of which are acquired in an interest exchange. K.S.A. 2010 Supp. 17-78-102(a).
44. K.S.A. 2010 Supp. 17-78-109(a). However, statutory appraisal rights will be unavailable to the extent that the entity’s organic rules limit their availability pursuant to authority contained in the entity’s organic law. Id.
45. K.S.A. 17-6712.
bility companies, it does not grant statutory appraisal rights. Therefore, members of an LLC lack such rights for any and all transactions under BETA.

Moreover, because KRULPA no longer authorizes limited partnership mergers, limited partners also arguably lack statutory appraisal rights. On the other hand, it can plausibly be argued that limited partners do possess statutory appraisal/buyout rights because of the linkage between KRULPA and KUPA. That is, KRULPA states that any case not provided for is governed by KUPA. Thus, KUPA’s appraisal/buyout rights should be available to limited partners as well as to general partners. This statutory linkage argument must contend with the legislative history surrounding the adoption of BETA, which is at least superficially troublesome in two respects. First, the law that enacted BETA also struck all references to limited partnerships that previously appeared in KUPA’s merger provisions. This action, however, was simply a housekeeping measure to conform KUPA to the new reality that henceforth BETA exclusively would govern mixed entity mergers involving general partnerships and limited partnerships. Second, the 2010 repeal of K.S.A. 56-1a609, KRULPA’s authorization of like entity limited partnership mergers, was driven by the secretary of state’s desire to have such mergers also governed by BETA rather than KRULPA. However, the secretary of state’s focus was solely procedural, and no consideration was given to limited partner appraisal rights or any other substantive matters. On the contrary, the motivation for repeal was that section 56-1a609 was primitive and misleading in its lack of procedural detail and therefore was badly out of step with the rest of Kansas’s merger statutes. Rather than amend KRULPA to provide comprehensively for limited partnership mergers, the choice was made simply to repeal section 56-1a609 and rely on BETA for coverage. For this reason, the legislation was viewed as noncontroversial and passed both houses of the Kansas legislature unanimously.

Given that history, the linkage between KRULPA and KUPA regarding limited partnership appraisal/buyout rights could and should be interpreted as still viable.

Contractual appraisal rights are also available to the extent provided in the entity’s organic rules, the agreement of merger, interest exchange, conversion or domestication, or in the case of a corporation, by action of its governors. If an interest holder is entitled to contractual appraisal rights but the entity’s organic law does not provide procedures for conducting an appraisal, the KGCC applies to the extent practicable, unless the entity’s organic rules or the agreement provide otherwise.

D. Excluded entities

The following entities may not engage in transactions under BETA: (1) insurance companies; (2) banks and trust companies; (3) credit unions; and (4) professional corporations and professional LLCs.

III. Mergers

A. Mergers authorized

Any combination of domestic and foreign entities may merge and any may be the surviving entity, provided applicable foreign law authorizes the foreign entity’s participation in the merger. However, BETA does not govern like-entity mergers involving two or more corporations, partnerships, or LLCs because the organic laws governing those entities already provide for such mergers. Like-entity mergers involving limited partnerships will, however, be governed by BETA because the 2010 Legislature repealed K.S.A. 56-1a609, the provision of KRULPA governing limited partnership mergers.

B. Merger agreement

Each entity that is a party to a merger must approve and execute a merger agreement that sets forth: (1) the name, jurisdiction of organization, and type of each merging entity; (2) the same information with respect to the surviving entity if it is created by the merger; (3) the manner of converting the interests in each party to the merger into interests, securities, obligations, rights to acquire interests or securities, cash, other property, or any combination thereof; (4) if the surviving entity existed before the merger, any proposed amendments to

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49. K.S.A. 56-1a604.
50. See note 46, supra.
52. See META App. 2, § A2-3.
53. K.S.A. 56-1a609 only obliquely referred to a merger agreement and failed completely to require filing with the secretary of state of a certificate of merger, or alternatively, the merger agreement. Instead, it simply required a limited partnership that did not survive a merger to file a certificate canceling its certificate of limited partnership. Testimony of the Kansas Secretary of State on SB 441 to the Senate and House Committees on the Judiciary (2010) (on file with the author); Email exchanges between Sheri Smiley, Attorney, Kansas Secretary of State, and the author (March 4-19, 2010) (on file with the author).
54. The Senate Judiciary Committee recommended that, because of its noncontroversial nature, SB 441 be placed on the consent calendar. Kansas Senate Journal, 2010 Sess. 1019 (Feb. 11, 2010). SB 441 passed the Senate on a 40-0 vote five days later. Id. at 1033. The House of Representatives passed SB 441 one month after that on a 124-0 vote. Kansas House Journal, 2010 Sess. 1155 (March 19, 2010).
55. See also K.S.A. 2010 Supp. 17-78-106 (stating a rule of statutory non-exclusivity).
60. K.S.A. 2010 Supp. 17-78-201(c).
its organic rules that are called for by the merger; (5) if the surviving entity is created by the merger, its proposed organic rules in full; (6) the other terms and conditions of the merger; and (7) any other provisions required by law or by the organic rules of a merging entity.\(^{62}\)

Note that, like the KGCC, KRLLC, and KUPA,\(^ {63}\) BETA authorizes mergers in which interest holders of a merging entity receive consideration other than interests in the surviving entity. Such consideration may include cash, debt, or other property and may be furnished by a person that is not a party to the merger.\(^ {64}\) Depending on the type of entity and the facts of the particular case, interest holders “cashed out” in such a merger may have statutory appraisal rights\(^ {65}\) or possibly a cause of action for breach of fiduciary duty.\(^ {66}\) Of course, the merger agreement may also provide contractual appraisal rights.\(^ {67}\)

C. Approval of merger agreement

The requirements for approval\(^ {68}\) of a merger agreement vary depending on the type of entity and the provisions of its organic law and rules.\(^ {69}\) If the entity is a domestic for-profit business corporation, the merger must be approved pursuant to the KGCC and its organic rules in the same manner as a like entity merger requiring approval of its shareholders.\(^ {70}\) In the case of an unincorporated domestic entity, the merger must be approved pursuant to its organic law and rules in the same manner as a like-entity merger, but if its organic law and rules do not provide for approval of a merger, then by all of its interest holders that are entitled to vote on any matter.\(^ {71}\) Thus, if the entity is an LLC, the merger must be approved by a majority in profits interest of the members, unless the operating agreement provides otherwise.\(^ {72}\) If the entity is a partnership, the merger must be approved by all of the partners, unless otherwise provided in the partnership agreement.\(^ {73}\) Because KRULPA does not provide for mergers, if the entity is a limited partnership, the merger must be approved by all partners (both general and limited) that are entitled to vote on any matter, unless the partnership agreement provides otherwise.\(^ {74}\)

In addition to the above, each interest holder in a domestic merging entity that will have interest holder liability for liabilities that arise after the merger must approve the merger in writing.\(^ {75}\) Thus, if a corporation or LLC merges into a general partnership, each shareholder or member that becomes a general partner must approve the merger in writing, regardless of whether the shareholder’s or member’s vote or consent would otherwise be required. There is an exception to this requirement for unincorporated entities the written organic rules of which provide for less than unanimous approval of mergers in which some or all interest holders become subject to interest holder liability. In such a case, no special consent to the merger is required from interest holders that voted for, consented to, or became interest holders after the adoption of that provision.\(^ {76}\)

Of course, if a merging entity is a foreign entity, it must approve the merger in accordance with the applicable law of the jurisdiction of its organization.\(^ {77}\)

D. Amendment or termination of merger agreement

If the merger agreement of a domestic merging entity does not provide for amendment, it must be amended in the same manner in which it was originally approved.\(^ {78}\)

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64. K.S.A. 2010 Supp. 17-78-202(a)(3); META § 202 cmt. 3.
65. See text at notes 43-55, supra.
68. “Approve” is a defined term that means the governors and interest holders take whatever action is necessary under an entity’s organic rules, organic law, and other law to: (1) propose a transaction; (2) adopt and approve the terms and conditions of the transaction; and (3) conduct any required proceedings or otherwise obtain any required votes or consents of the governors or interest holders. K.S.A. 2010 Supp. 17-78-102(d).
69. The drafters of META suggest that the reference to the organic law of an entity should be construed broadly to include not only statutory procedures for approval of a merger, but also common law principles such as fiduciary duties of governors and controlling interest holders. META § 203 cmt. 1.
70. K.S.A. 2010 Supp. 17-78-203(a)(1)(A)(ii). Thus, the merger must be a so-called long-form merger under K.S.A. 17-6701(a)-(e) rather than one of several other kinds of merger in which the requirement of a shareholder vote is dispensed with. See, e.g., K.S.A. 17-6701 (f), (g), -6703.
73. K.S.A. 2010 Supp. 56a-905(c).
agreement provides for amendment, that procedure, whether solely by vote of the entity’s governors, its interest holders, or both, must be followed.\(^79\) However, interest holders that had the right to vote on the original agreement have a statutory right to vote on any amendment that: (1) changes the amount or type of consideration to be received in the merger; (2) changes the organic rules of the surviving entity (except changes that do not require interest holder approval under the surviving entity’s organic law or rules); or (3) changes any other provision of the agreement in a manner that would adversely and materially affect the interest holder.\(^80\)

A merger becomes effective upon the filing of a certificate of merger with the secretary of state, or if the certificate provides for delayed effectiveness, upon the delayed effective date.\(^81\) Before a merger becomes effective, the merger agreement may be terminated as provided in the agreement, or unless prohibited by the agreement, in the same manner in which the agreement was approved.\(^82\) However, if the merger agreement is terminated after a certificate of merger with a delayed effective date has been filed, a certificate of termination must be filed with the secretary of state before the certificate of merger becomes effective.\(^83\)

**E. Certificate of merger**

In order for a merger to become effective, a signed certificate of merger must be filed with the secretary of state on behalf of the surviving entity.\(^84\) The certificate must contain: (1) the name, jurisdiction of organization and type of each entity that is a party to the merger, other than the surviving entity; (2) the same information with respect to the surviving entity; (3) if the certificate is not to be effective on filing, the delayed effective date, which cannot be later than 90 days after filing; (4) a statement that the merger was properly approved by each merging entity; (5) the amended or new public organic document of the surviving entity (or, if an LLP, its statement of qualification, which technically is not a public organic document); and (6) if the surviving entity is a foreign entity that is not qualified to do business in Kansas, the mailing address to which the secretary of state may send process.\(^85\)

A merger agreement that is signed by all merging entities and that contains the information required to appear in a certificate of merger may be filed in lieu of a certificate.\(^86\)

**F. Effect of merger**

BETA’s provisions regarding the effect of a merger are highly detailed. The following is a summary of the most important.

The surviving entity continues or comes into existence and all other merging entities cease to exist. All property, rights, privileges, powers, immunities, and purposes of all merging entities vest in the surviving entity without the necessity of assignment and without reversion or impairment. All liabilities of all merging entities are liabilities of the surviving entity. If any of the merging entities were parties to pending litigation, the surviving entity may, but need not, be substituted. The surviving entity’s organic rules are amended or created as provided in the agreement and certificate of merger. Interests in the merging entities are converted as provided in the merger agreement, and the interest holders have only the rights provided in the merger agreement and any appraisal rights provided by K.S.A. 2010 Supp. 17-78-109 and the merging entities’ organic laws.\(^87\) Except as otherwise provided in a particular entity’s organic law or rules, a merger does not give rise to any rights that would accompany a dissolution, liquidation, or winding up of the entity.\(^88\)

A person that did not have pre-merger interest holder liability (e.g., a shareholder of a corporation or a member of an LLC) but that becomes subject to interest holder liability as a result of the merger (e.g., a general partner in a surviving partnership or limited partnership) has such liability only as provided in the entity’s organic law and only as to liabilities that arise after the merger.\(^89\) A person that had pre-merger interest holder liability with respect to a domestic merging entity, but that ceases to hold an interest in that entity as a result of the merger (either because the entity is not the surviving entity or because the person is cashed out in the merger): (1)

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83. K.S.A. 2010 Supp. 17-78-204(c). The certificate of termination must be signed and may be filed by any merging entity; is effective upon filing; and must state the names of the merging and surviving entities, the date the certificate of merger was filed, and a statement that the merger was terminated in accordance with section 17-78-204.
is not discharged from the pre-merger interest holder liability by reason of the merger; (2) does not incur any interest holder liability for liabilities that arise after the merger; and (3) the person’s release, discharge, collection, and contribution rights and obligations with respect to the pre-merger liability are the same as if the merger had not occurred.\[^{90}\]

If the surviving entity is a foreign entity, it may be served with process in Kansas for the enforcement of any liabilities of any domestic merging entities, and it is deemed to have appointed the secretary of state as its agent to accept such service.\[^{91}\]

### IV. Interest Exchanges

Part 3 of BETA authorizes interest exchanges, which are new to Kansas law, and it therefore applies to both like and mixed entity transactions for all types of entities. In an acquisition cast in the form of a simple merger, the acquiring entity survives with the combined assets, liabilities, rights, powers, privileges, purposes, and so forth, of both entities, and the acquired entity disappears. Under prior law, if the acquiring entity wished to keep the acquired entity in existence and operate it as a wholly-owned subsidiary, it had only two alternatives, both of which were unnecessarily complicated. It could engage in a reverse triangular merger, in which it created a shell subsidiary, which was then merged into the acquired entity with the acquired entity surviving. The interest holders of the acquired entity received interests in the acquiring entity, debt securities, cash, and/or other property, and the acquiring entity’s interests in the disappearing shell subsidiary were converted into interests in the acquired entity. Alternatively, the acquiring entity could make a direct offer to purchase the interests of the interest holders of the acquired entity. Unless the acquired entity was closely-held, this approach would rarely result in acquiring all of its outstanding interests, so a follow-up reverse triangular merger usually was necessary if complete ownership was desired.

#### A. Interest exchanges authorized

BETA authorizes a domestic entity to acquire a previously unrelated domestic or foreign entity as a subsidiary simply and directly with an “interest exchange,” in which all of one or more classes or series of interests in the acquired entity are exchanged for interests, securities, obligations, rights to acquire interests or securities, cash, or other property, pursuant to an agreement of interest exchange negotiated between the two entities. Similarly, all of one or more classes or series of interests in a domestic entity may be acquired in an interest exchange by another domestic or foreign entity.\[^{92}\] It is important to note that if the acquired entity has multiple classes or series of interests outstanding, the acquiring entity need not acquire all of the different classes or series, but it must acquire all of the interests in the class or series it seeks.

#### B. Interest exchange agreement

A domestic entity may become the acquired entity in an interest exchange by approving an interest exchange agreement, which is similar to a merger agreement. The interest exchange agreement must provide: (1) the name and type of organization of the acquired entity; (2) the name, jurisdiction of organization, and type of the acquiring entity; (3) the manner of converting the interests in the acquired entity into interests, securities, obligations, rights to acquire interests or securities, cash, property, or any combination thereof; (4) any proposed amendments to the organic rules of the acquired entity; (5) the other terms and conditions of the interest exchange; and (6) any other provision required by law or the organic rules of the acquired entity.\[^{93}\]

#### C. Approval of interest exchange agreement

An interest exchange agreement must be approved by a domestic acquired entity in accordance with its organic law and rules, if any, with respect to approval of interest exchanges. If the acquired entity’s organic law and rules do not provide for approval of interest exchanges, then in accordance with its organic law and rules with respect to approval of a merger, as if the interest exchange were a merger (in the case of a corporation, a long-form merger requiring a vote of its shareholders). If the acquired entity’s organic law and rules do not provide for approval of either an interest exchange or a merger, then by all of the interest holders entitled to vote.\[^{94}\]

Because the organic laws governing Kansas entities do not provide for interest exchanges, the voting requirements for mergers will apply as a default unless the organic rules of an acquired entity provide otherwise.\[^{95}\] The similarity of an interest exchange to a merger makes this a sensible default rule. However, the absence of statutory provisions in Kansas’s organic laws suggests that it would be good practice for the organic rules of Kansas entities to address explicitly the approval requirements for interest exchanges.\[^{96}\]

In addition to the above, each interest holder of a domestic acquired entity that will have interest holder liability for liabilities that arise after the interest exchange must approve the interest exchange in writing (unless the entity is unincorporated, its organic rules provide for less than unanimous approval of interest exchanges or mergers in which some or all interest holders become subject to interest holder liability, and the interest holder voted for, consented to, or became an interest holder after the adoption of that provision).\[^{97}\]

Of course, if the acquired entity is a foreign entity, it must approve the interest exchange in accordance with the applicable law of the jurisdiction of its organization.\[^{98}\]

In contrast to an acquired entity, the interest holders of an acquiring entity are not required to approve an interest exchange unless its organic law or rules provide otherwise.\[^{99}\] This provi-

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92. K.S.A. 2010 Supp. 17-78-301(a). A foreign entity may also be either the acquiring or acquired entity if the interest exchange is authorized by the law of the foreign entity’s jurisdiction of organization. Id. 17-78-301(b).
95. See text at notes 68-74, supra, for a discussion of the requirements for approval of mergers with respect to different types of entities.
sion is consistent with the law governing triangular mergers, in which shareholders of a parent corporation are not required to approve a merger involving the parent’s acquisition subsidiary.

D. Amendment or termination of interest exchange agreement

BETA’s provisions governing amendment and termination of interest exchange agreements are substantially the same as those governing merger agreements.  

E. Certificate of interest exchange

In order for an interest exchange to become effective, a domestic acquired entity must sign and file with the secretary of state a certificate of interest exchange that sets forth: (1) the name and type of organization of the acquired entity; (2) the name, jurisdiction of organization and type of the acquiring entity; (3) if the certificate is not intended to be effective on filing, its effective date, which may not be more than 90 days after filing; (4) a statement that the interest exchange agreement was properly approved by the acquired entity; and (5) any amendments to the acquired entity’s public organic document that were approved as part of the interest exchange agreement.

A signed interest exchange agreement that contains the information required to appear in a certificate of interest exchange may be filed in lieu of a certificate.

F. Effect of interest exchange

Not surprisingly, the effect of an interest exchange is similar to that of a reverse triangular merger. The interests in the acquired entity that are the subject of the interest exchange cease to exist or are converted or exchanged as provided in the interest exchange agreement, and the interest holders have only the rights provided in the interest exchange agreement and any appraisal rights that they would have in a merger that was a like entity merger. The acquiring entity becomes the interest holder of the interests in the acquired entity as provided in the interest exchange agreement, and the acquired entity’s organic rules are amended as provided in the agreement and certificate of interest exchange. In keeping with the substance of an interest exchange as simply the acquisition of another entity as a subsidiary, BETA affirms that, except as otherwise provided in the acquired entity’s organic law or rules, an interest exchange does not give rise to any rights that would accompany a dissolution, liquidation, or winding up of the acquired entity.

BETA’s provisions governing the effect of an interest exchange on interest holder liability are substantially the same as those governing mergers.

V. Conversions

A. Conversions authorized

Unlike mergers and interest exchanges, which by definition involve multiple entities, conversions involve only a single entity that changes its form into that of a different type of entity. As noted at the outset, prior law authorized partnerships and LLCs to convert into other types of unincorporated entities without dissolving and reorganizing, but they could not convert into corporations. Moreover, there was no statutory authority for corporations to convert into any other type of entity. BETA repealed the provisions of prior law and replaced them with broad authorization for a domestic entity to convert into a different type of domestic or foreign entity (if authorized by the law of the foreign jurisdiction) or for a foreign entity to convert into a different type of domestic entity (if authorized by the law of the foreign jurisdiction).  

B. Conversion agreement

A domestic entity may convert into a different type of domestic or foreign entity by approving a conversion agreement that is similar to a merger agreement. The conversion agreement must provide: (1) the name and type of the converting entity; (2) the name, type, and jurisdiction of organization of the converted entity; (3) the manner of converting the interests in the converting entity into interests, securities, obligations, rights to acquire interests or securities, cash, other property, or any combination thereof; (4) the proposed public organic document of the converted entity, if any; (5) the proposed private organic rules of the converted entity; (6) the other terms and conditions of the conversion; and (7) any other provision required by law or the organic rules of the converting entity.

C. Approval of conversion agreement

The conversion agreement of a domestic converting entity must be approved in accordance with its organic rules, if any, with respect to conversions. If the converting entity’s organic rules do not provide for approval of conversions, then the conversion agreement must be approved in accordance with its organic law and rules with respect to a merger, as if the conversion were a merger (in the case of a corporation, a long-form merger requiring the vote of its shareholders). If the converting entity’s organic law and rules do not speak to approval of either a conversion or a merger, then approval must be by all of the interest holders entitled to vote. As with interest exchanges, it would be good practice to address specifically in the organic rules of Kansas entities the requirements for approval of conversions.

In addition to the above, each interest holder of a domestic converting entity that will have interest holder liability for li-

101. K.S.A. 2010 Supp. 17-78-305(a), (b), (c).
106. See K.S.A. 2010 Supp. 17-78-206(c), (d), -306(c), (d); text at notes 89-90 supra.
109. K.S.A. 2010 Supp. 17-78-403(a)(1)(A). Note that, in contrast to the corresponding provisions governing mergers and interest exchanges, this section references only the requirements for approval of conversions, if any, in the organic rules of the converting entity and not also those in its organic law. Cf. K.S.A. 2010 Supp. 17-78-205(a)(1)(A), -303(a)(1)(A). The reason may be that the drafters of META strongly suggested that adopting states repeal all provisions that authorized conversions in their organic business laws. META § 301, legislative note. Kansas followed this suggestion.
abilities that arise after the conversion must approve the conversion in writing.112 Thus, if a corporation or LLC converts into a general partnership, each shareholder or member that becomes a general partner must approve the conversion in writing, regardless of whether the shareholder's or member's vote would otherwise be required. There is an exception to this requirement for unincorporated entities the written organic rules of which provide for less than unanimous approval of a conversion or a merger in which some or all interest holders become subject to interest holder liability. In such a case, no special consent to the conversion is required from interest holders that voted for, consented to, or became interest holders after the adoption of that provision.113

Of course, if the converting entity is a foreign entity, it must approve the conversion in accordance with the applicable law of the jurisdiction of its organization.114

D. Amendment or termination of conversion agreement

BETA's provisions governing amendment and termination of conversion agreements are substantially the same as those governing merger agreements.115

E. Certificate of conversion

BETA's provisions governing certificates of conversion are substantially the same as those governing certificates of merger.116

F. Effect of conversion

Conversion does not dissolve the converting entity or require it to wind up its affairs.117 Nor, unless otherwise provided in its organic law or rules, does conversion give rise to any rights that would accompany a dissolution, liquidation, or winding up of the converting entity.118 On the contrary, although the converted entity becomes organized under and subject to the organic law of the converted entity, it remains the same entity without interruption as the converting entity, albeit in a different legal form.119 Thus, upon effectiveness, all assets, rights, privileges, powers, immunities, purposes, and liabilities of the converting entity vest in the converted entity by operation of law without the necessity of assignment and without reversion or impairment.120 If the converting entity was a party to pending litigation, the converted entity may, but need not be substituted.121 The converted entity's organic rules are effective and enforceable as provided in the conversion agreement and certificate of conversion.122 Interests in the converting entity are converted as provided in the conversion agreement, and the interest holders have only the rights provided in the conversion agreement and any appraisal rights that they would have in a merger that was a like-entity merger.123

If the converted entity is a foreign entity, it may be served with process in Kansas and is deemed to have appointed the secretary of state as its agent to accept service. If the converting entity is a qualified foreign entity, its qualification is canceled upon the conversions becoming effective.124

BETA's provisions governing the effect of a conversion on interest holder liability are substantially the same as those governing mergers.125

VI. Domestications

A. Domestications authorized

Prior to 2010 there was no statutory authority in Kansas for domestication, the process by which an entity changes its jurisdiction of organization without dissolving and reorganizing. Part 5 of BETA now broadly authorizes a Kansas entity to become a domestic entity of the same type in a foreign jurisdiction, and a foreign entity to become a Kansas entity of the same type, provided that, in either case, the process is also authorized in the foreign jurisdiction.126 Note that domestication under Part 5 involves only a change in the entity's jurisdiction of organization and not also a change in the entity's type.127

B. Domestication agreement

A Kansas entity may become a foreign entity by approving an agreement of domestication that provides: (1) the name and type of the domesticating Kansas entity; (2) the name and jurisdiction of organization of the domesticated entity; (3) the manner of converting the interests in the domesticating entity into interests, securities, obligations, rights to acquire interests or securities, cash, other property, or any combination thereof; (4) the proposed public organic document of the domesticated entity, if any; (5) the proposed private organic rules of the domesticated entity; (6) the other terms and conditions of the domestication; and (7) any other provision required by law or the organic rules of the domesticating entity.128

C. Approval of domestication agreement

A domestication agreement must be approved by a Kansas entity that seeks to domesticate in a foreign jurisdiction in accordance with its organic rules, if any, with respect to approval of domestications.129 If the domesticating entity's organic rules do not provide for approval of domestications, then the domestication agreement must be approved in accordance with its

125. See K.S.A. 2010 Supp. 17-78-206(c), (d), -406(c), (d); text at notes 89-90 supra.
127. K.S.A. 2010 Supp. 17-78-501(a), (b). META § 501 cmt. 1: “A domestication . . . differs from a conversion in that a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.”
129. K.S.A. 2010 Supp. 17-78-503(a)(1)(A). Note that, in contrast to the corresponding provisions governing mergers and interest exchanges, this section references only the requirements for approval of domestinations, if any, in the organic rules of the domesticating entity and not also those in its organic law. Cf. K.S.A. 2010 Supp. 17-78-203(a)(1)(A),
organic law and rules with respect to approval of a merger, as if the domestication were a merger (in the case of a corporation, a long-form merger requiring a vote of its shareholders). If the domesticating entity's organic law and rules do not speak to approval of either domestication or a merger, then the domestication agreement must be approved by all of the interest holders entitled to vote. Thus, the organic rules of a Kansas entity may specify the vote necessary to authorize its domestication in a foreign jurisdiction. Only if those rules are silent will the vote requirement revert to that necessary to approve a merger.

In addition to the above, each interest holder of a Kansas domesticating entity that will have interest holder liability for liabilities that arise after the domestication must approve the domestication in writing. Because domestincations involve only a change in jurisdiction of organization and not a change in entity type, this provision will rarely be implicated with respect to imposition of personal liability for post-domestication entity obligations. “Interest holder liability,” however, also includes such things as capital calls, which very well could be provided for in the entity's organic rules as amended by the domestication agreement. In such instances, each interest holder that would become subject to such a call must approve the domestication agreement in writing, regardless of whether the interest holder’s vote or consent would otherwise be required. Nevertheless, there is an exception to this requirement for unincorporated entities the written organic rules of which provide for less than unanimous approval of a domestication or a merger in which some or all interest holders become subject to interest holder liability. In such a case, no special consent to the domestication is required from interest holders that voted for, consented to, or became interest holders after the adoption of that provision.

Of course, if the domesticating entity is a foreign entity that seeks to domesticate in Kansas, it must approve the domestication in accordance with the law of its jurisdiction of organization.

D. Amendment or termination of domestication agreement

BETA’s provisions governing amendment and termination of domestication agreements are substantially the same as those governing merger agreements. The reason is that domestincations involve only entities of the same type. Therefore, if a domesticating entity's organic law provides for domestincations, the transaction will be carried out under that law and will not be governed by BETA in any respect. See META § 501, legislative note. The situation in Kansas is just the reverse—none of the organic laws governing Kansas entities authorize domestincations, so all such transactions will be governed by BETA.

E. Certificate of domestication

BETA’s provisions governing certificates of domestication are substantially the same as those governing mergers.

F. Effect of domestication

BETA’s provisions governing the effect of domestication are substantially the same as those governing conversion.

VII. Conclusion

BETA represents a significant advance in Kansas’s statutory business law. It simplifies mixed entity mergers; expands and rationalizes conversions; and introduces two entirely new and cost-effective kinds of transactions—interest exchanges and domestincations. Of nearly equal importance, it does so with procedural and filing requirements that are common to all four kinds of transactions. As such, BETA helps to solidify the state’s reputation as being business-friendly and in the forefront of 21st century business law innovation.

About the Author

Edwin W. Hecker Jr. received a Bachelor of Arts from Oakland University, a Juris Doctor, summa cum laude, from Wayne State University, where he was a note and comment editor for the Wayne Law Review, and an Master of Laws from Harvard Law School. Prior to joining the faculty of the University of Kansas School of Law, Hecker practiced business law with the Detroit firm of Miller, Canfield, Paddock & Stone. He is a member of the Business Law sections of the American and Kansas bar associations. He has been an active participant in revision of Kansas’s business laws and was a member of the KBA subcommittee that recommended adoption of the Business Entity Transactions Act.
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INDEFINITE SUSPENSION
IN RE CESAR ALBERTO BACA
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 105,567 – JUNE 24, 2011

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against Cesar Alberto Baca, of Aurora, Colo., an attorney admitted to the practice of law in Kansas in 2008. On November 4, 2010, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). Baca’s license was suspended in 2008 for failure to comply with the annual requirements. Baca was disbarred in Missouri in October 26, 2010. Baca’s misconduct involves communications with and posting explicit photographs of his penis on the Internet while engaging in dialogue with a girl he thought was a 14-year-old, but was actually a Colorado law enforcement officer.

DISCIPLINARY ADMINISTRATOR: The deputy disciplinary administrator recommended that Baca be indefinitely suspended from the practice of law. The deputy disciplinary administrator argued that a reinstatement hearing is necessary in this case to ensure that the respondent is fit to return to the practice of law. The deputy disciplinary administrator recommended that, in the event the respondent’s license is later returned to him, that his practice be limited.

HEARING PANEL: The Hearing Panel determined that respondent violated KRPC 8.4(a) (2010 Kan. Ct. R. Annot. 603) (misconduct); 8.4(b) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer); 8.4(g) (engaging in conduct adversely reflecting on lawyer’s fitness to practice law); Kansas Supreme Court Rule 208 (2010 Kan. Ct. R. Annot. 320) (registration of attorneys); and Kansas Supreme Court Rule 211(b) (2010 Kan. Ct. R. Annot. 327) (failure to file timely answer in disciplinary proceeding). The Hearing Panel unanimously recommended that Baca be suspended from the practice of law. The Hearing Panel further recommended that the Court allow the respondent to apply for reinstatement after he is successfully discharged from all obligations with the authorities in Colorado.

HELD: Court stated Baca took no exceptions to the Hearing Panel’s report and ruled that the evidence before the panel established the facts of the respondent’s misconduct by clear and convincing evidence. Court indefinitely suspended Baca from the practice of law in the state of Kansas. Court held that any application for reinstatement will not be entertained without the respondent’s successful completion of his criminal probation in Colorado; and any reinstatement hearing must consider, among other factors: (1) whether respondent is capable of serving in a fiduciary or confidential capacity for a minor, such as in a guardian ad litem position or as counsel in juvenile proceedings; and (2) whether respondent has a past or current obligation to register as a sex offender in any jurisdiction, including whether any applicable registration requirement of another jurisdiction is comparable to that of Kansas.

ORDER OF REINSTATEMENT
IN RE JAMES A. CLINE
NO. 102,473 – JUNE 22, 2011

FACTS: On October 9, 2009, the Kansas Supreme Court suspended James A. Cline from the practice of law in Kansas for a period of three years. See In re Cline, 289 Kan. 834, 217 P.3d 455 (2009). In its opinion, this Court permitted the petitioner to seek reinstatement after serving one year of the three-year period of suspension. On June 10, 2011, Cline filed a motion to suspend the remaining two years of the suspension.

HELD: Court stated that after careful consideration, it granted Cline’s motion, suspended the remaining period of suspension, and reinstated the petitioner to the practice of law in Kansas.

Cline is reinstated to the practice of law in the state of Kansas conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the clerk of the appellate courts and the Kansas Continuing Legal Education Commission.

ORDER OF REINSTATEMENT
IN RE RUSSELL B. CRANMER
NO. 100,822 – JUNE 22, 2011

FACTS: On December 5, 2008, the Kansas Supreme Court suspended Russell B. Cranmer from the practice of law in Kansas for a period of six months. See In re Cranmer, 287 Kan. 495, 196 P.3d 932 (2008). Before reinstatement, the petitioner was required to pay the costs of the disciplinary action, comply with Supreme Court Rule 218 (2010 Kan. Ct. R. Annot. 370), and otherwise comply with Supreme Court Rule 219 (2010 Kan. Ct. R. Annot. 370). On April 8, 2011, Cranmer filed a petition for order of reinstatement.

HELD: Court stated that after careful consideration it granted Cranmer’s petition and reinstated him to the practice of law in Kansas. Cranmer is reinstated to the practice of law in the state of Kansas conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the clerk of the appellate courts and the Kansas Continuing Legal Education Commission.

ORDER OF REINSTATEMENT
IN RE CHARLES T. FRAHMI
NO. 103,535 – JUNE 22, 2011

FACTS: On November 19, 2010, the Kansas Supreme Court sus-
pended Charles T. Frahm from the practice of law in Kansas for a period of three years. See In re Frahm, 291 Kan. 520, 241 P.3d 1010 (2010). This court made the suspension effective as of the date of the temporary suspension order, April 1, 2008. On April 27, 2011, the petitioner filed a motion for reinstatement.

HELD: Court stated that after careful consideration it granted Frahm’s motion and reinstated him to the practice of law in Kansas conditioned upon his compliance with the annual continuing legal education requirements and upon his payment of all fees required by the clerk of the appellate courts and the Kansas Continuing Legal Education Commission.

DISBARMENT
ORIGINAL PROCEEDING IN DISCIPLINE
IN THE MATTER OF KEVIN C. HARRIS
NO. 105,340 – JULY 22, 2011

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against Kevin C. Harris, of Kansas City, an attorney admitted to the practice of law in Kansas in 1985. Harris’ license had previously been suspended and the disbarment resulted from his dealing with a mortgage foreclosure action.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be disbarred.

HEARING PANEL: A panel of the Kansas Board for Discipline of Attorneys conducted a hearing on the complaint on September 10, 2010, at which the respondent was personally present and represented by counsel.


HELD: Court held the findings and conclusions supported the Hearing Panel’s evidence of disciplinary violations. Court stated that it declined the respondent’s invitation to impose a lesser sanction than that recommended by the board and the disciplinary administrator. Harris had extensive contact with the disciplinary process, resulting in respondent receiving (1) an informal admonishment in 1994 for failing to diligently represent his client, failing to appear in court on behalf of a client, and failing to forward a fine and costs to the court on behalf of a client; (2) supervised probation for two years in 1997 for having engaged in misconduct; (3) an informal admonition in 2002 for failing to provide diligent representation in an appellate case; and (4) a two-year suspension in 2008. Court held that when these prior disciplinary offenses are considered along with the respondent’s multiple offenses in this case, including violations of Kansas Supreme Court Rules 207, 208, 211, and 218, disbarment was the appropriate discipline.

INDEFINITE SUSPENSION
IN RE MARLIN E. JOHANNING
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 105,109 – JULY 15, 2011

FACTS: This is a contested original proceeding in discipline filed by the office of the disciplinary administrator against Marlin E. Johanning, an attorney admitted to the practice of law in Kansas in 1979. On May 28, 2010, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC) for his safekeeping of client money. The respondent filed an answer on July 8, 2010. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on September 1, 2010, at which the respondent was personally present and represented by counsel.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Johanning be indefinitely suspended from the practice of law.


HELD: Court stated that Johanning’s actions obstructed his client’s compliance with a court order and damaged others’ confidence in the judicial system. Court rejected the Hearing Panel’s lighter recommended discipline because Johanning had been counseled about the need for compliance with his trust account obligations, but he has not complied and he does not appreciate the seriousness of his misconduct.

CIVIL

SPEEDY TRIAL
STATE V. MONTES-MATA
LYON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 98,883 – JUNE 24, 2011

FACTS: Carlos Montes-Mata was arrested in October 2005 by a Kansas Highway Patrol trooper and was held in the Lyon County jail on drug-related charges. He did not post an appearance bond. The protracted procedural journey thereafter included a plea by Montes-Mata, a change of counsel, the withdrawal of his plea, and an interlocutory appeal on a motion to suppress. Shortly after the mandate from the Court of Appeals was issued, Montes-Mata filed a motion to dismiss the charges against him for violation of his right to a speedy trial. The district judge held a hearing and granted the motion, dismissing the pending charges. The state appealed the dismissal, and the Court of Appeals affirmed the district judge’s ruling. State v. Montes-Mata, 41 Kan. App. 2d 1078, 208 P.3d 770 (2009). The state then petitioned for review on this issue of first impression. The state’s appeal is not based on the calculation of the length of Montes-Mata’s incarceration. Counsel agreed that, excluding the time for the interlocutory appeal, Montes-Mata had been held for approximately 111 days when his motion to dismiss was heard. Instead, the appeal centers on the question of the effect, if any, to be given an immigration document, Form I-247, sent to the jail while Montes-Mata was incarcerated. The Kansas Supreme Court overruled the district court’s order dismissing the charges against Montes-Mata based on speedy trial violations.

ISSUE: Speedy trial

HELD: Court stated the Form I-247 sent to the Lyon County sheriff is not the equivalent of an outstanding warrant for probation revocation, parole violation, or new charges in another jurisdiction. The notice in this case from the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE) is analogous to a call to a sheriff from a law enforcement agency in a neighboring county, expressing interest in one of his or her inmates and asking the sheriff for notice when the inmate is to be released. The request is for cooperation, not custody. It is not particularly helpful that the I-247 form bears the heading “Immigration Detainer—Notice of Action” since, in this case, the “action” was inconsistent with the common custodial use of the term detainer. The I-247 sent to the Lyon County sheriff by the ICE represented nothing more than information about the possibility of formal proceedings. Unless a communication from another agency or jurisdiction constitutes a present custodial claim on a defendant, it
cannot affect the speedy trial question of whether the defendant is being held solely on pending charges. In this case, the state did not bring Montes-Mata to trial within the time required by K.S.A. 22-3402(1), and the district judge properly discharged him from further liability for trial on the crimes charged.

**STATUTE:** K.S.A. 22-3402

**WORKERS’ COMPENSATION**

**BRYANT V. MIDWEST STAFF SOLUTIONS INC.**

**WORKERS COMPENSATION BOARD – AFFIRMED**

**COURT OF APPEALS – REVERSED**

**NO. 99,913 – JULY 29, 2011**

**FACTS:** Bryant was injured while stooping to grab tool out of his tool bag, and while stooping down or leaning over to carry out welding. Administrative law judge (ALJ) entered an award, finding Bryant was injured in course of his employment. Workers Compensation Board (Board) affirmed, modifying amount of award. Midwest appealed. In unpublished opinion, Court of Appeals reversed the ALJ and Board, finding that substantial competent evidence did not support the award because “stooping” and “leaning” were normal activities of daily living. Bryant’s petition for review granted.

**ISSUE:** Compensable injury under K.S.A. 44-508(e) and the district judge properly discharged him from further liability for trial on the crimes charged.

**HELD:** Significant amendment to Kansas Workers Compensation Act in 2010 noted, but instant case is controlled by statutory scheme in place when Bryant incurred injury. Kansas cases surveyed, finding no bright-line test for what constitutes a work injury. Proper approach is to focus on whether the activity that results in injury is connected to, or inherent in, performance of job. Bryant was not engaged in normal activities of day-to-day living when he reached for tool belt or bent down to carry out welding task. Bryant’s injury was covered by workers’ compensation statute. Court of Appeals is reversed. Appeal remanded for ruling on issues not addressed below related to calculation of wages.

**STATUTES:** K.S.A. 2010 Supp. 44-508(e); K.S.A. 2009 Supp. 44-508(c); and K.S.A. 44-529(c)

**CRIMINAL**

**STATE V. BAILEY**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 101,785 – JULY 15, 2011**

**FACTS:** Bailey, Starr, and Dean participated in offenses that culminated in death of a victim. Bailey tried as an adult and convicted of first-degree murder, aggravated robbery, aggravated burglary, criminal discharge of a firearm at an occupied building, and drug charges. On appeal, Bailey challenges his adult certification, claiming trial court’s erroneous reference to K.S.A. 38-1636(e) with its “substantial evidence” standard invalidated the prosecution. Bailey also claimed felony-murder instruction: (a) did not properly instruct jury on issue of whether underlying felonies had been completed before commission of the murder; (b) should have included unanimity instruction on the underlying felonies; and (c) should have defined “attempt.” Bailey next claimed the trial court erred in telling Starr and Dean they had no Fifth Amendment privilege when called to testify as state witnesses at Bailey’s trial.

**ISSUES:** (1) Adult certification, (2) felony-murder jury instruction, and (3) Fifth Amendment privileges

**HELD:** Stipulated facts reviewed by district court under wrong legal standard are reviewed by Supreme Court under “preponderance of evidence” standard in K.S.A. 2010 Supp. 38-2437(e), finding substantial evidence supports trial court’s certification under the correct standard.

Jury, by its verdict, found the murder occurred during commission of one or more of the underlying felonies. Under facts, underlying felony charges were alternative means of committing felony murder, thus no unanimity instruction required. Also, no evidence the underlying crimes were attempted rather than completed crimes, thus removing surplusage “attempt” language in jury instruction would not have changed outcome in case.

Starr and Dean had no Fifth Amendment privilege regarding testimony related to charges to which they had entered guilty pleas.

**STATUTES:** K.S.A. 2010 Supp. 38-2347, -2347(e), -2347(f); and K.S.A. 58-1636, -1636(e), -1636(f)

**STATE V. BERRY**

**SEDGWICK DISTRICT COURT – REVERSED AND REMANDED**

**NO. 100,512 – JULY 22, 2010**

**FACTS:** Berry killed another motorist during high-speed chase from traffic stop. Cocaine discovered upon his apprehension. He was convicted of first-degree felony murder, with possession of cocaine the underlying felony. Pursuant to felony-murder instruction rule, district court denied Berry’s requests for instructions on lesser included offenses. On appeal Berry raised nine issues, including: (1) there was insufficient evidence of direct causal connection between cocaine possession and the killing to support the felony-murder charge; (2) district court erred in not instructing jury on lesser-included offenses of felony murder; (3) district court erred in not giving additional instruction on causation for felony murder; and (4) prosecutor misstated law on causation during closing argument.

**ISSUES:** (1) Evidence of causal connection, (2) jury instructions on lesser-included offenses of felony murder, (3) jury instruction on causation in felony murder, and (4) prosecutorial misconduct

**HELD:** Sufficient evidence supports causal connection required for felony-murder conviction in this case. A rational fact-finder viewing evidence in light most favorable to prosecution could have concluded Berry fled law enforcement and initiated high-speed chase to avoid being caught with substantial quantity of cocaine.

Felony-murder instruction rule is abandoned after extensive review of historical development of that judicially created rule where-by lesser-included offense instructions were required only when evidence of underlying felony was weak, inconclusive, or conflicting. Analysis under that rule focused on evidence supporting the underlying felony rather than evidence supporting lesser offenses. Statutory mandate of K.S.A. 22-3414(3) applies to felony murder. Instructions on lesser degrees of homicide are proper in felony-murder cases when there is some evidence reasonably justifying a conviction of some lesser-included crime beyond a reasonable doubt. Language to the contrary in previous opinions is disapproved. This new rule applies to all criminal prosecutions pending on direct review or not yet final. Failure to follow statutory mandate of K.S.A. 22-3414(3) was reversible error. Berry’s felony-murder conviction is reversed, case remanded for new trial on that charge. All other issues raised on appeal are moot, but two that might arise on remand are discussed.

Analysis in State v. Ransom, 288 Kan. 697 (2009), approving causation element in PIK Crim. 3d 56.02, is applied. No error by district court in refusing to create and issue an additional instruction on causation.

Prosecutor’s closing argument, that the killing occurred while Berry was possessing cocaine, failed to adequately describe elements of felony murder. Second step of prosecutorial misconduct analysis not required because case is being remanded.

**CONCURRENCE** (Johnson, J., joined by Beier, J.): Whole-hearted agreement with majority’s holding on issue of lesser-included offense instructions in felony-murder cases. Disagreement with guidance on causation instruction issue. Jury had no basis to reject prosecutor’s erroneous argument that felony murder only requires the contemporaneous occurrence of the felony and the killing. Would have found trial court’s failure to give an instruction on
STATE V. CHAVEZ
SEDGWICK DISTRICT COURT – SENTENCE AFFIRMED IN PART AND VACATED IN PART
NO. 103,168 – JULY 15, 2011

FACTS: Chavez was convicted of one off-grid count of aggravated indecent liberties with a child, under Jessica’s Law, and one on-grid count of aggravated indecent liberties with a child. Chavez was sentenced to a 25-year term with lifetime parole and lifetime electronic monitoring for the off-grid conviction and a concurrent aggravated term of 100 months for the on-grid conviction.

ISSUES: (1) Sentencing and (2) Jessica’s Law

HELD: Court held there can be no reasonable doubt that the legislature intended for a person convicted of aggravated indecent liberties with a child to be parole eligible only after serving the mandatory minimum sentence. Court stated that defendants who are subject to Jessica’s Law face a mandatory minimum term of not less than 25 years’ imprisonment before becoming eligible for parole. Court found no abuse of discretion by the district court in denying the motion for departure with the reasons of the duration of the criminal activity, the vulnerability of the victim and the harm caused. Court vacated the portion of the sentence ordering electronic monitoring finding the issue was a parole issue and not within the jurisdiction of the court. Court rejected Chavez’s claims of a jury trial to decide the aggravating factors and also to decide his criminal history.

STATUTES: K.S.A. 21-4643, -4721; and K.S.A. 22-3601, -3717

STATE V. GATLIN
ANDERSON DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED AND REMANDED
NO. 99,091 – JUNE 24, 2011

FACTS: Gatlin convicted of intentional aggravated battery causing disfigurement, K.S.A. 21-3414(a)(1)(A), arising out of bar fight in which Gatlin bit of tip of victim’s thumb. Finding Gatlin’s actions were intentional, district court refused Gatlin’s request for instructions on lesser included crimes of reckless aggravated battery. Gatlin appealed. In unpublished opinion, Court of Appeals affirmed, applying clearly erroneous standard to jury instruction issue that had not been preserved below. Gatlin’s petition for review granted.

ISSUES: (1) Preserving jury instruction issue and (2) jury instruction on lesser-included crimes

HELD: Gatlin’s two requests during trial for instructions defining recklessness and setting out elements of recklessness-based lesser-included offenses of aggravated battery were sufficient to preserve issue for appellate review. Issue thus reviewed in light most favorable to the defendant rather than clearly erroneous standard applied by Court of Appeals.

Under facts, where Gatlin testified he bit tip of fellow bar-fight combatant’s thumb off when they lost their balance and his head hit the ground, there was sufficient circumstantial evidence of recklessness to warrant the requested instructions. District court erred in refusing to instruct on definition of recklessness and the recklessness-based lesser-included offenses sought by Gatlin. Aggravated battery conviction reversed and remanded for a new trial.

STATUTES: K.S.A. 21-3201(c), -3414(a)(1)(A), -3414(a)(2)(A), -3414(a)(2)(B); K.S.A. 22-3414(3); and K.S.A. 60-404

STATE V. LEVY
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 101,653 – JUNE 24, 2011

FACTS: Levy convicted of sex offenses with child victim. Three life sentences imposed under Jessica’s Law, two concurrent, with third running consecutively. On appeal, Levy claimed: (1) his sentence was disproportionate in violation of Eighth Amendment, (2) showing the recorded “Safetalk” video interview at preliminary hearing when child victim not present violated Confrontation Clause, and (3) trial counsel were ineffective.

ISSUES: (1) Cruel and unusual punishment, (2) confrontation, and (3) ineffective assistance of counsel

STATE V. GILBERT
SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED AND APPEAL DISMISSED
NO. 100,150 – JULY 15, 2011

FACTS: Gilbert as passenger in parked car he did not own was arrested on outstanding warrant. Drug evidence discovered in search of car incident to Gilbert’s arrest was used to convict him on drug charges. Gilbert appealed. In unpublished opinion, Court of Appeals held Gilbert had standing under Brendlin v. California, 551 U.S. 249 (2007), to contest the search, reversed the convictions, and ordered suppression of the evidence seized in the vehicle search. State’s petition for review granted.

ISSUE: Standing to challenge search of vehicle

HELD: Rakas v. Illinois, 439 U.S. 128 (1978), controls outcome in this case. A passenger who is neither an owner nor in possession of an automobile lacks standing to challenge search of that automobile under Fourth Amendment. Holding in Brendlin is limited to whether a passenger may contest a vehicle’s stop in same manner as the driver. Holding in Rakas was not overturned or limited by Brendlin. Gilbert lacks standing to challenge constitutionality of vehicle search. Court of Appeals’ decision is reversed. Gilbert’s appeal dismissed for lack of jurisdiction.

STATUTES: K.S.A. 2006 Supp. 65-4152(a)(2), -4160(a); K.S.A. 20-3018(b); K.S.A. 22-2501, -2501(c); and K.S.A. 22-2510(c) (Furse)

STATE V. HORTON
JOHNSON DISTRICT COURT – APPEAL SUSPENDED AND REMANDED
NO. 101,054 – JULY 15, 2011

FACTS: Horton’s conviction for first-degree felony murder reversed and remanded. State v. Horton, 283 Kan. 44 (2007). Evidence in second trial included testimony of two prisoners as state witnesses. After jury began deliberating, Horton requested suspension of jury deliberations for two days in order to analyze telephone evidence regarding a state prisoner witnesses. District court denied the request, stating it had no authority to suspend jury deliberations to allow for introduction of new evidence. On appeal, Horton claimed district court abused its discretion by refusing to exercise it.

ISSUE: Discretion to reopen case to offer additional evidence

HELD: A district court has broad discretion to determine whether a party may reopen its case, including authority to suspend jury deliberations to allow for introduction of additional evidence. Here, district court abused its discretion in refusing to hear and weigh evidence relating to admissibility of recorded telephone conversations and possible impeachment of witness. Because it is impossible to determine on the record whether this abuse of discretion resulted in prejudice to the defendant, case is remanded to district court for determination of this narrow issue. Jurisdiction over the appeal is retained pending resolution of issue on remand.

STATUTES: None
HELD: Levy failed to preserve Eighth Amendment issue for appellate review. Factors in State v. Freeman, 223 Kan. 362 (1978), were never raised for district court's consideration.

Neither Confrontation Clause claim, nor constitutional challenge to K.S.A. 22-2902(3), were preserved for appeal.

Applying general rule in Rowland v. State, 289 Kan. 1076 (2009), Levy's claims of ineffective assistance of trial counsel are not considered for first time on direct appeal. Also, minimum requirements in State v. Van Cleave, 239 Kan. 117 (1986), not met for remand to district court for an evidentiary hearing.

STATUTES: K.S.A. 21-4643; K.S.A. 22-2902(3); and K.S.A. 60-404

STATE V. MC DANIEL

FACTS: McDaniel pled guilty to one count of aggravated battery after he stabbed the victim. The district court sentenced McDaniel to 34 months' incarceration, the highest presumptive sentence in the grid box. At a later hearing termed a “continued” sentencing hearing, the court ordered McDaniel to pay restitution in the amount of $7,744.26.

ISSUES: (1) Restitution and (2) Jurisdiction

HELD: Court held that the district judge's failure to require that any hearing on the amount of restitution occur before sentencing did not deprive the district court of jurisdiction. Court also held the district judge did not change the defendant's sentence after pronouncement. The court had jurisdiction to complete sentencing by adding a restitution amount at a continued hearing set by the agreement of the parties. Court also held that sentencing to the highest term in an applicable KSGA grid box without proof of aggravating facts to a jury does not violate Appendix.

STATUTES: K.S.A. 21-4603d, -4721; and K.S.A. 22-3424

STATE V. SIMMONS

FACTS: A jury convicted James Simmons of two counts of rape and one count of misdemeanor theft. Simmons appealed several issues, including five claims of prosecutorial misconduct during trial. The Court of Appeals affirmed Simmons' convictions. Supreme Court granted Simmons' petition for review under the prosecutorial misconduct claims only.

ISSUE: Prosecutorial misconduct

HELD: Court concluded that the prosecutor's examples and statements about Stockholm Syndrome and his colloquy with potential jurors about it constituted misconduct because it was more than a simple probing of whether the jurors were prejudiced against people who, although held captive, exhibit signs of positive feelings toward their captors. Court concluded prosecutor committed misconduct in closing argument when he discussed the rape in the shower and said that every day that the victim takes a shower she will be thinking about this rape. Court held the comments were an improper appeal for sympathy for the victim and diverted attention from the jury's function of determining guilt and the court's admonition did not cure the prejudice. Court found the other alleged misconduct did not warrant reversal namely that the prosecutor's statement concerning the rape and kidnapping without referring to them as “alleged” was not misconduct; that the prosecutor did not intentionally elicit testimony from the detective of his personal opinion that probable cause existed to believe Simmons committed the crimes; and it was not misconduct when the prosecutor referred to one of the witnesses as an effort of a smear campaign against the victim.

STATUTES: K.S.A. 20-3018; K.S.A. 21-3420, -3421, -3502, -3506; and K.S.A. 60-210, -261, -456

GOLDSMITH V. STATE
COWLEY DISTRICT COURT – REVERSED AND REMANDED COURT OF APPEALS – AFFIRMED NO. 99, 041 – JULY 1, 2011

FACTS: A jury convicted Jack L. Goldsmith of aggravated kidnapping, aggravated burglary, rape, and aggravated criminal sodomy. The district court imposed a sentence of 1,116 months' imprisonment. The Kansas Court of Appeals affirmed the convictions, and the Supreme Court denied Goldsmith's petition for review. Goldsmith filed a request for DNA testing pursuant to K.S.A. 21-2512 in 2004. In March 2006, the district court conducted a hearing to establish the particular evidence the state would send to the Kansas Bureau of Investigation (KBI) for testing. Eventually, the parties agreed upon 35 items, and the district court ordered the testing pursuant to agreement of the parties. The state filed the KBI's laboratory report with the district court in May 2007. The report indicated that Goldsmith's blue sweatpants had been tested and that one sample was consistent with a mixture of DNA from both Goldsmith and the victim. In addition, the KBI attached a letter that stated it would not provide any further DNA testing in this case. The result consistent with Goldsmith and the victim meant that the testing of additional items would “not be utilizing resources wisely.” On May 25, 2007, the district court filed an order dismissing the action pursuant to K.S.A. 21-2512, finding that the DNA testing was unfavorable to Goldsmith. The Court of Appeals ruled that the state had not fully complied with the district court's order for testing and that it was not permitted to determine unilaterally when to stop testing the items agreed upon and ordered. Court of Appeals also stated the state should have filed a motion to amend the order if it wanted to stop the testing before analyzing all of the items; and the district court should have held a hearing on the motion before deciding how to proceed.

ISSUE: DNA testing

HELD: When a district court has issued an order pursuant to K.S.A. 21-2512 for post-conviction forensic DNA testing of multiple items of evidence, the state may not unilaterally discontinue testing after obtaining a single result unfavorable to the defense. Nor may the district court automatically dismiss the petition. If the state believes further testing of additional items to be pointless, it should move to reconsider or amend the court's order; the court should hold an evidentiary hearing on the motion; and the defendant should be permitted to attend the hearing and participate with the assistance of counsel.

STATUTE: K.S.A. 21-2512, -2515

STATE V. STIEBEN

FACTS: Jury found Stieben guilty of DUI. Officer was only witness, and testified about observing Stieben's driving and performance on field sobriety tests. During deliberations, jury asked question as to whether Stieben crossed fog line before officer turned around to follow. Relying on trial notes and memory, district court judge answered question in the affirmative, over disagreement among counsel as to officer's testimony. Stieben appealed. Court of Appeals affirmed in unpublished opinion, finding trial court's incorrect response was harmless error. Stieben's petition for review granted.

ISSUE: Response to jury question on a point of fact

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Held: Trial court committed reversible error in how it answered the jury's question. Trial court's response violated express provisions of K.S.A. 22-3420(3), and invaded jury's province as fact-finder which effectively denied Stieben her constitutional right to a jury trial. Usurpation of jury's role was especially egregious here because answer given to the jury was contrary to the only evidence presented. Court is unable to conclude that state has shown beyond a reasonable doubt that the error did not affect Stieben's substantial rights. Judgment of Court of Appeals and judgment of district court are reversed.

Statutes: K.S.A. 8-1522; K.S.A. 20-311d; K.S.A. 22-3420(3); K.S.A. 60-248(e); and K.S.A. 2005 Supp. 8-1567(a)(3)

State v. Ward
Seward District Court – Affirmed
Court of Appeals – Affirmed
No. 99,549 – July 29, 2011

Facts: Ward convicted of multiple felonies related to four separate cocaine sales to a wired informant. On appeal, Ward claimed trial court erred in denying motion for mistrial filed when prosecution witnesses identified two individuals sitting in courtroom wearing orange jail jumpsuits as being with Ward during one or more of the sales. Ward also claimed insufficient evidence supported jury's verdict. Court of Appeals affirmed in unpublished opinion, finding even if abuse of discretion in denying mistrial, no showing that verdict was contrary to the only evidence presented. Court is unable to conclude that state has shown beyond a reasonable doubt that the error did not affect Ward's substantial rights. Judgment of Court of Appeals and judgment of district court are reversed.

Statutes: K.S.A. 8-1522; K.S.A. 20-311d; K.S.A. 22-3420(3); K.S.A. 60-248(e); and K.S.A. 2005 Supp. 8-1567(a)(3)

State v. Whorton
Sedgwick District Court – Affirmed
No. 103,840 – July 15, 2011

Facts: Pursuant to agreement with joint recommendation for departure sentence based on Whorton's lack of criminal history, Whorton entered guilty plea to charges of aggravated criminal sodomy and aggravated indecent liberties with a child. District court denied motion for departure and imposed sentence under Jessica's Law. Because constitutional right to fair trial and presumption of innocence are implicated, Court of Appeals should have applied Chapman harmless error standard. Applying that standard, court is convinced beyond a reasonable doubt that state proved that drug sales were with in 1,000 feet of school as defined by K.S.A. 65-4161(d) was not preserved for appellate review and is not addressed. Even though officers monitoring drug transactions did not witness actual exchange of money and cocaine, more than sufficient evidence in this case to support Whorton's convictions.

Dissent (Rosen, J., joined by Johnson, J.): Agrees with majority's reasoning but not with its conclusion that failure to grant motion for mistrial was harmless error. Prosecution's impermissible manipulation in procuring involuntary appearance and forced participation of individuals in jail clothing during Ward's trial created immeasurable prejudice to the defendant which could not be overcome by weight of remaining evidence against her. Would reverse and remand for a new trial.

Statutes: K.S.A. 2010 Supp. 21-36a05(a), -36a05(e), -36a07; K.S.A. 2010 Supp. 60-261; K.S.A. 20-3018(b); K.S.A. 21-3302; K.S.A. 22-3423(1), -3423(1)(c), -3602(e); K.S.A. 60-261, -2105; K.S.A. 65-4161, -4161, -4161(d); and K.S.A. 79-5204

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Court of Appeals

Civil

Adoption and Termination of Father’s Parental Rights
In Re Baby Girl B.
Leavenworth District Court – Reversed and Remanded with Directions
No. 104,740 – July 8, 2011

FACTS: Curtis, the natural father of Baby Girl B., appeals from the trial court’s termination of his parental rights. Curtis and Rachael, the baby’s birth mother, had an intimate sexual relationship during a pending divorce from Rachael’s husband, but Rachael terminated the relationship because she could not trust Curtis. There was some question that although Curtis and Rachael communicated with each other, Rachael may or may not have told Curtis that she was pregnant. Rachael gave up the baby for adoption. The trial court terminated Curtis’ parental rights based on two statutory grounds. First, the trial court found that Curtis “after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child’s birth” under K.S.A. 2009 Supp. 59-2136(h)(1)(D). Second, the trial court found that Curtis “abandoned the mother after having knowledge of the pregnancy” under K.S.A. 2009 Supp. 59-2136(h)(1)(E).

ISSUES: (1) Adoption and (2) termination of father’s parental rights

HELD: Court concluded that under the facts of this case, the trial court erred in terminating the natural father’s parental rights upon its finding that, after having knowledge of the pregnancy, he failed without reasonable cause to provide support for the mother during the six months prior to the child’s birth and he abandoned the mother after having knowledge of the pregnancy. Court held that the trial court did not resolve the inconsistency of whether Curtis was informed of the pregnancy and the trial court’s conclusion was based on Curtis’ failure to investigate Rachael’s possible pregnancy and his failure to verify that she was pregnant. The statutes are not based on the language of a possible pregnancy. Court also found the evidence did not support abandonment where Rachael terminated the relationship long before she realized she was pregnant and it was unclear whether Curtis knew Rachael was pregnant. Court concluded the trial court’s findings were not supported by clear and convincing evidence and reversed the termination of Curtis’ parental rights and remanded the case to the district court with directions to conduct further proceedings to determine the custody issues involving Baby Girl B.

CONCURRENCE: Judge Malone concurred in the decision. Judge Malone would hold that even if Curtis gained knowledge that Rachael was pregnant, the petitioners still failed to demonstrate by clear and convincing evidence that Curtis’ parental rights should be terminated.

STATUTE: K.S.A. 59-2136

Appointment of Receiver
City of Mulvane V. Henderson et al.
Sedgwick District Court – Reversed and Remanded with Directions
No. 104,995 – July 8, 2011

FACTS: Midwest Legacy LLC, a/k/a Midwest Legacy LLC (Midwest), purchased the Mulvane Mobile Home Park (the Park) from the D&D Simpson Family LLC (D&D). The City of Mulvane, Kan. (the City), provided sewer service to the Park. When Midwest failed to pay the sewer fees, the City filed an action against Midwest to collect and to disconnect sewer service to the Park. D&D, which still held an installment contract on the Park, was allowed to intervene. Subsequently, at the request of D&D, a receiver was appointed to collect the income from the Park, pay the bills, and generally maintain the Park during the pendency of the contract dispute.

ISSUE: Appointment of receiver

HELD: Court stated that D&D found itself in the middle of the dispute. It clearly faced immediate and irreparable injury to real property in which it had an interest if sewer service was disconnected by the City. However, there was insufficient evidence that the appointment of a receiver was the appropriate remedy. Although the City raised the possibility of other remedies, such as injunctive relief, and discussed the fact that Midwest could set up some alternative method of sewage disposal, the district court did not consider any alternatives to the appointment of a receiver. Other remedies, such as a temporary injunction prohibiting the City from disconnecting sewer service during the pendency of the litigation or posting a bond to guarantee payment of sewer fees to the City during the pendency of the litigation, are just two examples which would have been less severe, equally as effective, and more appropriately targeted to the party who was threatening to do the harm. Court stated that given the fundamental property rights that are affected when the court steps in and appoints a receiver, the district court abused its discretion by not considering other adequate remedies for the threatened harm. Court remanded for the district court to fully consider other adequate remedies to protect D&D’s interests until such time as the underlying case is adjudicated on the merits.

STATUTES: K.S.A. 17-76,117; and K.S.A. 60-219, -224, -1301, -1305, -2102

Breach of Contract, Commercial Loans, Construction Contracts, Fraud, Breach of Good Faith and Fair Dealing, and Damages
Johnson District Court – Affirmed
No. 102,853 – July 29, 2011

FACTS: Sanjiv Narula, Indubala Narula, and their closely held business, Promotional Resources Inc. (the Narulas), entered a loan agreement for the construction of a new office building. Bank of America N.A. encouraged the Narulas to construct the building. Moreover, it furnished a financing package to the Narulas to construct the building. The package included the loan agreement. Under the loan agreement, the Narulas received a construction loan that required monthly interest-only payments to Bank of America while the building was being constructed. The loan agreement also stated that if construction of the building was completed by December 31, 2001, the construction loan would automatically convert to a permanent loan. In August 2004, Bank of America sued the Narulas to foreclose its commercial mortgage on the building and for the breach of the loan agreement and note. The Narulas counterclaimed for damages caused by Bank of America’s failure to convert the construction loan to a permanent loan. The Narulas’ counterclaims included claims for breach of contract, breach of the covenant of good faith and fair dealing, fraud, negligent misrepresentation, and breach of fiduciary duty. Before trial, the trial court also granted the Narulas leave to amend their counterclaims to assert a claim for punitive damages against Bank of America. The case was tried to the court. After an eight-day bench trial, the trial court denied Bank of America’s claims and granted the Narulas’ counterclaims. The trial
court awarded the Narulas $793,997 in compensatory damages and $750,000 in punitive damages.

ISSUES: (1) Whether the trial court correctly ruled that Bank of America was not entitled to recover interest on the note after December 31, 2001, because the bank was the first party to materially breach the loan agreement; (2) whether the trial court’s finding that the modification agreements to the loan agreement were unenforceable was supported by substantial competent evidence; (3) whether the trial court’s finding that Bank of America breached the loan agreement was supported by substantial competent evidence; (4) whether the trial court’s finding that Bank of America breached its fiduciary duty to the Narulas was supported by substantial competent evidence; (5) whether the trial court’s finding that Bank of America breached its duty of good faith and fair dealing was supported by substantial competent evidence; (6) whether the trial court’s award of $386,603 in damages for the forced liquidation of the Narulas’ personal investments was supported by substantial competent evidence; and (7) whether the Narulas’ claim for punitive damages was properly before the court, and, if so, whether the bank employee’s conduct was willful, wanton, or malicious, and whether there was clear and convincing evidence that the conduct on which the court based punitive damages was authorized or ratified by someone at the bank expressly authorized to do so.

HELD: Court affirmed the trial court’s ruling that the Narulas did not release Bank of America from liability by signing a second, third, and fourth modification and extension agreements. Court found there was a lack of consideration because the extension did not benefit the Narulas and was a one-sided bargain. Court held the trial court erred in holding that any releases between the parties were unenforceable simply because Bank of America had committed a prior breach of the loan agreement, but found the releases were unenforceable based on fraud, duress, economic duress, and adhesion. Court agreed that the failure of Bank of America to convert the construction loan to the permanent loan, as required by the terms of the loan agreement was a material breach of contract. On the claim of breach of good faith and fair dealing, Court held there was substantial competent evidence to support the trial court’s findings that Bank of America secretly attempted to remove the permanent loan obligation in the loan agreement, that Bank of America intentionally deceived the Narulas into signing the second modification and extension agreement, and that Bank of America failed to tell the Narulas before signing the second modification and extension agreement that the swap agreement was at least $100,000 “under water.” Court held that the self dealing on the part of Bank of America and its failure to disclose crucial financial details to the Narulas was a breach of Bank of America’s fiduciary duty. Court affirmed the trial court’s award of compensatory and punitive damages.

STATUTES: K.S.A. 60-261, -2105, -3702, -3703; and K.S.A. 84-1-201, -9-627

**DRIVER’S LICENSE SUSPENSION**

**CRETEN V. KANSAS DEPARTMENT OF REVENUE**

**WYANDOTTE DISTRICT COURT – AFFIRMED**

**NO. 102,792 – JUNE 24, 2011**

FACTS: Dawn Creten was pulled over for speeding and driving left of center. After failing numerous field sobriety tests, Creten blew a 0.191 on the Intoxilyzer 5000 and her license was suspended. At the district court level, Creten challenged the Intoxilyzer results, arguing that the machine had not been properly certified by the Kansas Department of Health and Environment (KDHE), and that the Tonganoxie Police Department did not substantially comply with testing procedures to maintain the certification. Court affirmed Creten’s suspension and concluded that the failure to perform a certified standard run of the Intoxilyzer machine during the calendar week immediately prior to Creten’s tests was insufficient to defeat a substantial compliance with testing procedures established by the KDHE, i.e., a one-day delay in performing the certified standard run had no effect on the machine’s reliability.

ISSUE: Driver’s license suspension

HELD: Court concluded that the legislature intended the phrase “testing procedures” to be limited to the testing procedures established by the KDHE regarding the administration of a breath test.

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**Appellate Practice Reminders . . .**

**From the Appellate Court Clerk’s Office**

**A Supreme Court Oral Argument – Near You**

On January 27, 2011, the Kansas Supreme Court left its seat in the Judicial Center to return to the historic courtroom in the Capitol Building for an afternoon of oral arguments, celebrating the Kansas Sesquicentennial. An idea was born.

Following that historic event, for the first time in memory, the Court scheduled an afternoon of oral arguments outside Topeka. On April 13, oral arguments were held in Salina with local court personnel assisting the Supreme Court Clerk.

Although most oral arguments will continue to be scheduled in Topeka, the Capitol and Salina venues were so well-received that the Court will, from time to time, schedule dockets in other locations, making the Court’s proceedings accessible to more people.

In September 2011, the Court will hear morning dockets in Greensburg and Wichita. On September 28, the Court will sit in the Kiowa County Courthouse in Greensburg to hear cases arising out of Rooks, Ford, Morton, Pratt, and Barber counties. On September 29, the Court will hear Sedgwick County cases in the Council Chamber in Wichita’s City Hall. Both locations have adequate seating to accommodate individual as well as group attendance. The Court would, however, like to plan seating for groups, so advance notice would be helpful, particularly for a large group.

The Wichita Bar Association and the Kansas Bar Association Appellate Practice Section will co-sponsor a continuing legal education event following the docket in Wichita. Members of the Court will participate in an en banc roundtable discussion of oral argument best practices.

For more information about the Supreme Court’s travelling dockets, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts at (785) 296-3229. Go to www.kscourts.org to hear oral arguments from the Supreme Court’s archive or to listen to oral arguments live when the Court is in session.
not the testing procedures established by the KDHE to ensure the continued certification of an Intoxilyzer machine. Court concluded that “testing procedures” as used in K.S.A. 8-1020(h)(2)(F) does not include the weekly certified standard run that is performed to ensure continued certification of the Intoxilyzer machine by the KDHE. Court held that under the facts of this case, substantial competent evidence supports the district court’s finding that the Tonganoxie Police Department substantially complied with KDHE protocol requiring a weekly certified standard run of the machine.

**STATUTE:** K.S.A. 8-1002(a), -1020(h)(2)

### DUI AND JURISDICTION

**JUENEMANN V. KANSAS DEPARTMENT OF REVENUE**

**FINNEY DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**

**NO. 101,329 – JULY 22, 2011 (MOTION TO PUBLISH)**

FACTS: Juenemann was arrested for DUI. A readable copy of Juenemann’s Intoxilyzer 5000 chemical breath test result was attached to the DC-27 and showed a blood alcohol level of 0.226. Additionally, the reverse side of the DC-27 notified Juenemann of the penalties for a failed test result of “.08 or above, but less than 0.15” and of the increased penalties for a test result of “0.15 or above”: the individual’s driver’s license would be suspended for one year and the individual would be subjected to a one-year “ignition interlock restriction.” The Kansas Department of Revenue (KDOR) suspended Juenemann’s license. An administrative hearing officer issued an order affirming the suspension and finding, among other things, that “[t]he test results indicated that the respondent had an alcohol concentration of 0.150 or greater in the respondent’s breath.” Juenemann then filed a petition for judicial review in the district court. Several months after Juenemann filed her petition for review, Juenemann filed a motion titled “Motion to Dismiss Driver’s License Suspension and to Reinstatement Driving Privileges.” Although Juenemann had asserted in her petition for review that the district court had jurisdiction to review the matter, in her motion she argued the KDOR and the district court lacked subject matter jurisdiction because the hearing order contained a finding that exceeded the scope of review of the administrative hearing. Following a trial, the district court issued a journal entry which first considered and rejected each of Juenemann’s substantive issues. The court found: (1) Sgt. Fontenot had reasonable grounds to believe Juenemann was operating a vehicle while under the influence of alcohol; (2) the chemical breath test was properly administered; (3) the test result of 0.226 was valid; (4) Juenemann was personally served with the DC-27; and (5) the hearing order was not fatally defective. However, after rejecting Juenemann’s substantive arguments, the court then held there was no statutory procedure created to review the issuance of suspensions for test results of 0.15 or greater and therefore the administrative judge did not have jurisdiction to issue a one-year suspension of the plaintiff’s license.

**ISSUES:** (1) DUI and (2) jurisdiction

**HELD:** Court held that the language utilized by the district court in dismissing the suspension reveals the flaw in its analysis. The court ultimately concluded that “[t]he Administrative Judge did not have jurisdiction to issue a 1 year suspension of the Plaintiff’s license.” In fact, the administrative judge did not issue the order of suspension. Instead, the administrative judge’s role was to review the agency’s suspension order within the confines of its scope of review. Court held the district court was not entitled to dismiss the suspension. Court also held that the scope of review set forth in K.S.A. 2007 Supp. 8-1020(h)(2)(G) of review of a test result of 0.08 or greater necessarily permits review of whether the person’s breath alcohol test results revealed an alcohol concentration of 0.15 or greater. Court concluded that Juenemann was served with a notice of suspension indicating that her test result showed an alcohol concentration of 0.08 or greater in her blood or breath, and referring to the attached Intoxilyzer report, which verified her result of 0.226. Further, the reverse side of the DC-27 notified Juenemann of the increased penalties for a failed test result of “0.15 or above” depending upon the number of prior occurrences, if any. Juenemann was fully informed under the applicable implied consent statutes, and court reversed the district court’s decision reversing the suspension of Juenemann’s license and remanded to the district court with directions to enter judgment affirming the administrative suspension.

**STATUTE:** K.S.A. 8-1001, -1014, -1020(h), (m), (p)

### PATERNITY AND STATUTE OF LIMITATIONS

**ROY V. EDMONDS ET AL.**

**DOUGLAS DISTRICT COURT – AFFIRMED**

**NO. 104,749 – JUNE 24, 2011**

FACTS: Carolyn and Dennis were married in 1965, but they divorced several years later. The divorce decree stated that the divorce was not final until 60 days after entry of the divorce. Only 32 days after the divorce, Carolyn married Daniel, and Carolyn became pregnant with Jarrod. He was born in 1968 and Daniel was listed as Jarrod’s father. Carolyn and Daniel were divorced in 1970 and both parties stipulated that Jarrod and another child were born to Carolyn and Daniel. When Jarrod was 15, Carolyn told him that Dennis was his natural father. When Dennis died intestate in 2008, the administrator requested an order for genetic testing. In 2010, Jarrod filed a petition for determination of paternity, arguing it was in his best interests to determine if he was Dennis’ sole heir. The district court held that Jarrod’s paternity action was barred by the statute of limitations because it was not brought within three years of Jarrod reaching the age of majority.

**ISSUES:** (1) Paternity and (2) statute of limitations

**HELD:** Court held the trial court did not err in holding that Jarrod paternity action was barred by the three-year statute of limitations. Court also rejected Jarrod’s argument that the statute of limitations violated the Equal Protection Clause of the 14th Amendment and that dismissing his paternity action before genetic testing could be completed violated public policy. Court found that Jarrod failed to raise the public policy argument in the trial court, but that states have a legitimate interest in avoiding the litigation of stale or fraudulent claims.

**CONCURRENCE:** Judge Leben concurred stating that for a presumed father, a paternity claim may be brought at any time; for all others, the action must be brought within three years of the child reaching the age of majority.

**STATUTES:** K.S.A. 38-1110, -1113, -1114, -1115, -1118; and K.S.A. 60-212(b)(1)

### SERVICE OF PROCESS

**FISHER V. DECARVALHO**

**ELLIS DISTRICT COURT – AFFIRMED**

**NO. 104,644 – JUNE 24, 2011**

FACTS: Melanie A. Fisher sued Alex F. DeCarvalho M.D. for medical malpractice alleging negligent performance of an arthroscopic surgery. Fisher appeals the district court’s decision dismissing with prejudice her cause of action against DeCarvalho on the ground that Fisher failed to properly serve process on DeCarvalho prior to the expiration of the statute of limitations. Fisher claims the district court erred in dismissing her cause of action because she substantially complied with the statutory method for service of process by certified mail, and DeCarvalho acknowledged service by making a voluntary entry of appearance. Alternatively, Fisher claims the district court erred by failing to grant her an additional 90 days to serve process pursuant to K.S.A. 60-203(b) after the district court found service to be invalid.

**ISSUE:** Service of process
Held: Court held that Fisher’s attempt to serve DeCarvalho via certified mail at his business address did not constitute substantial compliance with the statutory method of service of process such that service was rendered valid under K.S.A. 60-204. Further, DeCarvalho did not make a voluntary entry of appearance when he requested additional time to file a responsive pleading, so as to render service valid under K.S.A. 60-303(e). Finally, under the facts of this case, Fisher was not entitled to receive an additional 90 days to serve process under K.S.A. 60-203(b). Court concluded that the district court did not err by dismissing with prejudice Fisher’s cause of action against DeCarvalho on the ground that Fisher failed to properly serve process on DeCarvalho prior to the expiration of the statute of limitations.

Concurrence: Judge Pierron concurred stating that the majority correctly stated the precedent upon which the court was bound, but that the service statutes were met in this case and the entire case should not be thrown out because of the more or less technical errors in the way the doctor was actually made aware of the suit.

Statutes: K.S.A. 12-105b; and K.S.A. 60-102, -203, -204, -212, -303, -304, -513

Sexually Violent Predator and Admissibility of Evidence
In Re Care and Treatment of Douglas Girard and Eugene Mallard
Clay District Court – Affirmed
No. 103,505 – June 24, 2011

Facts: Girard and Mallard appeal the orders of the district court committing them to the custody of the secretary of Social Rehabilitation Services and placing them in the Sexually Violent Predator Treatment Program at Larned State Hospital. Girard and Mallard challenge the use of the STATIC-99 and the MnSOST-R tests in determining their likelihood of recidivism. In Mallard’s case, the court held the tests were admissible under Frye, because both tests have been subject to peer review, published, tested, and obtained widespread acceptance. At Girard’s hearing, the district court held that the results of the tests were admissible independent of Frye and Daubert because the tests were not even scientific tests, but simply statistical analyses of various factors.

Issues: (1) Sexually violent predator and (2) admissibility of evidence

Held: Court stated the generally accepted test set forth in Frye governs the admissibility of expert scientific opinion evidence in Kansas in those situations where such a test or standard is required. Court held Frye is controlling law in Kansas and the district court correctly applied Frye. Court stated the larger question was whether Frye was even applicable to the tests challenged by Girard and Mallard. Court held that the arguments concerning the accuracy of the tests goes to the weight of the evidence rather than its admissibility. Court stated that the probative value of this testimony is significant and directly relevant to whether an individual should be committed as a sexually violent predator.

Concurrence: Judge Malone concurred with the majority’s opinion and stated the case should be decided on the admissibility of the tests pursuant to Frye.

Statute: K.S.A. 59-29a01, -29a07

Workers’ Compensation and Task Loss
Gustin v. Payless ShoeSource Inc.
Workers Compensation Board – Affirmed
No. 104,732 – July 8, 2011

Facts: Patricia Gustin was employed by Payless ShoeSource. For 10 years her job involved packing and decasing boxes of shoes. In the course of unloading a trailer Gustin fell, resulting in injuries to her back and leg. She was paid temporary total disability benefits, after which she returned to light duty work. Two months after Gustin’s fall, Payless closed its facility and Gustin was laid off. She has not worked since she left Payless. The administrative law judge (ALJ) awarded compensation by averaging the conclusions of the two experts and finding that Gustin had sustained a 34 percent task loss. The Board affirmed the task loss and concluded that a claimant loses the ability to perform a work task when a credible doctor opines that the work task cannot be performed within the restrictions imposed for the work-related injury.

Issues: (1) Workers’ compensation and (2) task loss

Held: Court held that under the facts presented, the employer did not hire the employee to do one thing one time. The employee was hired to do a set of tasks over and over, day in and day out. The employee’s ability to earn wages from the employer was dependent upon the ability to perform those tasks every hour of every day of the work day.
the work week. If the employee can perform a job task on Monday but stays home Tuesday and Wednesday because Monday's work has exacerbated the work injury, a physician may very well conclude that the worker has lost the ability to do the task in order to successfully perform the job. Court rejected the employer’s proposed definition of “ability” as used in K.S.A. 44-510e(a) with respect to an injured worker’s ability to perform work tasks. Under the employer’s definition, the loss of ability would be limited to only those tasks which a claimant can no longer physically perform due to the injury, irrespective of any physician’s restrictions and regardless of the consequences. Court concluded that in light of the record as a whole, substantial evidence supported the Board’s finding of task loss.

STATUTES: K.S.A. 44-510e, -556; and K.S.A. 77-601, -621

CRIMINAL

STATE V. ADAME
MONTGOMERY DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED
NO. 103,646 – JUNE 24, 2011

FACTS: Adame convicted of felony DUI, driving with suspended license, and failing to provide vehicle liability insurance. Concurrent felony and misdemeanor prison terms imposed, with fines and unspecified BIDS attorney fees. Journal entry of sentencing assessed actual amount of attorney fees. Adame appealed claiming district court failed to: (1) give unanimity instruction on alternative means DUI charges, (2) consider Adame’s financial resources and burden of paying attorney fees, (3) consider community service as alternative to the mandatory DUI fine, and (4) consider financial resources and burden of paying fines.

ISSUES: (1) Alternative means charges, (2) assessing BIDS attorney fees, (3) community service alternative, and (4) assessing court fines

HELD: On facts of case, sufficient evidence to support DUI conviction by alternative means of operating or attempting to operate a vehicle. Numerous appeals on issue of alternative means could be avoided if prosecutors avoided prevalent shotgun approach, and instead charged only the specific alternative means that fit clearly within evidence to be presented at trial.

Adame’s financial condition and nature of burden that payment of attorney fees would impose was not considered on the record at time of assessment. BIDS attorney fees vacated, and case remanded for further consideration of fees.

District court failed to consider community service as an alternative to mandatory fine imposed for fourth DUI. Remanded for that consideration.

On remand, district court to consider Adame’s ability to pay and burden of payment of court fines more than $100 for convictions for driving with suspended license and providing no insurance, even though jail time was also imposed for the no insurance conviction under K.S.A. 2008 Supp. 40-3104(g)(1).


STATE V. FLynn
SUMNER DISTRICT COURT – REVERSED AND REMANDED
NO. 103,566 – JUNE 24, 2011

FACTS: Flynn convicted of one count of rape, and acquitted on all other charges of rape and other offenses. On appeal, he argues jury should have been instructed that he had a reasonable time to cease consensual sexual intercourse once the victim told him to stop.

ISSUE: Jury instruction on termination of consent

HELD: A special jury instruction consistent with State v. Bunyard, 281 Kan. 392 (2006), was warranted in this case where facts concerning the conviction offense supported a theory of defense consistent with termination of sexual intercourse within a reasonable time after consent is withdrawn. Had such instruction been given, jury might have acquitted Flynn. Reversed and remanded for new trial.

DISSENT (Malone, J.): Agrees with J. Luckert’s dissent in Bunyard, and finds present case is factually and legally distinguishable from Bunyard. Not convinced there was a real possibility the jury would have rendered a different verdict if Bunyard instruction had been given, thus trial court’s failure to do so was not clearly erroneous.

STATUTES: K.S.A. 22-3414(3); and K.S.A. 2004 Supp. 21-3502(a)(1)(A)

STATE V. HAMILTON
PRATT DISTRICT COURT – AFFIRMED
NO. 104,623 – JULY 1, 2011

FACTS: Hamilton was charged with driving under the influence of alcohol after being arrested and agreeing to a breath test on the Intoxilyzer 8000, which indicated a breath alcohol level of 0.13. The district magistrate judge found him guilty, but he appealed to the district court and filed a motion to suppress the results of the breath test. Despite Hamilton’s challenge to compliance with the protocol for such testing, the district court held that the officer’s conclusory statement that he followed the required protocol was sufficient for admission of the test results. Hamilton was then convicted on a stipulation of facts.

ISSUES: (1) DUI and (2) foundation for results of breath test

HELD: Court held that testimony which establishes that the operator of a breathalyzer machine has been certified by the state of Kansas and is presently certified as an operator, and that the test he or she conducted is in accordance with the operational procedure of said breathalyzer machine, is sufficient foundation for the operator’s testimony relative to the results of the test. Court also held that absent specific evidence that an officer administering a breath test failed to comply with some aspect of required operational protocol, general conclusory evidence of protocol compliance, when coupled with evidence of certification of the machine and the operator, is sufficient foundation for admission of breath test results.

STATUTES: None

STATE V. JACKSON
BUTLER DISTRICT COURT – REVERSED AND REMANDED
NO. 104,309 – JULY 29, 2011

FACTS: Jackson convicted of possession of methamphetamine and drug paraphernalia. Officers executed search warrant at residence where Jackson and others were social guests, and opened three to four purses to determine identity. Jackson arrested when drug evidence found in plain sight in her purse. District court denied Jackson’s pretrial motion to suppress evidence obtained from illegal search and seizure of purse. Jackson appealed.

ISSUE: Search of social guest’s personal property

HELD: Kansas law is not clear as to which of two tests applies to determine if social guest’s personal property is subject to reach of search warrant. Possibility of possession test (possession test) and actual or constructive notice test (notice test) are stated and compared under law in Kansas and other jurisdictions. To protect social guests from unreasonable searches and seizures of their persons or property during execution of search warrant, notice test together with the relationship exception are to be applied. Applied to uncontroverted facts in this case, state did not meet its burden to demonstrate search of Jackson’s purse was lawful, and State offered nothing to rebut reasonable assumption that three to four purses on kitchen floor during
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a social gathering attended by three to four women were owned by guests rather than female occupant of the residence. District court erred in overruling Jackson's motion to suppress. Convictions are reversed and vacated. Case remanded.

STATE: K.S.A. 22-2509

STATE V. NYE
RENO DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 104,046 – JULY 29, 2011

FACTS: Nye convicted of felony DUI. On appeal he claimed: (1) district court's admission of evidence that Nye was arrested and transported to Law Enforcement Center because he was driving on a suspended license violated K.S.A. 60-455, (2) prosecutorial misconduct in closing argument, and (3) district court failed to make the necessary findings to impose fine for the DUI conviction.

ISSUES: (1) Evidence of driving on a suspended license, (2) prosecutorial misconduct, and (3) fine for DUI conviction

HELD: No error in admitting evidence that Nye was driving on a suspended license. State argued that Nye drove erratically because he was intoxicated. Nye claimed fatigue and windy conditions explained his driving and transport for testing. Thus reason for Nye's transport was substantially at issue as it related to Nye's defense, and district court correctly determined the evidence was relevant to a disputed material fact. No abuse of discretion in finding probative value outweighed prejudicial effect, and limiting instruction was given.

Under facts of case, no prosecutorial error in rebuttal comments about Nye oozing odor of alcohol, and near violation of the court's limiting instruction regarding Nye's erratic driving. Nye's refusal to take breath test did not justify prosecutor's comment that Nye "knew back then" that he was guilty and "he knows it now." Such comments were outside the wide latitude allowed prosecutors, placed burden on Nye to take breath test to prove his innocence, and impugned Nye's right to contest the charge and request a jury trial. However, this commentary was not gross and flagrant misconduct, and no showing of ill will. Ample direct evidence, including 30-minute police video, supported the conviction. Prosecutor's improper comments did not deny Nye a fair trial. Also, trial court's isolated unfortunate misstatement that defendant had burden of proof did not warrant reversal when jury was correctly instructed.

District court did not consider on the record Nye's financial status or whether to impose monetary fine or community service. Fine is vacated. Case remanded for appropriate findings.

STATUTES: K.S.A. 2010 Supp. 8-1001(k), -1001(k)(8), -1001(l), -1567(g)(1), -1567(j); and K.S.A. 60-455

STATE V. PERKINS
NORTON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS
NO. 103,735 – JULY 15, 2011

FACTS: A Norton County jury convicted Thomas Perkins of driving under the influence — his fourth violation of K.S.A. 2008 Supp. 8-1567 and, therefore, a felony — along with having a suspended driver's license and open containers of beer — those are misdemeanors. Perkins challenges the DUI and license suspension convictions on grounds of alternative means of committing criminal or traffic offenses. Perkins also appeals the way the district court imposed the mandatory fine for the DUI.

ISSUES: (1) DUI, (2) sufficiency of the evidence, and (3) alternative means

HELD: Court held that for purposes of K.S.A. 2008 Supp. 8-1567, a driver who actually operates a vehicle necessarily also attempts (successfully) to do so. The converse would not necessarily be
true; someone who attempts to operate a vehicle need not complete
the act to violate K.S.A. 2008 Supp. 8-1567. On the facts here, the
jury found Perkins drove the pickup truck before Trooper Henrick-
son arrived on the scene. That finding factually and legally establish-
es conduct sufficient to support the alternative means of attempting
to operate for purposes of K.S.A. 2008 Supp. 8-1567. Court also
found that the state failed to present any evidence against Perkins to
support a conviction under K.S.A. 8-262 on the alternative means
of driving with a canceled or revoked license. Perkins’ conviction
rested on an insufficient factual basis and is reversed. Court also
held the trial court erred in not considering the option of allowing
Perkins to perform community service instead of paying the fine
of $2,500. Court vacated the fine and remanded for trial court to
consider the community service option.

K.S.A. 2008 Supp. 8-257, -262, -1001, -1567; and K.S.A. 21-3105,
-3201, -3301, -3810, -3502, -4204

STATE V. POWELL
GREENWOOD DISTRICT COURT – AFFIRMED
NO. 102,749 – JUNE 24, 2010

FACTS: Powell convicted of offenses arising from theft and dam-
age to law enforcement vehicle. Prior to bench trial on stipulated
facts, Powell sought to suppress results of search warrant for collec-
tion of samples for DNA analysis. District court denied the motion,
applying Leon good faith exception to the warrant application which
failed to state that blood and tissue had been found in the vehicle.
Powell appealed, and also claimed there was no statutory authority
for issuance of a search warrant for a blood sample.

ISSUES: (1) Leon good faith exception and (2) warrant for blood
tissue samples

HELD: Under facts of case it was reasonable for officers to believe
they had a valid warrant to obtain DNA evidence from Powell, and
exclusion of the evidence would not further purposes of exclusion-
ary rule.

Legislature’s use of broad language in K.S.A. 22-2502(a)(1) gave
district court jurisdiction to order the search warrant in this case
for samples from Powell’s blood, hair, cheek cells, and fingerprints.
Rhode Island case cited by Powell is distinguished. DNA sample
taken from Powell was properly admitted into evidence.

STATUTES: K.S.A. 2010 Supp. 21-3110(7); K.S.A. 2010
Supp. 22-2502(a); K.S.A. 21-3701, -3720; and K.S.A. 22-2502(a),
-2502(a)(1)

CITY OF OVERLAND PARK V. RHODES
JOHNSON DISTRICT COURT – AFFIRMED
NO. 103,762 – JULY 8, 2011

FACTS: Kelly K. Rhodes appealed her conviction of driving
while intoxicated (DUI). She argues the police DUI checkpoint was
unconstitutional and, as a result, her conviction should be reversed.
She also argues the Intoxilyzer 8000 test results should have been
suppressed because the officers failed to comply with the Kansas
Department of Health and Environment (KDHE) regulations and
the Intoxilyzer 8000 was not properly certified.

ISSUES: (1) DUI, (2) constitutionality of checkpoint, and (3)
equipment certification

HELD: Court weighed all 13 factors in the determining the con-
stitutionality of the checkpoint in light of the state’s interest in oper-
ating the checkpoint against the intrusion of the individual. Court
held the police department appropriately considered and carried out
the majority of the factors in its operation of the checkpoint. It was
therefore constitutional and the district court did not err in failing
to suppress the results of the stop. Court also held that because the
testing equipment was certified, although not under the new regula-
tions at the time of testing Rhodes, it still substantially complied
with the KDHE regulations.
DISSENT: Judge Atcheson dissented and would reverse the decision of the district court and remand with directions that the motion to suppress be granted. Judge Atcheson indicated that states and municipalities may operate motor vehicle checkpoints to identify and arrest drunk drivers without offending the Constitution. But governments cannot use those checkpoints as a means of communicating information or ideas they consider beneficial or worthwhile.

STATUTE: K.S.A. 60-513

STATE V. ROLLINS
JOHNSON DISTRICT COURT – AFFIRMED
NO. 103,124 – JULY 1, 2011

FACTS: Richard Orrison, vice president of Wall Ties and Forms (Wall Ties), a manufacturer of aluminum forming systems that are used in the concrete industry, notified the police that two pallets or “skids” of aluminum forms had been stolen from Wall Ties. During his internal investigation, Orrison watched one daytime and two nighttime surveillance videos that showed Rollins, a Wall Ties employee, using two forklifts to load the missing skids into a van on the evening of July 31, 2008. Rollins was charged with theft under K.S.A. 21-3701(a)(1) and (b)(3). During Rollins’ trial, the district court overruled his contemporaneous and continuing objection to the State’s attempt to introduce testimony concerning the daytime surveillance video. The state introduced Rollins’ timesheet over his objection claiming that the State failed to produce it during discovery. The district court overruled Rollins’ objection. Rollins testified that when he arrived for work on July 31, 2008, he was informed that the “first shift” failed to make a delivery. Rollins made the delivery of 16 7-foot square tubing units to BRB Contractors’ construction site at 1701 Baltimore, Kansas City, Mo. In rebuttal, Carl Englican, vice president and partner of Wall Ties, testified: (1) Wall Ties only sells the 7-foot square tubing units internationally, not domestically; (2) there was no construction site at 1701 Baltimore in Kansas City, Mo., on that date; and (3) Wall Ties had no client named BRB Contractors. The jury convicted Rollins of theft, and he was sentenced to 11 months’ imprisonment with no post-release supervision.

ISSUES: (1) Alternative means, (2) right to be present, (3) admission of evidence, and (4) cumulative error

HELD: Court held the phrase in K.S.A. 2010 Supp. 21-3110(13) “obtains or exerts control over property” includes but is not limited to, the taking, carrying away, or the sale, conveyance, or transfer of title to, interest in, or possession of property. There is no quantifiable difference between the actions that constitute obtaining or exerting; these words create a distinction without a difference. One must necessarily obtain property one has exerted control over, and one must necessarily exert control over property one has obtained. Consequently, this is not an alternative means case and the district court did not err in instructing the jury on the elements of theft. Court rejected Rollins’ claim that the district court violated his constitutional right to be present at all critical stages of his trial when it dismissed the jury for the evening during deliberations. Court also stated the evidence was overwhelming and Rollins failed to object when the jury began deliberating the next day. Court found no abuse of discretion in the admission of Rollins’ timesheet or the admission of testimony concerning the contents of the several surveillance videos. Court found no error upon which to base cumulative error.

STATUTES: K.S.A. 21-3110, -3701; K.S.A. 22-3212, -3405; and K.S.A. 60-404

BOHANON V. WERHOLTZ
RENO DISTRICT COURT – AFFIRMED
NO. 104,490 – JULY 15, 2011 (MOTION TO PUBLISH)

FACTS: Brazell Bohanon is an inmate at the Hutchinson Correctional Facility. He appeals the summary denial of his petition for writ of mandamus which he filed after being found guilty of several disciplinary offenses while incarcerated at the El Dorado Correctional Facility.

ISSUE: Prison discipline

HELD: Court stated that a change of venue rests largely in the discretion of the trial court. Objection to the venue of an action shall not be allowed except on timely motion made and for grounds established before trial of the action is commenced on the merits. K.S.A. 60-610. If an objection to venue is not raised in a motion or responsive pleading, it is waived. K.S.A. 60-212(h). Court held that under the facts of this case, the district court did not err in granting summary judgment to the secretary of corrections where an inmate filed a petition for writ of mandamus alleging a violation of the inmate’s right to written notice of a prison disciplinary proceeding.

STATUTE: K.S.A. 60-610, -612, -801, -1501

STATE V. WILLIAMS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,036 – JULY 8, 2011

FACTS: Williams was charged with aggravated trafficking after he picked up L.M., a 16-year-old female from a Wichita Children’s Home and took her to Dallas, where she worked as a prostitute. A jury found Williams guilty. Williams asserts the aggravated trafficking statute is unconstitutionally vague and overbroad; the prosecutor committed misconduct during closing arguments; he should have been sentenced for the crime of promoting prostitution under the identical offense doctrine, that promoting prostitution is a more specific crime than the general crime of aggravated trafficking; and his sentence was improperly increased without his criminal history proven to a jury beyond a reasonable doubt.

ISSUES: (1) Aggravated trafficking, (2) constitutional statute, (3) prosecutorial misconduct, (4) general vs. specific crime, and (5) Apprendi;

HELD: Court held the aggravated trafficking statute is not unconstitutionally vague or overbroad. Court stated when read in its entirety, K.S.A. 21-3447(a)(2) is clearly aimed at preventing the exploitation of minor children. The statute only applies where the offender knows that a child will be used to engage in forced labor, involuntary servitude, or sexual gratification of the offender or another. The state has a compelling interest in the well-being of its children and in the exercise of its police powers may enact legislation to protect children from adult predators. Court found no prosecutorial misconduct and that the prosecutor was either making fair comments on the evidence or responding to defense counsel’s arguments. The comments were not outside the wide latitude afforded a prosecutor during closing argument. Court held that the crimes of aggravated trafficking and promoting prostitution do not have identical elements and that under the facts of this case, the state might have successfully prosecuted the defendant for aggravated trafficking or promoting prostitution. However, the test is not whether the facts would support an alternative charge but whether the applicable elements of the charged offense are identical to the elements of an offense imposing a lesser penalty. Regarding the general and specific nature of these crimes, court stated there is no suggestion that the evidence does not support a finding of guilt on either means of committing aggravated trafficking. Indeed, there is substantial evidence in the record to support a finding that Williams both recruited and transported L.M. As a result, under these facts, promoting prostitution cannot be considered a more specific offense than aggravated trafficking. Court denied Williams’ Apprendi claim.

STATUTES: K.S.A. 8-1567; K.S.A. 21-3446, -3447, -3512, -3513, -3608a; and K.S.A. 22-4902, -4904
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SEPTEMBER

Friday, September 9, 9 a.m. – 3:30 p.m.
2011 KBA Insurance Law Institute
Kansas Law Center, Topeka

Wednesday, September 21, Noon – 1 p.m.
*Padilla v. Kentucky: A Year Later*
Speaker: Michael Sharma-Crawford,
Sharma-Crawford Attorneys at Law LLC,
Kansas City, Mo.
Telephone seminar

Thursday, September 22, Noon – 1 p.m.
*Immigration Issues for the Criminal Defender*
Speaker: Michael Sharma-Crawford,
Sharma-Crawford Attorneys at Law LLC,
Kansas City, Mo.
Telephone seminar

Friday, September 23, 9 – 3:30 p.m.
*Energizing the Law Practice: An Overview of Energy Law Topics Affecting Construction and Real Estate Transactions in Kansas*
Ramada Inn, Salina

Thursday, September 29, 1:30 – 2:45 p.m.
*Applying Practical “Steps as You Prep” to Appear Before the High Court*
Wichita Bar Association, Wichita

Friday, September 30, 9 – 11:45 a.m.
*Outdoor Recreational Law CLE and Clay Shoot*
Flint Oak Resort, Fall River

Lunch and clay shoot following.

OCTOBER

Friday, October 7, 9 a.m. – 3:30 p.m.
*Lesbian, Gay, Bisexual and Transgender Legal Issues*
Stinson Morrison Hecker LLP, Kansas City, Mo.

Friday, October 14, 9 a.m. – 3:30 p.m.
2011 KBA Employment Law Institute
The Oread, Lawrence

Friday, October 21, 9 a.m. – 3:30 p.m.
*Nuts & Bolts for the Transactional Lawyer*
Hyatt Regency, Wichita

Friday, October 21, 9 a.m. – 3:30 p.m.
*KBA/KIOGA Oil & Gas Conference*
Hyatt Regency, Wichita

Co-sponsored by the Kansas Independent Oil & Gas Association

Friday, October 28, 9 a.m. – 3:30 p.m.
*Agricultural Law Update*
Kansas Farm Bureau, Manhattan

Co-sponsored by the Kansas Farm Bureau Legal Foundation

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YOU ARE INVITED TO HEAR ORAL ARGUMENTS
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Members of the Supreme Court will participate in a roundtable discussion on best practices for oral argument.

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• What are the most effective attributes of a successful argument?
• What are the most effective attributes of a rebuttal argument?

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Chief Justice Lawton Nuss, a 1982 K.U. Law graduate, joined the Salina firm of Clark Mize & Linville, practicing a wide range of law. He was appointed to the Supreme Court in 2002, becoming Chief Justice in 2010.

Justice Marla Luckert, a 1980 Washburn Law graduate, joined the Topeka firm of Goodell, Stratton, Edmonds and Palmer, focusing on general litigation and health law. She was appointed to the Third Judicial District bench in 1992 and became Chief Judge in 2000. She was appointed to the Supreme Court in 2003.

Justice Carol Beier, a 1985 K.U. Law graduate, served a clerkship in the 10th Circuit before entering private practice with the Washington, D.C. firm Arent, Fox, Kintner, Plotkin & Kahn then the Wichita firm of Foulston Slocum LLP. She was appointed to the Court of Appeals in 2000 where she served until her appointment to the Supreme Court in 2003.

Justice Eric Rosen, a 1984 Washburn Law graduate, joined the Topeka firm of Hein, Ebert and Rosen. He was appointed to the Third Judicial District bench in 1993. He was appointed to the Supreme Court in 2005.

Justice Lee Johnson, a 1980 Washburn Law graduate, practiced law in Caldwell, Kansas, first with Don B. Stallings and later as a solo practitioner. He was appointed to the Court of Appeals in 2001 where he served until his appointment to the Supreme Court in 2007.

Justice Dan Biles, a 1977 Washburn Law graduate, served five years as an Assistant Attorney General. He joined the Overland Park law firm of Gates, Biles, Shields & Ryan, P.A., practicing administrative, trial, and appellate work. He was appointed to the Supreme Court in 2009.

Justice Nancy Moritz, a 1985 Washburn Law graduate, joined Spencer Fane Britton and Browne, specializing in defensive matters and employment litigation. In 1995 she became an Assistant United States Attorney. She was appointed to the Court of Appeals in 2004 where she served until her appointment to the Supreme Court in 2010.

ROUNDTABLE MODERATED BY SEN. JEFFREY KING, PRESIDENT, KBA APPELLATE PRACTICE SECTION

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