



## UNFAIRLY MALIGNED

### The Myths Surrounding the Kansas Civil Asset Forfeiture Debate

By Colin D. Wood and Gaten T. Wood

#### I. Introduction.

Other than criminals, it is a safe bet that everyone agrees bad guys should not get to keep the profits of illegal activities or use property in such a way that it damages our society. But at the same time, we would all agree that property rights are important and that innocent property rights should be protected. So, how do we constitutionally accomplish both of those very legitimate policy goals? Well, for more than 200 years Americans have found no better way than to target such ill-gotten gains and criminal assets through the use of civil asset forfeiture, a legal mechanism that removes bad property from bad uses, and redirects it to victims and community safety programs.

The current debate over civil asset forfeiture is the fourth of its kind in Kansas since 1970. Each time, we stop to examine and evaluate the need for, and the scope of, our state's forfeiture laws. Each time, the debaters change but the myths surrounding civil forfeiture creep back in, "...for the great enemy of the truth is very often not the lie—deliberate, contrived, and dishonest—but the myth—persistent, persuasive, and unrealistic."<sup>1</sup>

This article will review current law and highlight the unforeseen but practical consequences of certain proposed legislative changes. In the end, it is hoped that the reader will understand there are many valid reasons why civil forfeiture laws exist, and why public policy in Kansas concerning forfeiture has not substantively changed since before statehood.<sup>2</sup>

#### II. The Current Debate.

The Kansas Supreme Court reminded us fifty years ago that "[t]he police power is an inherent power of the Sovereign and is essential to protect members of the community from injury. It rests upon the fundamental principle that all property is owned subject to the limitation that its use may be regulated for the safety, health, morals, and general welfare of the community in which it is located."<sup>3</sup>

Grounded in that police power, civil asset forfeiture is an in rem (against the property itself) proceeding in civil court that legally severs ownership rights in certain property because that property represents the "proceeds" from crime, or that property was used or intended to be used in an illegal exchange—such as to purchase controlled substances—or that property was used or intended to be used to make committing

a crime easier (known as facilitation). Many of the civil forfeiture court case names are strange, but they quickly identify that each is a proceeding against property and not a person: State v. \$551,985.00 in U.S. Currency<sup>4</sup> or State v. One 2006 Grey Lexus SC430.<sup>5</sup>

Civil forfeiture has been public policy in America since colonial times. In 1789, our First Congress passed customs acts containing *in rem* forfeiture procedures for the enforcement of the laws of the newly born nation. Kansas has had civil forfeiture laws or public nuisance statutes since it was a western territory.<sup>6</sup> The use of civil forfeiture has repeatedly been held constitutional by both Kansas state courts and the United States Supreme Court.<sup>7</sup>

In 1994, the Kansas Legislature passed, almost unanimously, the current civil forfeiture reform act known as the Kansas Asset Seizure and Forfeiture Act (KSASFA).<sup>8</sup> The Kansas Bar Association praised KSASFA, calling civil forfeiture a “legitimate tool for law enforcement.”<sup>9</sup> There have been approximately twenty Kansas appellate court cases interpreting KSASFA. No appellate case has found a single issue with its due process provisions.<sup>10</sup>

In 2000, an audit was undertaken by the Legislative Division of Post Audit to determine “whether the laws governing the sale of [forfeited] property are being followed, and how the proceeds are spent.” That audit found no misuse of funds, but did find that some agencies mixed drug tax and state forfeiture monies into one fund and failed to submit annual reports on forfeitures to their governing bodies.<sup>11</sup>

Although civil forfeiture was under recent national media scrutiny,<sup>12</sup> the current Kansas debate started in the 2015 legislature with the introduction of a bill that would have required a criminal conviction before civil forfeiture was authorized.<sup>13</sup> That bill was followed in 2016 by two more: the first required not only a criminal conviction, but redirected any forfeited proceeds from law enforcement programs to the state general fund; the second would have created a grant fund with a portion of forfeited proceeds given to agencies not involved in the original property seizure or the related investigations. None of the bills received a hearing.<sup>14</sup>

By July 2016, a second state audit of civil forfeiture in Kansas was completed for the Legislature. Again, “... [the agencies audited] adequately safeguarded seized property, appropriately liquidated forfeited property, and appropriately spent forfeiture proceeds.” However, the audit did again find that agencies were not properly reporting forfeiture financial reports to their local government bodies.<sup>15</sup>

### III. Myths Surrounding Kansas Civil Forfeiture

#### Myth #1. Civil asset forfeiture laws lack constitutional due process protections, and owners are required to prove the seized property’s innocence.

You be the judge. KSASFA contains the following protections concerning the right to legal notice, an opportunity to be heard, and a decision by a neutral fact-finder:

a. Law enforcement may only seize property upon probable cause to believe that property is then subject to forfeiture; probable cause is the same level of constitutional suspicion required to take a person into custody for an alleged crime.<sup>16</sup>

b. Law enforcement is required to provide written notice to the person from whom property is seized. Among other

things, the notice contains information about the property, the law enforcement agency involved, and a contact person able to respond to questions.<sup>17</sup>

c. Constitutional notice of a forfeiture proceeding is required to be given to all known and unknown potential claimants, innocent owners, lienholders, etc. that may have an ownership interest in the seized property.<sup>18</sup>

d. Claimants may request a probable cause hearing before a district judge.<sup>19</sup>

e. Similar to persons arrested of crimes, seized property can be released upon the posting of an appropriate bond.<sup>20</sup>

f. Seizures are reviewed by the county or district attorney or other forfeiture prosecutor before the case is filed in court.<sup>21</sup>

g. There are no filing fees to file a claim in a civil forfeiture case.<sup>22</sup>

h. The state is required to file the civil forfeiture case in court within 90 days of the seizure for forfeiture, or the property is subject to a conditional release by the court.<sup>23</sup>

i. A civil forfeiture case may be stayed pending the resolution of a parallel criminal case involving a claimant to protect that claimant’s Fifth Amendment rights.<sup>24</sup>

j. No civil forfeiture case may be conditioned upon a plea bargain of a parallel criminal case; and no criminal case may be conditioned upon a settlement of a parallel civil forfeiture case.<sup>25</sup>

k. A claimant may request that a court dismiss an improper forfeiture complaint; may request the suppression of evidence illegally obtained by the state; has the right to all discovery materials in the state’s possession; and, may depose the state’s witnesses before trial and may cross-examine them at trial.<sup>26</sup>

l. KSASFA provides for settlement between the parties at any time during the seizure and forfeiture process. Settlements must be in writing and approved by a district court judge.<sup>27</sup>

m. Civil forfeiture trials are heard and decided by a judge of the district court.<sup>28</sup>

n. At trial, the state has the initial burden to prove by a preponderance of the evidence that the seized property is subject to forfeiture. The “preponderance of the evidence” standard is the same as in most other civil court disputes. Upon a showing of forfeitability, a claimant is then and only then required to put up a defense. Should the state not carry its burden of proof, the claimant has no requirement to put on any evidence; the claimant wins and the property is ordered released.<sup>29</sup>

o. Although innocent ownership of property is not a constitutional right, Kansas has an absolute statutory innocent owner defense to forfeiture. Owners who did not know and could not have reasonably known that their property was going to be used illegally, or who acted reasonably to prevent the illegal use, are fully protected from forfeiture.<sup>30</sup>

p. A court is required to review and prevent a forfeiture from being grossly disproportionate to the crime involved in the civil forfeiture. In other words, small crimes cannot result in very large forfeitures.<sup>31</sup>

q. Should the claimant be unsuccessful at trial, the claimant has the right to appeal the case to the Kansas Court of Appeals.<sup>32</sup>

r. In any subsequent public sale of forfeited property, no person involved in the seizure and forfeiture of the property

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(i.e. law enforcement, attorneys, judges, or staff) may bid on or purchase the property.<sup>33</sup>

### **Myth #2. Most claimants walk away from seizures because it is so hard and expensive to fight a civil forfeiture.**

It costs absolutely nothing to file a claim in a civil forfeiture case in Kansas.<sup>34</sup> Unrepresented claimants regularly file claims and win their cases in Kansas courts.<sup>35</sup> Most claimants who hire attorneys do so under a contingent fee agreement, meaning the attorney receives no fee unless the case settles or the claimant prevails at trial.

Stefan Cassella, a leading federal asset forfeiture treatise author and practitioner, recently remarked on why potential claimants refuse to file a claim saying,

...[i]t has been suggested that the reason that eighty percent of civil forfeiture cases are uncontested is that there is no right to counsel. That is not true. Before CAFRA [the federal Civil Asset Forfeiture Reform Act] was enacted in 2000, it was similarly argued that the reason a similar fraction of cases was uncontested was the burden of proof was on the claimant, there was no innocent owner defense, and claimants were required to post a cost bond before they could get in the courthouse door. Yet when reforms addressed to those issues were enacted by CAFRA, the fraction of contested cases remained virtually unchanged...[t]he real reason is that in most civil forfeiture cases, there is no defense to the forfeiture, or the property owner does not see it as being in his interest to raise one. If the government seizes \$60,000 in cash, a loaded handgun and a kilo of cocaine, potential claimants to the money may—and almost always do—walk away without filing a claim, even if represented by counsel...<sup>36</sup>

Since property seizures by law enforcement typically involve a parallel criminal investigation, many potential claimants choose not to be connected with the event.

### **Myth #3. Law enforcement is incentivized to violate civil rights because forfeiture law directs forfeited property to law enforcement trust funds; and there are no controls on law enforcement's use of forfeited property.**

For over 30 years, the United States Congress and the Kansas Legislature have directed forfeited property to law enforcement and community safety programs to help fund those activities at a lower cost to the taxpayer, and encourage federal, state and local law enforcement agencies to work together more closely.<sup>37</sup>

Unlike a few other states, in the 22-year history of KSASFA, there has not been one documented abusive seizure of property in Kansas. That is not to say the incentive to abuse does not exist, but the record certainly suggests that KSASFA has had sufficient checks, balances, and protections to have prevented improper seizures from seeing a courtroom since its inception.<sup>38</sup> “The protection against improper police activity that may be motivated by a need to enhance law enforcement resources has always been to ensure due process in the forfeiture proceeding. There is nothing wrong with providing law

enforcement agencies with an incentive to combat criminal activity by focusing on the economic foundations of the illegal enterprise if the protections guaranteed by the Fourth and Fifth Amendments are preserved.”<sup>39</sup>

Admittedly, there have been agency administrators who have been justifiably questioned by the media about “unusual” purchases with forfeited funds.<sup>40</sup> However, there has not been one Kansas case of criminally misappropriated funds.

State law requires forfeited funds to be placed into an agency's law enforcement trust fund.<sup>41</sup> It requires that the fund go through the regular audit process and all expenditures go through the normal local authorization process. The funds may only be used for “special, additional law enforcement purposes.” The funds must supplement and not supplant a law enforcement agency's budget, and all deposits and expenditures from the trust fund must be publicly reported to the agency's governing board. It is illegal to forecast into the budgeting process future forfeiture receipts.<sup>42</sup>

### **Myth #4. Property owners should be convicted of a crime before property is forfeited.**

At first blush, that sounds like a really great idea to most people. The only problem is that for decades it has been found not to work...ever, at all. First, criminals die. When that happens, there can never be a conviction. Second, some criminals simply abscond before they are convicted and are never heard from again. In fact, at the time of seizure, a significant percentage of criminals give invalid contact information, addresses, and telephone numbers because they want nothing to do with the bad property. Third, some criminals are not prosecuted for valid reasons such as insufficient evidence in the parallel criminal case, age, poor health, lack of mental capacity, cooperation in other and more important investigations, agreements with prosecutors to testify against co-defendants, or a simple lack of prosecutorial resources. Fourth, for decades courts have recognized that smart and experienced bad guys put their assets into the names of relatives, friends, and sham companies to protect them from the prying eyes of other criminals, law enforcement investigators, and from civil forfeiture.<sup>43</sup>

[N]o one can seriously argue that a person who knowingly allows his gun to be used to commit a murder should be allowed to recover the gun. Nor should the donee of fraud proceeds be allowed to retain the victim's money because the perpetrator is at large and cannot be prosecuted...[c]ivil forfeiture provides an alternative, noncriminal remedy for wrongdoing committed by a person who, in the interests of justice, needs not be subjected to criminal prosecution, but nevertheless should be sanctioned for his or her participation in a serious criminal offense.<sup>44</sup>

As a practical matter, requiring a criminal conviction to later forfeit criminal assets would essentially raise the burden of proof for the forfeiture action to “beyond a reasonable doubt” (the requirement for the criminal conviction). Nowhere else in property and tort law is there such a stringent requirement. An analogy to that proposal would be requiring a criminal

conviction of a bad driver involved in a deadly accident before any victim or family of a victim could recover their damages. That policy has never been the law in Kansas.

One of civil forfeiture's greatest strengths is its ability to pursue assets despite the death of a criminal defendant or an absconded criminal, or when, in the interests of justice, a person eludes being charged, or when a bad guy hides illegal assets in the names of others. The following are just three examples of Kansas cases where, had a conviction been required, the criminal assets would not have been forfeited to the taxpayers:

#### 1. \$3,770,000.00 in U.S. Currency.

In January 2000, while traveling in a rented car through Colby, Kan., Justin Erik DeBusk committed a traffic offense. DeBusk and his passenger, Robert Henry Golding, were stopped by a Colby police officer. During the event, when he thought he was going back to prison, Golding killed himself at the scene of the traffic stop.

Inside the trunk of the rental car was Golding's \$3,770,000.00 in cash. Elsewhere, inside of a storage locker in Colorado, Golding had stashed another five million. All of the money was derived from Golding's longstanding illegal interstate and international marijuana business. The state of Kansas filed a civil forfeiture action against the money seized in Kansas, and it was later forfeited. A federal court in Colorado forfeited the other five million dollars. Because of his death, Golding was neither charged nor convicted.<sup>45</sup>

#### 2. \$5,535,870.00 in U.S. Currency.

In October 2010, Wichita DEA agents were notified of a suspicious aircraft flight plan of a small, commercially chartered jet traveling across the country. When the aircraft stopped for fuel in Salina, agents contacted the crew and passengers. During the investigation, twelve suitcases were located that none of the aircraft's occupants would claim. The twelve suitcases contained \$5,535,870.00 in currency. Although DEA pursued a lengthy parallel criminal investigation and tentatively tied the money to a large drug organization, no criminal charges were ever brought against anyone due to an insufficient amount of evidence. When no one came forward to claim the cash, a federal court in Wichita forfeited it.<sup>46</sup>

#### 3. Unified School District 266, Maize, Kansas.

In November 2014, the Federal Bureau of Investigation searched certain financial records at the district headquarters of Unified School District No. 266 in Maize, Kansas. Ramon Mosate, the district's technology director, was under investigation for defrauding the district of over one million dollars. Later, but before he was charged with a crime, Mosate killed himself in Irving, Texas. Because of his self-inflicted death, no criminal charges could ever be filed against him.

During the criminal investigation, the United States had filed a civil forfeiture complaint against Mosate's house and bank accounts where he had placed some of the criminal proceeds. In a September 2016 settlement of the civil forfeiture case, almost \$490,000 was recovered and returned to the school district.<sup>47</sup>

Civil forfeiture, without the need of a criminal conviction, prevented the estates of Golding and Mosate from keeping the proceeds of their crimes. Civil forfeiture, without the need of a criminal conviction, forfeited the millions in drug proceeds on the Salina airplane when no one would come for-

ward. These are only three examples of the kinds of cases that happen every day in Kansas. Without civil forfeiture, criminals will simply keep what they gain from their crimes. Requiring a criminal conviction prior to forfeiture will allow bad assets to be kept by bad guys smart enough or experienced enough to change the name on the bank account, or the title, or the deed.

The last word on criminal convictions: although not one person nor one record supports the proposition that there has been a detrimental incentive to law enforcement when forfeited assets are directed to public safety programs, proponents of requiring a criminal conviction may actually be creating an unintentional incentive themselves. If a conviction is required before civil forfeiture, that would then require law enforcement officers to arrest persons who in the past might not have been arrested because of their cooperation, or their age, or their health, or their relatively low-level participation in the parallel crime.

#### IV. Summary.

Civil asset forfeiture is a boogeyman only to bad guys. Since 1994, KSASFA has proven to be lawful and reasonable, with strong due process protections. It has withstood numerous attacks under judicial review, legislative reforms, and media stories. The record reflects that, except for a few minor reporting mistakes that are correctable with training, Kansas law enforcement continues to appropriately seize, manage, forfeit, and expend criminal assets, all to the benefit of Kansas citizens and taxpayers.

As for the idea that comes around every five to ten years of requiring a criminal conviction before a civil forfeiture proceeding, history and common sense have shown that it simply will not work. A criminal who commits suicide, flees, hides his unlawful assets, or willfully fails to make himself known will be victorious...and all to the detriment of those same Kansas citizens and taxpayers. ■

#### About the Authors



**Colin Wood** is a retired KBI senior special agent and assistant attorney general. Currently a federal contract attorney cross-designated a Special Assistant United States Attorney he teaches extensively on law enforcement topics. He is a graduate of Wichita State University and Washburn University School of Law, and during his 43 years of public service he has held office as sheriff, mayor, and city commissioner. Colin has authored previous Journal articles on asset forfeiture procedure, reasonable suspicion analysis, and Kansas consent law.



**Gaten T. Wood** became Barber Co. Attorney in Medicine Lodge, Kansas in October 2013. He is a graduate of Kansas State University and the Oklahoma City University School of Law. After law school, he worked as an Assistant County Attorney in Pratt Co. He was a member of a recent Attorney General's committee reviewing KSASFA improvements. In private practice, he teaches constitutional law, instructs officers and agents in search and seizure, car stops, roadside detentions, drug interdiction, and litigates state civil asset forfeiture cases for many Kansas law enforcement agencies.

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1. John F. Kennedy, 35th President of the United States, Commencement Address at Yale University, June 11, 1962.
2. See Colin D. Wood, "When Good Property Goes Bad, A Primer on Kansas Asset Forfeiture Law and Procedure," 70 J. Kan. Bar Assn., Mar. 2001, at 24.
3. *Ray v. State Highway Commission*, 196 Kan. 13 (1966), cert. denied 385 U.S. 820.
4. 2010 WL 3211928 (Kan. Ct. App.).
5. 2013 WL 2991143 (Kan. Ct. App.).
6. Statutes of the Territory of Kansas, 1855, Ch. 3, Sec. 26, requiring the public burning of gaming tables.
7. *State v. Brown (Van Oster)*, 119 Kan. 874 (1925); *City of Hoisington v. \$2,044.00 in U.S. Currency*, 7 Kan. Ap. 2d 825 (2000); *The Palmyra*, 25 U.S. 1, 12 Wheat. 1 (1827); *Van Oster v. Kansas*, 272 U.S. 464 (1926); *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663 (1974); *United States v. Usery*, 518 U.S. 267 (1996); see generally, "The Constitutionality of Civil Forfeiture," 125 Yale L.J. 2246, June, 2016, by Caleb Nelson.
8. K.S.A. 60-4101 *et seq.*; Senate and House Action Report and Subject Index Report, 1994 KSASEFA passed the Kansas House of Representatives 117-5, and the Kansas Senate 38-1.
9. Ron Smith, former KBA General Counsel, "Legislative Information for the Kansas Legislature" memo dated February 17, 1993 concerning KSASEFA, HB 2423 and directed to members of the House Judiciary Committee, pg. 1.
10. "Report of Attorney General Robert T. Stephan's Task Force on Asset Forfeiture," 1993. Kyle Smith, Assistant Attorney General, Chairperson; Debra Vermillion, Assistant Johnson County District Attorney, Vice Chairperson; Colin Wood, KBI Special Agent, Secretary; Clifford Hacker, Lyon County Sheriff; Douglas Roth, Assistant Sedgwick County District Attorney; Tom Smith, Attorney, Liberal; Jack Blow, Kansas Highway Patrol; Kevin Fletcher, Assistant Reno County District Attorney. Two of these members have since become state district court judges.
11. Performance Audit Report, "Seized Property in Kansas: Determining Whether Laws Governing the Sale of Property Are Being Followed, and How the Proceeds Are Spent," Legislative Division of Post Audit, State of Kansas, August, 2000.
12. See generally in 2014, The New York Times series on asset forfeiture; The Washington Post series on asset forfeiture; and HBO's John Oliver's Last Week Tonight very funny, but not always legally accurate, satire of civil forfeiture.
13. 2015 Kansas Legislature, House Bill 2771.
14. 2016 Kansas Legislature, House Bill 2638; 2016 Kansas Legislature House Bill 2699.
15. Performance Audit Report, "Seized and Forfeited Property: Evaluating Compliance with State Law and How Proceeds Are Tracked, Used, and Reported," Legislative Division of Post Audit, State of Kansas, July, 2016.
16. K.S.A. 60-4107(a), (b).
17. K.S.A. 60-4107(d).
18. K.S.A. 60-4109(a)(3).
19. K.S.A. 60-4112(c).
20. K.S.A. 60-4108(b).
21. K.S.A. 60-4107(h), (i).
22. K.S.A. 60-4111.
23. K.S.A. 60-4109(a).
24. K.S.A. 60-4113(p).
25. K.S.A. 60-4107(m).
26. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693, 702 (1965); K.S.A. 60-4113(f), (q).
27. K.S.A. 60-4107(l).
28. K.S.A. 60-4113(g).
29. K.S.A. 60-4113(g), (h).
30. *Bennis v. Michigan*, 516 U.S. 442, 446-09 (1996); K.S.A. 60-4106(a)(3).
31. K.S.A. 60-4106(c); *Austin v. United States*, 509 U.S. 602, 621 (1993).
32. K.S.A. 60-2102.
33. K.S.A. 60-4117(a)(3)(C).
34. K.S.A. 60-4111.
35. Author Colin Wood, having lost only one civil forfeiture trial in his career, lost it to an unrepresented claimant.
36. "The Role of Civil Forfeiture, Point Counterpoint," *Judicature*, Duke Law Center, Vol. 100, No. 4, Winter, 2016, p. 73.
37. A Guide to Equitable Sharing of Federally Forfeited Property for State and Local Law Enforcement Agencies; Report of Attorney General Robert T. Stephan's Task Force on Asset Forfeiture, *supra*, note 10.
38. See *supra*, notes 11 & 15.
39. See *supra*, note 35, quoting Stefan Cassella.
40. Topeka Capital Journal, March 23, 2014, *Drug Forfeiture Outlay Doesn't Violate Letter of State Law*.
41. K.S.A. 60-4117(a).
42. K.S.A. 60-4117(d).
43. E.g., *State v. One 1967 Chevrolet El Camino*, 247 Kan. 469, 474 (1990).
44. See *supra*, note 35, quoting Stefan Cassella.
45. *State v. \$3,770,000.00 in U.S. Currency*, Thomas County District Court Case No. 2000 CV 8; "The Ten Million Dollar Man," *The Wichita Eagle*, January 30, 2000.
46. *United States v. \$5,535,870.00 in U.S. Currency*, District of Kansas Case No. 10-1376-WEB.
47. *United States v. 3101 North Den Hollow Court, Wichita, Kansas et al*, District of Kansas Case No. 14-1393-JTM; "Maize School District Gets Nearly \$490,000.00 In Fraud Case Settlement," *The Wichita Eagle*, November 5, 2016.



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