

MINUTES

SPECIAL COMMITTEE ON JUDICIARY

November 8-9, 2007
Room 123-S—Statehouse

Members Present

Senator John Vratil, Chairperson
Representative Mike O'Neal, Vice-Chairperson
Senator Phil Journey
Senator Julia Lynn
Senator Derek Schmidt
Representative Sydney Carlin
Representative Marti Crow
Representative Lance Kinzer
Representative Bill Light
Representative Jan Pauls
Representative Marc Rhoades
Representative Vern Swanson

Members Excused

Senator Greta Goodwin
Senator Julia Lynn (November 9)
Representative Lance Kinzer (November 9)

Staff

Jill Wolters, Office of the Revisor of Statutes
Bruce Kinzie, Office of the Revisor of Statutes
Duston Slinkard, Office of the Revisor of Statutes
Jason Thompson, Office of the Revisor of Statutes
Athena Andaya, Kansas Legislative Research Department
Jerry Donaldson, Kansas Legislative Research Department
Emalene Correll, Kansas Legislative Research Department
Carol Benoit, Chief of Staff for Senator Vratil
Ann McMorris, Committee Secretary

Conferees

Topic No 14—Release of Inmates to House Arrest by the Secretary of Corrections (November 8)

Secretary Roger Werholtz, Kansas Department of Corrections

Topic No. 15—Child Care Custody – Military Deployment (November 8)

Stacey Adair, Citizen
Matthew Shelton, Chief of Legal Assistance, Fort Riley, Kansas
Colonel Bruce Woolpert, Legal Adviser to the Adjutant General

Topic No. 1—Operations of the Board of Healing Arts (November 8)

Chris Clarke, Performance Audit Manager, Legislative Division of Post Audit
Larry Buening, Executive Director, Kansas Board of Healing Arts

Thursday, November 8 Morning Session

Vice-Chairperson O'Neal called the meeting to order at 10:00 a.m. Chairperson Vratil was attending a funeral and joined the meeting around noon.

Moved by Representative Rhoades, seconded by Senator Journey, the minutes for the October 11 and 12, 2007, meeting of the Special Committee on Judiciary be approved. On suggestion of staff, a change was made on page 5, in third paragraph from the bottom. The words "this topic" was changed to "Vehicular Homicide" for more clarity as to the intent of the Committee. Motion carried.

Vice-Chairperson O'Neal opened the hearing on Topic No. 14—Release of Inmates to House Arrest by the Secretary of Corrections.

Vice-Chairperson O'Neal announced the proponent, Senator Nick Jordan, was unable to be personally present, but he submitted written testimony for the Committee's consideration. Senator Jordan introduced SB 306 in the 2007 Session, however, the bill did not receive a hearing in Committee. SB 306 would have changed the current law to clarify when defendants may be sentenced by the court to a house arrest program and when inmates in the custody of the Secretary of Corrections could be placed in a house arrest program (Attachment 1).

Secretary Roger Werholtz, Kansas Department of Corrections, testified *via* conference call. He noted his concern with this proposal is that the mandatory implementation of a house arrest program by the Department could jeopardize a wide range of other sound correctional programs if one tragic crime is committed by an offender on house arrest. He added that under current law, the Secretary of Corrections already has discretionary authority to implement a house arrest program, but SB 306 would make the implementation mandatory. He did take this opportunity to note that the criteria of court-ordered house arrest should be updated. He stated

the proposal would have no significant impact on prison population nor on the Department's budget ([Attachment 2](#)).

There was discussion of various aspects of a house arrest program: (1) reviewing on a case-by-case basis; (2) criteria for suitable candidates; (3) work release programs; and (4) budget savings.

Vice-Chairperson O'Neal closed the hearing on Topic No. 14.

Vice-Chairperson O'Neal opened the hearing on Topic No. 15—Child Care Custody—Military Deployment.

The Committee was provided a copy of the recently enacted North Carolina law on custody, visitation and military orders ([Attachment 3](#)).

Representative Jim Ward introduced his constituent, Stacey Adair.

Stacey Adair, citizen, related the details of his sister's problems with custody of her child when she was deployed. Mr. Adair provided testimony on the deficiencies in the Service Members Civil Relief Act (SCRA) as it relates to the custody of minor children. He discussed the need for additional protections for Kansas' deployed service members. He noted the federal law should be changed to ensure soldiers can regain custody of their children at the end of their deployment ([Attachment 4](#)).

Matthew Shelton, Chief of Legal Assistance, Department of the Army, Fort Riley, Kansas, addressed the impediments of quick resolution of custody issues. He also discussed the current protections available to soldiers to deal with deployment custody issues. SCRA provides a stay in any civil proceedings in which a soldier cannot participate due to military service. The greatest problem with the Act is that it does not account for the best interests of the children involved in custody disputes. Custody issues can be prevented by requiring the courts to address deployments in parenting plans when either parent is a service member ([Attachment 5](#)).

Colonel Bruce Woolpert, Legal Adviser to the Adjutant General and a Judge Advocate in the Kansas Army National Guard, commented on the important topic of child custody and visitation issues for temporary duty, mobilized and deployed service members. He cited the North Carolina statute effective October 1, 2007, which addresses expedited hearings, electronic testimony, delegation of visitation rights, and automatic termination of temporary custody orders. He urged consideration be given to passing similar legislation so that Kansas service members, as well as their minor children, are protected from the loss of custodial arrangements and disruption of family contact due to the service member being deployed ([Attachment 6](#)).

Ronald W. Nelson, attorney, Nelson & Booth, Shawnee Mission, Kansas, provided information on issues surrounding child custody disputes with military service members by written testimony only ([Attachment 7](#)).

Trip Shawver, attorney-at-law, Wichita, Kansas, whose primary focus is family law and his specialty is working with military members, set out court cases he had been involved in where the best interest of the children had not been considered. He cited recent court cases involving child custody of service members. He suggested KSA 60-1610 needs to be amended. He provided written testimony only ([Attachment 8](#)).

A white paper entitled, "A Judge's Guide to the Servicemembers Civil Relief Act", by Mark E. Sullivan, was distributed to members of the Committee ([Attachment 9](#)).

The Chairperson closed the hearing on Topic No. 15 and called a recess for lunch with the Committee to reconvene at 1:30 p.m.

Afternoon Session

Chairperson Vratil opened the hearing on **Topic No. 1**—Operations of the Board of Healing Arts.

Chris Clarke, Performance Audit Manager, Legislative Division of Post Audit, reviewed the findings, conclusions, and recommendations of the Legislative Division of Post Audit as of October 2006. She reviewed the mission, membership, and the responsibilities of the Board of Healing Arts. Post Audit reviewed three questions covering key issues regarding the complaint-handling system of the Board of Healing Arts:

- **Does the Board of Healing Arts Conduct Timely and Thorough Investigations of Complaints it Receives, and Take Timely and Appropriate Actions to Correct Regulatory Violations it Finds?**

The conclusions and recommendations are listed on pages 18-20 of the Performance Audit Report;

- **Does the Board of Healing Arts Conduct Background Investigations That Would Enable it to Know Whether a Potential Licensee Has Had Malpractice or Negligence Problems in Another Jurisdiction Before Being Licensed in Kansas?**

The conclusions and recommendations are listed on page 26 of the Performance Audit Report; and

- **Does the Board's Composition Give Fair Representation to All Healing Arts Practices, and If Not, What Could Be Done to Address Any Deficiencies?**

The conclusions and recommendations are listed on page 33 of the Performance Audit Report.

The response from the Board of Healing Arts on action taken on these recommendations is contained in pages 41-46 of the Performance Audit Report ([Attachment 10](#)).

Committee members asked questions of Ms. Clarke following her explanation of each of the three questions in the Audit.

Larry Buening, Executive Director, Kansas Board of Healing Arts, introduced the Chairperson, Vice-Chairperson, and the members of the Board of Healing Arts who were in attendance. He reviewed action taken by the Board on the recommendations made in the October 2006, Post Audit Report.

He expressed support for SB 81 and urged its passage during the 2008 Session. 2007 SB 81 was amended and passed by the Senate Committee of the Whole and was sent to the House Health and Welfare Committee for hearing. SB 81, as amended, would authorize the State Board of Healing Arts to require new licensees to be fingerprinted and to submit the fingerprints to the Kansas Bureau of Investigation and the Federal Bureau of Investigation for a national criminal history record check for the purpose of determining initial qualifications and suitability to obtain a license.

Attachment one of Mr. Buening's testimony sets out the recommended language for statutory change regarding alternative sanctions. He provided a rough draft of the guidelines for the imposition of disciplinary sanctions being discussed by the Board (Attachment 11).

The Committee had questions regarding the guidelines used in investigation of patient complaints, availability of information to the public, website availability, and investigation of malpractice suits.

Chairperson Vratil closed the hearing on Topic No. 1.

Chairperson Vratil opened for discussion and recommendations on **Topic No. 7—Interference with Parental Custody**. It was the consensus of the Committee to take no action and make no recommendation pursuant to the written request of proponent, Sandra Barnett, Executive Director, Kansas Coalition Against Sexual and Domestic Violence (Attachment 12).

Topic No. 9—Establishment of District Attorney Offices. A bill has been drafted to include the different recommendations the Committee had discussed in the hearing on Establishment of District Attorney Offices. The Committee agreed on proposed reimbursement tiers: for filings of more than 400 felony cases, the state reimburses 100 percent of the District Attorney's salary; for filings of more than 275 and less than 400 felony cases, the state would reimburse 67 percent; for filings of more than 150 and less than 275 felony cases, the state would reimburse 33 percent; and for filings of 150 or fewer felony cases, the state would not be required to reimburse the County. Additionally, the Committee imposed a threshold for establishing a district attorney office in the county.

Topic No. 10—Submission of Blood or Other Biological Samples to the Kansas Bureau of Investigation. 2007 SB 237 would require individuals who are presently serving a sentence for certain crimes to submit specimens of blood or other biological samples to the KBI. In addition, between January 1, 2007 and June 30, 2008, any person charged with the commission of a person felony or drug severity level 1 or 2 felony would be required to submit a specimen of blood or other biological sample, but only after a determination of probable cause by a magistrate judge. On or after July 1, 2008, any person charged with the commission or attempted commission of any felony would be required to submit a specimen of blood or other biological sample, but only after a determination of probable cause by a magistrate judge.

Moved by Representative Crow, seconded by Representative Kinzer, to amend the law as recommended by the Kansas Bar Association to require a blood or other biological sample be submitted, but only after a determination of probable cause by a magistrate judge. The submission of the sample would be an additional condition of bond. Motion carried.

The Chairperson directed staff to draft a bill in conformance with the Committee's action and directed the proposed legislation be introduced in the Senate.

Topic No. 11—Settlement of Surface Damages Between Landowners and Their Farm Tenants and Gas and Oil Operators - A letter dated November 5, 2007 to the Committee and

signed by Edward Cross, Kansas Independent Oil and Gas Association and Erick Nordling, Southwest Kansas Royalty Owners Association, made the request that the Committee take no action and make no recommendation on the proposal to create a "Surface Damage Act." The letter indicated the proponents and the opponents to the proposal intend to continue their negotiations during November and December and will report their progress to the Committee prior to the start of the 2008 Legislative Session ([Attachment 13](#)).

The consensus of the Committee is to take no action on the proposal.

Chairperson Vratil recessed the meeting until 9:00 a.m. on November 9.

Friday, November 9 Morning Session

Topic No. 11—Settlement of Surface Damages Between Landowners and Their Farm Tenants and Gas and Oil Operators. Committee member Representative Bill Light related his experience as a landowner in dealing with an oil drilling company from Oklahoma. Even though he did not accept the company's offer for payment of a certain amount of money, the company proceeded to enter his land and set up for drilling the next day. He contacted the Oklahoma representative and learned Oklahoma has a Surface Owners Bill of Rights. He requested the Committee to consider Topic No. 11 more fully. On November 8, the Committee recommended no action be taken. He made the recommendation that a bill to model the Oklahoma Surface Owners Bill of Rights be put forward at the 2008 Session if the parties do not come before the Legislature with a workable agreement.

Chairperson opened Topic No. 11 for further discussion on amending the report, by making a stronger recommendation.

Moved by Representative Light, seconded by Representative Swanson, the Special Committee on Judiciary considers this a serious issue and something needs to be done to resolve or protect the interest of the surface owners. The Committee encourages the parties to seriously negotiate this subject and come to an agreement. If an agreement cannot be reached, legislation will be introduced in the 2008 Session. Motion carried.

Chairperson opened for discussion and recommendations on **Topic No. 12**—Vehicular Homicide.

Chairperson Vratil announced the following information has been provided on the Committee on Topic No. 12:

- Written testimony from the Office of the Kansas Attorney General by Jared S. Maag, Deputy Solicitor General, addressing the issue of whether the drawing of blood from those drivers who survive a fatality accident runs afoul of fundamental constitutional rights ([Attachment 14](#));
- A chronological History of Vehicular Homicide laws by Legislative Research as requested in an earlier meeting ([Attachment 15](#));
- An email from Representative Carlin in regard to Topic No. 12 ([Attachment 16](#)).

The Chairperson asked the Committee members for their comment.

Moved by Senator Journey, seconded by Representative Light, the report should reflect that the Committee heard from the various conferees and that the Committee considers this topic to be a serious issue. However, the Committee does not believe it is appropriate to amend the vehicular homicide statute to deal with the problem. Further, the Committee considered replacing the probable cause standard with an implied consent standard similar to that currently in use in the alcohol/driving under the influence law. The Committee recognizes there are inherent problems with this approach, and therefore, the Committee makes no recommendation. Motion failed.

Moved by Representative O'Neal, seconded by Representative Swanson, that the vehicular homicide statute not be amended, but would introduce legislation that would allow collection of blood or breath samples pursuant to the implied consent statute, in cases where there has been a fatality or an injury where an individual has to be transported for medical attention. Motion carried.

The Committee recommends legislation be introduced in the House.

Topic No. 14—Release of Inmates to House Arrest by the Secretary of Corrections. Vice-Chairperson O'Neal summarized the testimony received on Topic No. 14 on November 8. He noted there is already authority in the statutes to allow the Secretary to implement a house arrest program which the Secretary has chosen not to use. Secretary Werholtz asked that the class of individuals who should qualify for house arrest be determined by the Legislature.

The Committee, by consensus, chose to take no action on this proposal.

Topic No. 15—Child Care Custody—Military Deployment. Committee discussion revealed a consensus that the North Carolina law was a good model. The Committee concluded that this may address the problem of a servicemember losing custody of a child because of deployment.

The Committee recommends legislation incorporating all of the North Carolina provisions, except on 2(f), and adding a provision that a parenting plan that specifically addresses deployment be considered at the time a divorce is granted. Additionally, the legislation would include that Kansas would retain jurisdiction unless the parents agree.

Section 2(f) of the North Carolina legislation regarding electronic communications is not in the draft legislation because the consensus was it is better addressed in the Supreme Court Rules. The Committee approved the Chairperson sending a letter to the Supreme Court requesting a rule change or creation of a new rule.

Moved by Senator Journey, seconded by Representative O'Neal, that the Committee recommends legislation incorporating all of the North Carolina provisions, except 2(f), and adding a provision that a parenting plan which specifically addresses deployment be considered at the time a divorce is granted. Additionally, Kansas would retain jurisdiction unless the parents agree. Motion carried.

The Committee recommends legislation be introduced in the House.

Topic No. 1—Operations of the Board of Healing Arts. It was the consensus of the Committee that the Board of Healing Arts has made a reasonable good faith response to the recommendations in the Post Audit Report.

The Board of Healing Arts has proposed statutory language that would authorize the Board to accomplish competency maintenance in a non-disciplinary setting. The Committee recommends legislation on alternative sanctions as requested by Lawrence Buening, Executive Director, Kansas Board of Healing Arts. The Committee also supports the bills authorizing fingerprinting, 2007 SB 81 and 2007 SB 107, which are currently in the House. The Committee recommends appropriate action be taken on assigned bills.

It was recommended that the Kansas Board of Healing Arts' Executive Director report the status of items under advisement to the chairpersons of the House and Senate Judiciary Committees and House and Senate Health and Welfare Committees.

The Committee recommends the alternative sanctions legislation be introduced in the House.

Staff from the Office of the Revisor of Statutes distributed bill drafts and explained the intent of the additions and deletions to current statute:

- 7rs1530 – Act concerning crimes, criminal procedure and punishment; relating to parole suitability factors be introduced by the Senate (Attachment 17);
- 74s1534 – Act concerning civil procedures; relating to the change of judge in civil cases be introduced by the House (Attachment 18). Representative Pauls suggested the language from Section 1 (a) should be repeated in Section 1 (b) for better clarification;
- 7rs1537 – Act concerning administrative procedure be introduced by the House (Attachment 19); and
- 7rs1536 – Act concerning health care; relating to medical and other care and services assistance repayment; discretionary trusts be introduced by the Senate (Attachment 20).

Chairperson Vratil thanked the Committee for their participation in the discussion and recommendations on the 15 topics assigned to this Interim Committee. This is the final meeting.

Moved by Representative O'Neal, seconded by Representative Rhoades, the meeting be adjourned. Motion carried.

Prepared by Ann McMorris
Edited by Athena Andaya

Approved by Committee on:

December 11, 2007

(Date)

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