KLRD

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Judiciary, Corrections, and Juvenile Justice

G-1 Adoption

Adoption establishes a legal parent-child relationship between a child and third persons and terminates existing rights and obligations between a child and his or her biological parents. In Kansas, the Adoption and Relinquishment Act (KSA 59-2111 to 59-2144) governs adoptions, including termination of parental rights and the transfer of legal custody to and creation of legal rights in the adoptive parents. Any adult or married couple may adopt.

KSA 59-2112 defines the different methods of adopting: "adult adoption," "agency adoption," "independent adoption," and "stepparent adoption." This article focuses on adoption of minors. Agency adoptions are handled by a public or private entity lawfully authorized to place children for adoption, consent to the adoption, and care for children until they are adopted or reach majority. Independent adoptions can occur directly with an adoptive family or through an intermediary such as a doctor, lawyer, or friend. Stepparent adoptions involve the adoption of a minor child by the spouse of a biological parent, which requires termination of the parental rights of only one natural parent.

Jurisdiction and Venue

In Kansas, district courts may hear adoption petitions; however, the court must have jurisdiction. Generally, Kansas will have jurisdiction if the birth mother and adoptive parents are all Kansas residents. If the child is of Native American heritage, the Indian Child Welfare Act, 25 U.S.C.A. 1901 to 1963, may apply. Further, the parties may need to comply with the Interstate Compact for the Placement of Children, (KSA 38-1201 to 38-1206) if the child is born in Kansas and is to be placed with adoptive parents in another state or is born out of state and an agency will be involved in the adoption in Kansas.

Additional requirements exist for intercountry adoptions. Kansas law provides a foreign adoption decree will have the same force and effect as an adoption filed and finalized in Kansas if the person adopting is a Kansas resident; the adoption was obtained pursuant to the laws of the foreign country; the adoption is evidenced by proof of lawful admission into the United States; and the foreign decree is filed and recorded with any county within the state. The U.S. Department of State outlines procedures for intercountry

adoptions at *https://travel.state.gov/content/travel/en/Intercountry-Adoption.html*.

Legislation enacted in 2018 (SB 284) clarifies jurisdiction over adoption proceedings, including a proceeding to terminate parental rights, is governed by the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (KSA 23-37,101 to 37,405). If at the time the petition is filed a proceeding concerning the custody or adoption of the minor is pending in another state exercising jurisdiction pursuant to the UCCJEA, Kansas may not exercise jurisdiction unless the other state's court stays its proceeding. Similarly, if another state has issued a decree or order concerning custody, Kansas may not exercise jurisdiction unless the court of the state issuing the order does not have continuing jurisdiction, has declined to exercise jurisdiction, or does not have jurisdiction. For more information on the UCCJEA, see Briefing Book article *G-2 Child Custody and Visitation Procedures*.

Petition

KSA 59-2128 lists the required contents of the petition and requires the following items be filed with the petition:

- Written consents to adoption;
- Background information for the child's biological parents;
- Accounting for all consideration and disbursements; and
- Any required affidavit concerning venue.

Consent

In an independent adoption, consent is required from:

- The child's living parents; one of the parents if the other's consent is unnecessary pursuant to Kansas law; the child's legal guardian if both parents are dead or their consents are unnecessary; or the court terminating parental rights under the Revised Code for the Care of Children (the Child in Need of Care (CINC) Code), KSA 38-2201 to 38-2286;
- Any court having jurisdiction over the child pursuant to the CINC Code if parental rights have not been terminated; and
- Any child older than 14 sought to be adopted who is of sound intellect.

For stepparent adoptions, consent must be given by the living parents of a child; one of the parents if the other's consent is unnecessary; or the judge of any court having jurisdiction over the child pursuant to the CINC Code if parental rights have not been terminated, as well as any child older than 14 sought to be adopted who is of sound intellect.

KSA 59-2114 requires the consent to be in writing and acknowledged before a judge or an officer authorized to take acknowledgments, such as a notary. If acknowledged before a judge, the judge must inform the consenting person of the legal consequences of the consent. The consent is final when executed, "unless the consenting party, prior to final decree of adoption, alleges and proves by clear and convincing evidence that the consent was not freely and voluntarily given." Minority of the parent does not invalidate the parent's consent; however, birth parents younger than 18 must have the advice of independent legal counsel on the consequences of execution of a consent. Unless the minor is otherwise represented, the petitioner or child placement agency must pay for the cost of independent legal counsel. The natural mother cannot give consent until 12 hours after the birth of the child. A father may give consent any time after the birth of a child and may give consent before the birth of the child if he has the advice of independent legal counsel as to the consequences prior to its execution. The attorney providing independent legal advice shall be present at the execution of the consent.

For an agency adoption, once parents relinquish their child to an agency, consent must be given by the authorized representative of the agency and any child older than 14 sought to be adopted who is of sound intellect.

Relinquishment

Relinquishments to an agency will be deemed sufficient if in substantial compliance with the form created by the Judicial Council. Like consents, the relinquishment must be in writing and acknowledged by a notary or the court. (Again, the judge must inform the person of the legal consequences of the relinquishment.) Similar to consent, the law requires independent counsel for a minor relinquishing a child and provides the natural mother cannot relinquish the child until 12 hours after the birth. A father may relinquish any time after the birth of a child. If the agency accepts the relinquishment, the agency stands *in loco parentis* for the child and has the rights of a parent or legal guardian, including the power to place the child for adoption. If a person relinquishes the child, all parental rights are terminated.

Termination of Parental Rights

When parents consent to an adoption, they agree to the termination of their parental rights, although the rights are not terminated until the judge makes the final decree of adoption. If a parent does not sign a consent, a court can terminate parental rights pursuant to a CINC proceeding. For more information on CINC proceedings, see Briefing Book article *F-2 Foster Care*.

Additionally, KSA 59-2136 addresses circumstances where the necessity of a parent's consent or relinquishment is in question. While it frequently refers to fathers, it specifies that insofar as it is practicable, those provisions applicable to fathers also apply to mothers. Absent a father's consent, his parental rights must be terminated. If a father is unknown or his whereabouts are unknown, the court must make an effort to identify the father; appoint an attorney to represent him; and, if no person is identified as the father or possible father or if the father's whereabouts are unknown, order publication notice of the hearing. If identified, he must receive notice of the termination proceedings. If no father is identified or if, after receiving notice, he fails to appear or does not claim custodial rights, the court will terminate his parental rights. If a father is identified to the court and claims parental rights, the court must determine parentage pursuant to the Kansas Parentage Act (KSA 23-2201 to 23-2225). Further, if the father cannot employ an attorney, the court must appoint one for him. Thereafter, the court may terminate a parent's rights and find the consent or relinquishment unnecessary if it determines by clear and convincing evidence:

- The father abandoned or neglected the child after having knowledge of the child's birth;
- The father is unfit or incapable of giving consent;
- The father has made no reasonable efforts to support or communicate with the child after having knowledge of this child's birth;
- The father, 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;
- The father abandoned the mother after having knowledge of the pregnancy;
- The birth of the child was the result of the rape of the mother; or
- The father has failed to assume the duties of a parent for two consecutive years immediately preceding the filing of the petition to adopt.

In determining whether to terminate parental rights, the court must consider all of the relevant surrounding circumstances and may disregard incidental visitations, contacts, communications, or contributions.

Assessments

Petitioners must obtain an assessment performed by a person authorized by law to do so and file a report of the assessment with the court before the hearing on the petition, including the results of the investigation of the adoptive parents, their home, and their ability to care for the child. The assessment and report are valid only if performed within a year of filing the petition for adoption.

Temporary Custody Order

In an independent or agency adoption, the court may issue a temporary custody order pending the hearing. If the court places the child in a home not licensed to provide such care, it must first be assessed by a person or agency authorized to make assessments, or the court may "expeditiously" conduct an evidentiary hearing, including testimony by the petitioners prior to making the placement.

Adoption Hearing and Final Decree

KSA 59-2133 requires the court to set the hearing within 60 days from the date of filing the adoption petition. Additionally, in independent and stepparent adoptions, it requires notice be given to parents or possible parents at least ten calendar days before the hearing unless parental rights have been terminated or waived, and to any person who has physical custody of the child, unless waived. The court may designate others to be notified. In agency adoptions, notice must be served upon the consenting agency, the parents or possible parents, any relinquishing party, and any person who has physical custody of the child at least ten calendar days before the hearing, unless waived. After the hearing of the petition, the court considers the assessment and all evidence and, if the adoption is granted, makes a final decree of adoption.

An adopted child is entitled to the same personal and property rights as a birth child of the adoptive parents, who likewise are entitled to exercise all the rights of a birth parent and are subject to all the liabilities of that relationship. Both KSA 59-2118 and KSA 59-2136 allow children to inherit from their birth parents after parental rights have been terminated, although the birth parents' right to inherit is severed at that time.

Recent Legislation

Legislation enacted in 2018, SB 284, creates the Adoption Protection Act, which states, notwithstanding any other provision of state law and to the extent allowed by federal law, no child placement agency (CPA) shall be required to perform, assist, counsel, recommend, consent to, refer, or otherwise participate in placement of a child for foster care or adoption when the proposed placement of such child violates such CPA's sincerely held religious beliefs. The bill also prohibits taking the following actions against a CPA, if taken solely because of the CPA's objection to providing any of the services described above on the grounds of such religious beliefs:

- State agency or political subdivision denial of a license, permit, or other authorization or denial of renewal, revocation, or suspension of the same;
- Denial of participation in a Department for Children and Families (DCF) program in which CPAs are allowed to participate;
- Denial of reimbursement for performing foster care placement or adoption services on behalf of an entity that has a contract with DCF as a case management contractor; or
- Imposition of a civil fine or other adverse administrative action or any claim or cause of action under any state or local law.

The CPA's sincerely held religious beliefs must be described in the CPA's organizing documents, written policies, or such other written document approved by the CPA's governing body. The provisions of the bill do not apply to an entity while the entity has a contract with DCF as a case management contractor.

The bill also makes numerous amendments to the Adoption and Relinquishment Act based on Kansas Judicial Council recommendations.

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Judiciary, Corrections, and Juvenile Justice

G-2 Child Custody and Visitation Procedures

Kansas defines "legal custody" as "the allocation of parenting responsibilities between parents, or any person acting as a parent, including decision-making rights and responsibilities pertaining to matters of child health, education and welfare" (KSA 2018 Supp. 23-3211). Within that context, Kansas law distinguishes between "residency" and "parenting time." Residency refers to the parent with whom the child lives, while parenting time consists of any time a parent spends with a child. The term "visitation" is reserved for time nonparents are allowed to spend with a child.

Initial Determination

The standard for awarding custody, residency, parenting time, and visitation is what is in the "best interests" of the child. Courts can determine these issues when a petition is filed for divorce, paternity, a protection order, guardianship of a minor, or adoption.

To determine custody, a court must have authority under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), KSA 2018 Supp. 23-37,101 to 23-37,405. The first time custody is considered, only a court in the child's "home state" may make a determination. Exceptions apply when there is no home state, there is a "significant connection" to another state, or there is an emergency, *e.g.*, the child has been abandoned or is in danger of actual or threatened mistreatment or abuse. After a court assumes home state jurisdiction, other states must recognize any orders it issues.

Legal custody can be joint, meaning the parties have equal rights, or sole, when the court finds specific reasons why joint legal custody is not in the child's best interests (KSA 2018 Supp. 23-3206). After awarding legal custody, the court will determine residency, parenting time, and visitation.

Residency may be awarded to one or both parents, or, if the child is a Child in Need of Care (CINC) and neither parent is found to be fit, to a third party. In determining residency, KSA 2018 Supp. 23-3207 requires parents to prepare either an agreed parenting plan or, if there is a dispute, proposed parenting plans for the court to consider. For more information on parenting plans, see KSA 2018 Supp. 23-3211 to 23-3214. Based on the principle that fit

parents act in the best interests of their children, an agreed parenting plan is presumed to be in a child's best interests. Absent an agreement, however, or if the court finds specific reasons why the parenting plan is not in the child's best interests, it will consider all relevant factors, including those outlined in KSA 2018 Supp. 23-3203.

Though not required, a court may appoint or authorize a lawyer or guardian *ad litem*, especially in contested cases, to ensure a child's interests are being represented. Guardians *ad litem*, regulated by Kansas Supreme Court Rules, serve as advocates for the child's best interests and present cases in the same manner as any other attorney representing a client.

Additionally, in determining child custody, residency, and parenting time, a 2017 amendment to KSA 23-3203 allows courts to order a parent to undergo a domestic violence offender assessment conducted by a certified batterer intervention program and to follow all of the program's recommendations.

Modification

Courts may modify custody, residency, visitation, and parenting time orders, subject to the provisions of the UCCJEA, when a material change of circumstances is shown (KSA 23-3218). A state that previously exercised jurisdiction will have continuing authority over subsequent motions until it determines the child, child's parents, and any person acting as a parent either:

- No longer have a significant connection with that state and substantial evidence is no longer available in that state concerning the child's care, protection, training, and personal relationships; or
- A court of that state or of another state determines the child, child's parents, and any person acting as a parent do not presently reside in that state.

While a state exercises continuing jurisdiction, no other state may modify the order. If the state loses continuing jurisdiction, another state can modify an order only if it qualifies as a "home state" (KSA 23-37202; KSA 23-37,203).

To modify a final child custody order, the party filing the motion must list all known factual allegations that constitute the basis for the change of custody. If the court finds the motion establishes a *prima facie* case, it will consider the facts of the situation to determine whether the order should be modified. Otherwise, it must deny the motion. In an alleged emergency situation where the nonmoving party has an attorney, the court must first attempt to have the attorney present before taking up the matter. Next, the court is required to set the matter for review hearing as soon as possible after issuance of the *ex parte* order, but within 15 days after issuance. Third, the court must obtain personal service on the nonmoving party of the order and the review hearing. Finally, the court cannot modify the order without sworn testimony to support a showing of the alleged emergency. Similarly, no *ex parte* order can change residency from a parent exercising sole *de facto* residency of a child to the other parent unless there is sworn testimony to support a showing of extraordinary circumstances (KSA 23-3218; KSA 23-3219).

Custodial Interference and the Kansas Protection from Abuse Act

KSA 2018 Supp. 21-5409 outlines the crimes of "interference with parental custody" and "aggravated interference with parental custody." "Interference with parental custody" is defined as "taking or enticing away any child under the age of 16 years with the intent to detain or conceal such child from the child's parent, guardian, or other person having the lawful charge of such child." Joint custody is not a defense. This crime is a class A person misdemeanor if the perpetrator is a parent entitled to joint custody of the child; in all other cases, it is a severity level 10 person felony. Certain circumstances raise the crime to "aggravated" interference, a severity level 7 person felony.

If a noncustodial parent believes the child needs protection from the custodial parent, the parent can take action under the Kansas Protection

from Abuse Act, KSA 2018 Supp. 60-3101 to 60-3111, which allows a parent of a minor child to file a petition alleging abuse by another intimate partner or household member. The court must hold a hearing within 21 days of the petition's filing. Prior to this hearing, the parent who originally filed the petition may file a motion for temporary relief, to which the court may grant an *ex parte* temporary order with a finding of good cause shown. The temporary order remains in effect until the hearing on the petition, at which time the parent who filed the petition must prove abuse by a preponderance of the evidence. The other parent also has a right to present evidence. At the hearing, the court can grant a wide variety of protective orders it believes are necessary to protect the child from abuse, including awarding temporary custody.

Typically, the protective order remains in effect for a maximum of one year, but, on motion of the parent who originally filed the petition, may be extended for one additional year. Additionally, KSA 2018 Supp. 60-3107 requires courts to extend protection from abuse orders for at least two years and allows extension up to the lifetime of a defendant if, after the defendant has been personally served with a copy of the motion to extend the order and has had an opportunity to present evidence at a hearing on the motion and cross-examine witnesses, it is determined by a preponderance of the evidence the defendant has either previously violated a valid protection order or been convicted of a person felony or conspiracy, criminal solicitation, or attempt of a person felony, committed against the plaintiff or any member of the plaintiff's household.

Violation of a protection order is a class A person misdemeanor, and violation of an extended protection order is a severity level 6 person felony.

Military Child Custody and Visitation

There are additional legal considerations if either parent is a member of the military. For instance, the Servicemembers Civil Relief Act, 50 USC App. §§ 501-596, a federal law meant to allow deployed service members to adequately defend themselves in civil suits, may apply.

Additionally, if either parent is a service member, KSA 2018 Supp. 23-3213 requires the parenting plan to include provisions for custody and parenting time upon military deployment, mobilization, temporary duty, or an unaccompanied tour. Further, KSA 2018 Supp. 23-3217 specifies that those circumstances do not necessarily constitute a "material change in circumstances," such that a custody or parenting time order can be modified. If an order is modified because of those circumstances, however, it will be considered a temporary order.

When the parent returns and upon a motion of the parent, the court is required to have a hearing within 30 days to determine whether a previous custody order should be reinstated. In the servicemember's absence, the servicemember may delegate parenting time to a family member or members with a close and substantial relationship to the child if it is in the best interests of the child, and requires the nondeploying parent to accommodate the servicemember's leave schedule and facilitate communication between the servicemember and his or her children.

Third Party Custody and Visitation

Custody

KSA 2018 Supp. 38-141 recognizes the rights of parents to exercise primary control over the care and upbringing of their children. This stance is consistent with the U.S. Supreme Court's recognition that a parent's fundamental right to establish a home and raise children is protected and will be disturbed only in extraordinary circumstances. *Troxel v. Granville*, 530 U.S. 57 (2000); *Meyer v. Nebraska*, 262 U.S. 390 (1923). As such, parents generally are awarded custody unless they have been determined unfit under the Revised Kansas Code for the Care of Children (CINC Code), KSA 2018 Supp. 38-2201 to 38-2286.

Aside from a proceeding conducted pursuant to the CINC Code, a judge in a divorce case may award temporary residency to a nonparent if the court finds there is probable cause to believe the child is in need of care or neither parent is fit to

have residency. To award residency, the court must find by written order the child is likely to sustain harm if not immediately removed from the home; allowing the child to remain in the home is contrary to the welfare of the child; or immediate placement of the child is in the best interest of the child.

The court also must find reasonable efforts have been made to maintain the family unit and prevent the unnecessary removal of the child from the child's home or an emergency exists that threatens the safety of the child. In awarding custody to a nonparent under these circumstances and to the extent the court finds it is in the child's best interests, the court gives preference first to a relative of the child, whether by blood, marriage, or adoption, and then to a person with whom the child has close emotional ties. The award of temporary residency does not terminate parental rights; rather, the temporary order will last only until a court makes a formal decision of whether the child is in need of care. If the child is found not to be in need of care, the court will enter appropriate custody orders as explained above (KSA 2018 Supp. 23-3207).

If the child is found to be in need of care, custody will be determined pursuant to the CINC Code. For more information on CINC proceedings, see *F-2 Foster Care* in this Briefing Book.

Visitation

Courts may grant grandparents and stepparents visitation rights as part of a Dissolution of Marriage proceeding. Further, Kansas law gives grandparents visitation rights during a grandchild's minority if a court finds visitation would be in the child's best interests and a substantial relationship exists between the child and the grandparent (KSA 2018 Supp. 23-3301).

Kansas courts applying these statutes have placed the burden of proof for these two issues on the grandparents and, absent a finding of unreasonableness, weigh grandparents' claims against the presumption that fit parents act in their child's best interests. [See *In re Creach*, 155 P.3d 719, 723 (Kan. App. 2007).]

Host Families Act

The Host Families Act (KSA 2018 Supp. 38-2401, *et seq.*) allows a child placement agency or charitable organization to provide temporary care of children by placing a child with a host family. Host families are subject to screening and background checks and do not receive payment other than reimbursement for actual expenses. The Act also allows the Kansas Department for Children and Families (DCF) to provide information about respite care, voluntary guardianship, and support services, including organizations operating programs under the Act, to families experiencing financial distress, unemployment, homelessness, or other crises and to parents or custodians during a child protective investigation that does not result in an out-of-home placement due to abuse of a child.

Placement must be voluntary and shall not be considered an out-of-home placement, supersede any court order, or preclude any investigation of suspected abuse or neglect. A parent may place a child by executing a power of attorney that delegates to a host family any powers regarding the care and custody of the child, except power to consent to marriage or adoption, performance or inducement of an abortion, or termination of parental rights. The power of attorney may not be executed without the consent of all individuals with legal custody of the child, and execution is not evidence of abandonment, abuse, or neglect.

The power of attorney may not exceed one year but may be renewed for one additional year. The bill includes an exception, however, for parents serving in the military who may delegate powers for a period longer than one year if on active duty service, but no more than the term of active duty service plus 30 days. A parent executing a power of attorney under the Act can revoke or withdraw the power of attorney at any time. Upon such withdrawal or revocation, the child must be returned to the parent as soon as reasonably possible.

Child Support and Enforcement

KSA 2018 Supp. 23-3001 and 23-3002 require courts to determine child support in any divorce proceeding using the Kansas Child Support Guidelines, which KSA 2018 Supp. 20-165 requires the Kansas Supreme Court to adopt. Additional information about the Supreme Court guidelines is available at *http://www.kscourts.org/Rules-procedures-forms/Child-Support-Guidelines/*. Courts can order either or both parents to pay child support, regardless of custody. Child support also can be ordered as part of a paternity proceeding. Once established, enforcement of support orders is governed by the Income Withholding Act, KSA 2018 Supp. 23-3101 to 23-3118 and 39-7,135.

DCF has privatized Child Support Services (CSS), contracting with four vendors who began providing services on September 16, 2013.

Contractor information is available at *http://www.dcf.ks.gov/services/CSS/Pages/Contractor-Information.aspx*. CSS's responsibilities include establishing parentage and orders for child and medical support, locating noncustodial parents and their property, enforcing child and medical support orders, and modifying support orders as appropriate. CSS automatically serves families receiving Temporary Assistance for Needy Families (TANF), foster care, medical assistance, and child care assistance. Assistance from CSS is also available to any family who applies for services, regardless of income or residency.

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Judiciary, Corrections, and Juvenile Justice

G-3 Civil Asset Forfeiture

Civil asset forfeiture is the process through which a law enforcement agency may seize and take ownership of property used in the commission of a crime. This article provides an overview of the civil forfeiture laws in Kansas.

Overview of Kansas Civil Forfeiture Laws

Property and Conduct Subject to Civil Forfeiture

KSA Chapter 60, Article 41 is titled the Kansas Standard Asset Seizure and Forfeiture Act (SASFA). Under KSA 2018 Supp. 60-4104, certain conduct can lead to civil asset forfeiture even without prosecution or conviction. This conduct includes, but is not limited to, theft, prostitution, human trafficking, and forgery. Under KSA 2018 Supp. 60-4105, every kind of property used during conduct giving rise to forfeiture, or obtained as a result of conduct giving rise to forfeiture, is subject to forfeiture.

There are certain exceptions under KSA 2018 Supp. 60-4106. For example, under KSA 2018 Supp. 60-4106(a)(1), real property or interests in real property cannot be seized unless the conduct leading to forfeiture is a felony. Under KSA 2018 Supp. 60-4106(a)(3), property is not subject to forfeiture if the owner received the property before or during the conduct giving rise to forfeiture and did not know about the conduct or made reasonable efforts to prevent the conduct.

Kansas Forfeiture Procedure

Law enforcement officers may seize property with a warrant issued by the court, without a warrant if they have probable cause to believe the property is subject to forfeiture under the statutes, or constructively, with notice (KSA 2018 Supp. 60-4107). Under KSA 2018 Supp. 60-4107(d), the seizing agency must make reasonable efforts within 30 days to give notice of the seizure to the owner, interest holder, or person who had possession of the property.

Typically, the county or district attorney, the Attorney General, or an attorney approved by one of the two, will represent the law Kansas enforcement agency in a forfeiture action. KSA 2018

Supp. 60-4107(g)-(j) provides a procedure the law enforcement agency must follow to secure representation in such a proceeding. The 2018 Legislature amended this section to provide in those cases where the county or district attorney approves another attorney to represent a local agency in the forfeiture proceeding, the county or district attorney is prohibited from approving an attorney with whom the county or district attorney has a direct or indirect financial interest. Similarly, for state agencies, the Attorney General is prohibited from approving an attorney with whom the Attorney General has a direct or indirect financial interest. A county or district attorney and the Attorney General are prohibited from requesting or receiving any referral fee or personal financial benefit from any proceeding under SASFA.

Under KSA 2018 Supp. 60-4109(a), a civil forfeiture proceeding commences when the attorney representing the law enforcement agency (the plaintiff's attorney) files a notice of pending forfeiture or a judicial forfeiture action.

If the plaintiff's attorney does not initiate the forfeiture proceeding or the law enforcement agency does not pursue the forfeiture proceeding within 90 days against the property seized, and the property's owner or interest holder (the claimant) files a timely claim, the court must release the property to the owner (on the owner's request) pending further proceedings (KSA 2018 Supp. 60-4109(a)(1)).

Under KSA 2018 Supp. 60-4109(a)(1), the seized property cannot stay in the owner's possession more than 90 days without a court-authorized extension. Under KSA 2018 Supp. 60-4109(a)(2), if the owner files a petition for exemption to forfeiture under KSA 2018 Supp. 60-4110, the plaintiff's attorney can delay filing the judicial forfeiture proceeding for up to 180 days. To delay filing, the plaintiff's attorney must provide notice of exemption to any interest holders who filed petitions to have their interests exempt from forfeiture within 60 days after the effective date of the notice of pending forfeiture.

The plaintiff's attorney is also allowed, under KSA 2018 Supp. 60-4109(b), to file a lien on the forfeited property to cover necessary court costs, and the lien will constitute notice to any person claiming an interest in the property as along as it contains certain information.

Burden of Proof and Court Findings

Under KSA 2018 Supp. 60-4113(h), in a civil forfeiture proceeding, the plaintiff's attorney has the initial burden of proof and must prove, by a preponderance of the evidence, the property is subject to civil forfeiture. Then the burden of proof shifts to the claimant (the property owner or interest holder) to prove, by a preponderance of the evidence, the claimant's property interest is not subject to forfeiture. If the court finds the property is not subject to forfeiture, the property must be returned to the claimant. If the court finds the property is subject to forfeiture, the property is forfeited to the law enforcement agency that seized the property (KSA 2018 Supp. 60-4113(i)). However, under KSA 2018 Supp. 60-4106(c), the court must restrict the scope of the forfeiture to ensure it is proportionate with the conduct that gave rise to the seizure.

Use of Forfeited Property

When property is forfeited, the law enforcement agency can keep the property, transfer it to any government agency, destroy it, or use it for training purposes (KSA 2018 Supp. 60-4117(a)(1) and (a)(2)). The law enforcement agency also may sell the property. KSA 2018 Supp. 60-4117(a)(3)(A) requires property, other than real property, to be sold at public sale to the highest bidder. Real property may be sold at a public sale or through a real estate company (KSA 2018 Supp. 60-4117(a)(3)(B)).

Under KSA 2018 Supp. 60-4117(c)-(d), after the proceeds have been used to satisfy certain security interests or liens, expenses of the proceedings, reasonable attorney fees, and repayment of certain law enforcement funds, the remaining proceeds will go to the law enforcement agency's state forfeiture fund if the law enforcement agency is a state agency.

The 2018 Legislature amended this section to provide an exclusive list of 12 special, additional law enforcement purposes for which proceeds from forfeiture may be used. Moneys in the funds containing forfeiture proceeds must be separated and accounted for in a manner that allows accurate tracking and reporting of deposits and expenditures of proceeds from forfeiture credited to the fund, proceeds from pending forfeiture actions under SASFA, and proceeds from federal forfeiture actions.

Forfeiture Repository and Reporting Requirements

The Kansas Bureau of Investigation (KBI) is required to establish, on or before July 1, 2019, the Kansas Asset Seizure and Forfeiture Repository, which will gather information concerning each seizure for forfeiture made by a seizing agency pursuant to SASFA. The information gathered will include, but not be limited to:

- The name of the seizing agency or name of the lead agency if part of a multi-jurisdictional task force and any applicable agency or district court case numbers for the seizure;
- The county where and date and time the seizure occurred, a description of the initiating law enforcement activity leading to the seizure, and the specific location where the seizure occurred;
- Descriptions of the type of property and contraband seized and the estimated values of the property and contraband;
- Whether criminal charges were filed for an offense related to the forfeiture and court and case number information of such charges;
- A description of the final disposition of the forfeiture action, including any claim or exemption asserted under SASFA;
- Whether the forfeiture was transferred to the federal government for disposition;
- Total cost of the forfeiture action, including attorney fees; and
- Total amount of proceeds from the forfeiture action, specifying the amount received by the seizing agency and the amount received by any other agency or person.

The KBI will monitor compliance, and agencies not in compliance will be unable to seek forfeiture proceedings. Each year, the KBI must report to the Legislature any agencies not in compliance with the reporting requirements.

Recent Kansas Legislation

HB 2459 2018

The 2018 Legislature amended several provisions within SASFA to adjust procedural and timing requirements and created a new section of law that requires the KBI to establish a repository to gather information concerning each seizure for forfeiture made by a seizing agency pursuant to SASFA (detailed previously in this article).

Background of 2018 HB 2459. Following a 2016 Legislative Division of Post Audit (LPA) report (detailed later in this article) and the introduction of five House bills and three Senate bills in 2017 on the topic of civil asset forfeiture, the chairpersons of the House and Senate Judiciary Committees requested the Kansas Judicial Council study the topic. Following its study, the Judicial Council issued its report, including a draft of recommended legislation, in December 2017. The report and recommended legislation is available on the Judicial Council website. The bill, based on the Judicial Council's recommended legislation, was introduced by the House Committee on Judiciary at the request of the Judicial Council.

2013-2016 Legislation

In 2016, HB 2460 created the crime of violation of a consumer protection order, related to door-to-door sales, and added the crime to conduct giving rise to civil forfeiture. In 2014, Kansas enacted legislation concerning civil forfeiture as it pertains to certain firearms (2014 HB 2578). That bill added language to KSA 2013 Supp. 22-2512

as to how seized firearms could be disposed and specifications for notifying the owner of a seized weapon how to retrieve it if the weapon can be returned. In 2013, the Legislature passed HB 2081, which added certain offenses to the conduct giving rise to civil forfeiture (indecent solicitation of a child, aggravated indecent solicitation of a child, and sexual exploitation of a child). It also added electronic devices to the list of items that could be seized.

LPA Report

In July 2016, LPA released a report, "Seized and Forfeited Property: Evaluating Compliance with State Law and How Proceeds Are Tracked, Used, and Reported," which compared Kansas' forfeiture process with those of four other states and the federal government. It also examined the seizure and forfeiture processes of two statewide and four local law enforcement agencies, finding that the agencies generally complied with major state laws and best practices, with few exceptions.

The report found the agencies generally complied with state laws for liquidating forfeited property, but several agencies were missing important controls. LPA also found the six agencies lacked important controls for tracking forfeiture proceeds, but appeared to have good processes for appropriate use of forfeiture proceeds. Also, while the state agencies complied with reporting requirements in state law, the local agencies did not. The report noted additional findings, including that broad discretion over the use of forfeiture proceeds could create a risk of use for operating funds, that certain agencies had conflicts of interest or lacked controls for drug buys, and that none of the agencies had complete and written policies and procedures for seized and forfeited property.

The report noted numerous specific recommendations had been made to the various agencies based upon the findings. It recommended the Legislature consider legislation clarifying KSA 2015 Supp. 60-4117(d)(3) and the use of forfeiture funds for operating expenses. The report also recommended the House and Senate Judiciary Committees consider introducing legislation to either create a more centralized reporting structure or consider eliminating the reporting requirement altogether.

The highlights and full report may be found on LPA's website: *www.kslpa.org*.

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Judiciary, Corrections, and Juvenile Justice

G-4 Death Penalty in Kansas

Background

On June 29, 1972, the U.S. Supreme Court, in *Furman v. Georgia*, 408 U.S. 238 (1972), held the imposition and execution of the death penalty, or capital punishment, in the cases before the court constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the *U.S. Constitution*. Justice Stewart remarked that the death penalty was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." That case nullified all capital sentences imposed without statutory guidelines.

In the following four years, states enacted new death penalty laws aimed at overcoming the Court's *de facto moratorium* on the death penalty. Several statutes mandated bifurcated trials, with separate guilt and sentencing phases, and imposed standards to guide the discretion of juries and judges in imposing capital sentences. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court upheld the capital sentencing schemes of Georgia, Florida, and Texas. The Court found these states' capital sentencing schemes provided objective criteria to direct and limit the sentencing authority's discretion, provided mandatory appellate review of all death sentences, and allowed the judge or jury to take into account the character and record of an individual defendant.

The death penalty was reenacted in Kansas, effective on July 1, 1994. Governor Finney allowed the bill to become law without her signature.

The Kansas Supreme Court, in *State v. Marsh*, 278 Kan. 520, 534–535 (2004), held that the Kansas death penalty statute was facially unconstitutional. The Court concluded the statute's weighing equation violated the Eighth and Fourteenth Amendments to the *U.S. Constitution* because, "[i]n the event of equipoise, *i.e.*, the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required" (*Id.*, at 534).

The U.S. Supreme Court reversed the Kansas Supreme Court's judgment and held the Kansas capital sentencing statute is constitutional. In June 2006, the Court found the death penalty

statute satisfies the constitutional mandates of *Furman* and its progeny because it "rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. It does not interfere, in a constitutionally significant way, with a jury's ability to give independent weight to evidence offered in mitigation."

Kansas Capital Murder Crimes

In Kansas, the capital murder crimes for which the death penalty may be invoked include the following:

- Intentional and premeditated killing of any person in the commission of kidnapping, or aggravated kidnapping, when the kidnapping or aggravated kidnapping was committed with the intent to hold the person for ransom;
- Intentional and premeditated killing of any person under a contract or agreement to kill that person or being a party to the contract killing;
- Intentional and premeditated killing of any person by an inmate or prisoner confined to a state correctional institution, community correctional institution, or jail, or while in the custody of an officer or employee of a state correctional institution, community correctional institution, or jail;
- Intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, the crime of rape, criminal sodomy, or aggravated criminal sodomy, or any attempt thereof;
- Intentional and premeditated killing of a law enforcement officer;
- Intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or
- Intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping, or aggravated kidnapping, when the kidnapping or aggravated kidnapping was committed with intent to commit a sex offense upon or with the child or with the intent that the child commit or submit to a sex offense.

According to Kansas law, upon conviction of a defendant of capital murder, there will be a separate proceeding to determine whether the defendant shall be sentenced to death. This proceeding will be conducted before the trial jury as soon as practicable. If the jury finds beyond a reasonable doubt that one or more aggravating circumstances exist and that such aggravating circumstances are not outweighed by any mitigating circumstances that are found to exist, then by unanimous vote the defendant will be sentenced to death. The Kansas Supreme Court will automatically review the conviction and sentence of a defendant sentenced to death.

If mitigating circumstances outweigh the aggravating circumstances, a defendant convicted of capital murder will not be given a death sentence but will be sentenced to life without the possibility of parole. A defendant sentenced to life without the possibility of parole is not eligible for parole; probation; assignment to a community correctional services program; conditional release; postrelease supervision; or suspension, modification, or reduction of sentence.

Costs

Costs in Kansas death penalty cases have been examined in a 2003 Performance Audit by the Legislative Division of Post Audit (LPA) and in 2004 and 2014 reports by the Kansas Judicial Council Death Penalty Advisory Committee. Each of these studies indicates costs for death penalty cases tend to be higher than non-death penalty cases at the trial and appellate stages. For instance, the 2014 Judicial Council report indicated that Kansas Board of Indigents' Defense Services costs in death penalty trial cases filed between 2004 and 2011 averaged

$395,762 per case, as compared to $98,963 per trial case where the death penalty could have been sought but was not. More detail regarding the costs in death penalty cases may be found in the 2003 Performance Audit report and in the 2004 and 2014 Judicial Council reports, which are available on the LPA and Judicial Council websites, respectively.

The Board of Indigents' Defense Services has three units that participate in the defense of capital cases. The approved budget for these units in FY 2019 is $3,122,507. Actual expenditures for the unit in FY 2018 were $2,430,626. The agency estimates FY 2019 expenditures of $3,461,691 for capital defenses.

Death Penalty and Intellectual Disability

At the national level, the U.S. Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), stated capital punishment of those with "mental retardation" is cruel and unusual punishment under the Eighth Amendment to the *U.S. Constitution*. Various states subsequently attempted to draft legislation that would comply with the Atkins decision. In the Atkins decision, there is no definition of "mentally retarded," but the Court referred to a national consensus regarding mental retardation.

In 2012, the Legislature passed Sub. for SB 397, which replaced statutory references to "mental retardation" and similar terms with "intellectual disability" and directed state agencies to update their terminology accordingly. Thus, the concept of "mental retardation" as addressed by the U.S. Supreme Court in *Atkins* will be discussed here as "intellectual disability."

Kansas law defines "intellectual disability" in the death penalty context to mean a person having significantly subaverage general intellectual functioning to an extent that substantially impairs one's capacity to appreciate the criminality of one's conduct or to conform one's conduct to the requirements of law. [See KSA 21-6622(h).]

In 2016 Senate Sub. for 2049, the Legislature amended the definition of "significantly subaverage general intellectual functioning." This legislation was introduced in response to the U.S. Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014).

Under Kansas law, counsel for a defendant convicted of capital murder, or the warden or sheriff having custody of the defendant, may request the court to determine if the defendant has an intellectual disability. The court shall then conduct proceedings to determine if the defendant has an intellectual disability. If the court determines the defendant has an intellectual disability, no sentence of death, life without the possibility of parole, or mandatory term of imprisonment shall be imposed. [See KSA 21-6622.]

Death Penalty and Minors

In *Roper v. Simmons*, 543 U.S. 551 (2005), the U.S. Supreme Court invalidated the death penalty for all juvenile offenders. The majority opinion pointed to teenagers' lack of maturity and responsibility, greater vulnerability to negative influences, and incomplete character development, concluding juvenile offenders assume diminished culpability for their crimes.

KSA 21-6618 mandates that, if a defendant in a capital murder case was less than 18 years of age at the time of the commission of the crime, the court shall sentence the defendant as otherwise provided by law, and no sentence of death shall be imposed. Thus, the death penalty or capital punishment cannot be imposed on a minor in Kansas.

Method of Carrying Out Death Penalty

The method of carrying out a sentence of death in Kansas must be by intravenous injection of a substance or substances in sufficient quantity to cause death in a swift and humane manner, pursuant to KSA 22-4001. No death penalty sentence has been carried out in Kansas since the death penalty was reenacted in 1994.

On November 17, 2004, the death sentence of Stanley Elms of Sedgwick County was vacated

Inmates in Kansas Under Sentence of Death					
Defendant's Name	**Race**	**Date of Birth**	**Date Capital Penalty Imposed**	**County**	**Case Status**
Kyle Trevor Flack	White	06/18/85	05/18/16	Franklin	Appeal Pending
Frazier Glen Cross, Jr.	White	11/23/40	11/10/15	Johnson	Appeal Pending
James Kraig Kahler	White	01/15/63	10/11/11	Osage	Sentence upheld; See below
Justin Eugene Thurber	White	03/14/83	03/02/09	Cowley	Conviction upheld; remanded for redetermination of intellectual disability; See below
Scott Dever Cheever	White	08/19/81	01/23/08	Greenwood	Sentence upheld; See below
Sidney John Gleason	Black	04/22/79	08/28/06	Barton	Sentence upheld; See below
John Edward Robinson, Sr.	White	12/27/43	01/21/03	Johnson	Sentence upheld; See below
Jonathan Daniel Carr	Black	03/30/80	11/15/02	Sedgwick	See below
Reginald Dexter Carr, Jr.	Black	11/14/77	11/15/02	Sedgwick	See below
Gary Wayne Kleypas	White	10/08/55	03/11/98	Crawford	Sentence upheld; See below

pursuant to a plea agreement. He was removed from administrative segregation and sentenced to the Hard 40 term, which is life in prison with no possibility of parole for 40 years.

On April 3, 2009, the death sentence of Michael Marsh of Sedgwick County was vacated pursuant to a plea agreement. He was removed from administrative segregation and sentenced to two life sentences, with parole eligibility after 55 years, but with 85 months to serve for additional convictions if paroled.

On March 24, 2010, the death sentence of Gavin Scott of Sedgwick County was vacated pursuant to a plea agreement. He was removed from administrative segregation and sentenced to two life sentences.

In 2010, a Shawnee County district judge granted Phillip D. Cheatham, Jr., who was under sentence of death, a new sentencing hearing. In January 2013, before this hearing was held, the Kansas Supreme Court found Cheatham's trial counsel was ineffective, reversed Cheatham's convictions, and remanded the case for a new trial.

In January 2015, Cheatham legally changed his name to King Phillip Amman Reu-El. During jury selection for his retrial in February 2015, Amman Reu-El pleaded no-contest to capital murder and attempted murder charges. At a sentencing hearing in March 2015, the district court denied Amman Reu-El's request to withdraw his pleas and sentenced Amman Reu-El to the Hard 25 term (life in prison with no possibility of parole

for 25 years) for the capital counts and 13 years, 9 months for the attempted murder count, to be served consecutively. In May 2015, Amman Reu-El filed an appeal of the district court's denial of his motion to withdraw his pleas. The Kansas Supreme Court affirmed the district court's denial in May 2017. In September 2015, Amman Reu-El filed a pleading in district court claiming he received ineffective assistance of counsel in making his pleas, and repeated these claims in a supporting affidavit and KSA 60-1507 *habeas* motion filed with the district court in August 2017. This motion was denied by the district court in October 2017. As of September 2018, an appeal from this denial was pending in the Kansas Court of Appeals.

In August 2012, the Kansas Supreme Court reversed the capital murder convictions of Scott Dever Cheever and ordered the case remanded for a new trial. Cheever was under sentence of death for the convictions. The State appealed the case to the U.S. Supreme Court, which issued an opinion December 11, 2013, vacating the judgment of the Kansas Supreme Court and remanding the case for further consideration by Kansas courts of possible error under the Fifth Amendment or Kansas evidentiary rules. The Kansas Supreme Court heard further oral argument in September 2014 but stayed release of a decision pending the U.S. Supreme Court's review of the *Gleason* and *Carr* cases (see below). Following the U.S. Supreme Court's release of the decisions in those cases, the Kansas Supreme Court released, in July 2016, a decision upholding Cheever's convictions and death sentence. As in the *Robinson* decision (see below), Justice Johnson was the lone dissenting justice. Cheever's petition for writ of *certiorari* was denied by the U.S. Supreme Court in December 2017. As of September 2018, Cheever was being held in special management at Lansing Correctional Facility. Cheever's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues.

In July 2014, the Kansas Supreme Court vacated death sentences in three cases. The Court vacated Sidney John Gleason's death sentence and remanded for resentencing. In the appeals of Jonathan Daniel Carr and Reginald Dexter Carr, Jr., the Court reversed all but one of each defendant's capital murder convictions, vacated each defendant's death sentence for the remaining capital murder conviction, and remanded to the district court for further proceedings. However, the U.S. Supreme Court granted the Kansas Attorney General's petition for writ of *certiorari* in all three cases and heard oral argument in the cases in October 2015. In January 2016, the U.S. Supreme Court released decisions in all three cases reversing the Kansas Supreme Court's judgments (thereby reinstating the death sentences) and remanding to the Kansas Supreme Court for further proceedings. In February 2017, the Kansas Supreme Court affirmed Gleason's death sentence. Gleason's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues. As of September 2018, further proceedings are pending before the Kansas Supreme Court on additional issues in the Carr brothers' cases.

In November 2015, the Kansas Supreme Court upheld a capital murder conviction and death sentence of John Edward Robinson, Sr., for one of the counts of capital murder charged against him. This marked the first death sentence upheld by the Court since the reenactment of the death penalty in Kansas. The Court reversed two other murder convictions as multiplicitous and affirmed remaining convictions. The lone dissent from the Court's decision was by Justice Johnson, who disagreed that the State had properly charged and proven the count of capital murder upheld by the Court. The dissent also stated that the death penalty is both "cruel" and "unusual" and therefore violates § 9 of the *Kansas Constitution Bill of Rights*.

The Court subsequently denied Robinson's motion for rehearing and modification of judgment, and Robinson's petition for writ of *certiorari* was denied by the U.S. Supreme Court in October 2016. Robinson's direct appeals are now exhausted, but there may be further state or federal court proceedings on collateral issues.

In October 2016, the Kansas Supreme Court upheld Gary Kleypas' capital murder conviction

and death sentence. It reversed a conviction for attempted rape and remanded the case for resentencing on a conviction of aggravated burglary. Justice Johnson dissented, citing his dissenting opinions in Robinson and Cheever.

In February 2018, the Kansas Supreme Court upheld James Kahler's capital murder conviction and death sentence. Justice Johnson dissented, stating he would vacate and remand for resentencing based upon cumulative guilt-phase errors that undermined the jury's death sentence determination. Citing his *Robinson* dissent, he again stated the death penalty is an unconstitutional cruel or unusual punishment. In April 2018, Kahler filed a notice of intent to file a petition for writ of *certiorari*.

In June 2018, the Kansas Supreme Court upheld Justin Thurber's convictions for capital murder and aggravated kidnapping, but reversed the district court's determination that there was not reason to believe Thurber was intellectually disabled such that Thurber could not be sentenced to death. The Supreme Court remanded the issue of the determination of Thurber's intellectual disability to the district court for reconsideration in light of U.S. Supreme Court decisions and Kansas statutory changes that had occurred while Thurber's case was on appeal. Justice Rosen dissented, stating he would uphold the district court's intellectual disability determination and proceed to other penalty phase issues. In a separate dissent, Justice Johnson stated he would reverse Thurber's death sentence and resentence to life in prison on the cruel and unusual punishment grounds he has outlined in previous cases or on the basis of the majority's finding that the intellectual disability statute in effect when Thurber was sentenced was unconstitutionally restrictive.

As of September 2018, ten inmates under a death penalty sentence are being held in administrative segregation because Kansas does not technically have a death row. Inmates under sentence of death (other than Cheever) are held in administrative segregation at the El Dorado Correctional Facility (EDCF).

State-to-State Comparison

Kansas is one of 30 states that has a death penalty. The following tables show the states with a death penalty and the 20 states without such penalty. According to the Death Penalty Information Center, as of November 2016, four states with a death penalty (Colorado, Oregon, Pennsylvania, and Washington) also had an existing gubernatorial moratorium on the death penalty. (The Washington Supreme Court subsequently struck down the death penalty in that state.)

Jurisdictions with the Death Penalty				
Alabama	Idaho	Montana	Oregon	Virginia
Arizona	Indiana	Nebraska	Pennsylvania	Wyoming
Arkansas	Kansas*	Nevada	South Carolina	U.S. Government
California	Kentucky	New Hampshire*	South Dakota	U.S. Military*
Colorado	Louisiana	North Carolina	Tennessee	
Florida	Mississippi	Ohio	Texas	
Georgia	Missouri	Oklahoma	Utah	
* Indicates jurisdiction with no executions since 1976.				

Jurisdictions without the Death Penalty (year abolished in parentheses)		
Alaska (1957)	Maryland (2013)	New York (2007)
Connecticut (2012)	Massachusetts (1984)	North Dakota (1973)
Delaware[1] (2016)	Michigan (1846)	Rhode Island (1984)
Hawaii (1948)	Minnesota (1911)	Vermont (1964)
Illinois (2011)	New Jersey (2007)	Washington[3] (2018)
Iowa (1965)	New Mexico[2] (2009)	West Virginia (1965)
Maine (1887)	District of Columbia (1981)	Wisconsin (1853)

1 In August 2016, the Delaware Supreme Court held the state's capital sentencing procedures were unconstitutional and struck down the state's death penalty statute. The Delaware Supreme Court subsequently applied the decision retroactively to the 13 people with active death sentences, who were resentenced to lifetime imprisonment without parole.

2 In March 2009, New Mexico repealed the death penalty. The repeal was not retroactive, which left two people on the state's death row.

3 In October 2018, the Washington Supreme Court held the state's death penalty was unconstitutional, struck down the state's death penalty statute, and converted the sentences of the eight people with active death sentences to lifetime imprisonment without possibility of release.

Source: Death Penalty Information Center.

Recent Developments

In March 2009, the Senate Judiciary Committee held a hearing on SB 208 to repeal the death penalty in Kansas. The bill was amended and passed out of the Committee. The Senate Committee of the Whole re-referred the bill to the Senate Judiciary Committee for study by the Judicial Council during the interim. The Judicial Council formed the Death Penalty Advisory Committee to study SB 208 and concluded the bill presented a number of technical problems that could not be resolved by amending the bill. Instead, the Committee drafted a new bill, which was introduced in the 2010 Session as SB 375. SB 375 was passed, as amended, out of the Senate Committee on Judiciary. However, the bill, was killed on final action in the Senate Committee of the Whole.

Bills that would abolish the death penalty were again introduced in both chambers in 2011, 2013, 2015 (House only), 2016, and 2017. With the exception of 2017 HB 2167, which received a hearing in the House Committee on Corrections and Juvenile Justice, no further action was taken on these bills.

The 2012 House Committee on Corrections and Juvenile Justice held an "informational" hearing on the death penalty.

In 2013, HB 2388 was introduced and heard in the House Committee on Corrections and Juvenile Justice. This bill would have amended KSA 21-6619 to limit Kansas Supreme Court review in death penalty cases to properly preserved and asserted errors and allowing the Court to review

unpreserved and unassigned errors only to correct manifest injustice (as defined in the bill). Proponents of the bill indicated it was introduced in response to the Kansas Supreme Court's decision in *State v. Cheever*, 295 Kan. 229 (2012). A motion in the Committee to recommend the bill favorably as amended failed, and no further action was taken on the bill.

The 2013 Legislature passed Senate Sub. for HB 2043, which allows the Attorney General to file notice of intent to seek the death penalty in those cases where the county or district attorney or a court determines a conflict exists.

In 2014, the Senate Judiciary Committee introduced SB 257, which would have amended the procedure for direct appeals in death penalty cases by establishing statutory time limits and appellate brief page limits and limiting the scope of review. The bill would also have imposed additional requirements and limitations on both KSA 60-1507 motions generally, as well as KSA 60-1507 motions specifically filed by prisoners under sentence of death. The Senate Judiciary Committee slightly modified the language of SB 257 and recommended a substitute bill for HB 2389 containing this language. Senate Sub. for HB 2389 passed the Senate with these provisions, but they were removed by the conference committee and the bill was passed without any specific death penalty-related provisions.

In 2016, the Legislature passed Senate Sub. for 2049, amending the definition of "significantly subaverage general intellectual functioning." This legislation was introduced in response to the U.S. Supreme Court's decision in *Hall v. Florida*, 134 S. Ct. 1986 (2014), holding that Florida's threshold requirement for submission of intellectual disability evidence in the context of capital sentencing was unconstitutional.

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Judiciary, Corrections, and Juvenile Justice

G-5 Juvenile Services

The Division of Juvenile Services within the Kansas Department of Corrections (KDOC) oversees juvenile offenders in Kansas. Individuals as young as 10 years of age and as old as 17 years of age may be adjudicated as juvenile offenders. KDOC may retain custody of a juvenile offender in a juvenile correctional facility (JCF) until the age of 22.5 and in the community until the age of 23.

Juvenile Services leads broadly based state and local, public, and private partnerships to provide the State's comprehensive juvenile justice system, including prevention and intervention programs, community-based graduated sanctions, and JCFs.

Juvenile Services' operations consist of two major components:

- **Community-based prevention, immediate interventions, and graduated sanctions programs for nonviolent juvenile offenders.** Juvenile Services also administers grants to local communities for juvenile crime prevention and intervention initiatives. In addition to providing technical assistance and training to local communities, the division is responsible for grant oversight and auditing all juvenile justice programs and services.
- **Juvenile correctional facilities for violent juvenile offenders.** On March 3, 2017, Larned Juvenile Correctional Facility (LJCF) closed. The facility was able to house up to 128 juveniles. LJCF was one of two Kansas JCFs. At present, the only JCF in Kansas is the Kansas Juvenile Correctional Complex (KJCC) located in Topeka. A third facility, Atchison Juvenile Correctional Facility, suspended operations on December 8, 2008, and a fourth facility, Beloit Juvenile Correctional Facility, suspended operations on August 28, 2009.

The 2016 Legislature passed SB 367, which made substantial reforms to the Kansas juvenile justice system in both the community-based services and the JCF operations for which Juvenile Services is responsible. KDOC's Juvenile Services program is tasked with implementing many of the provisions of SB 367, either alone or in conjunction with other partners in the juvenile justice system. The 2017 Legislature passed House Sub. for SB 42, which made further amendments to the system as a follow-up to SB 367.

Further detail regarding SB 367 and House Sub. for SB 42 is provided on the following pages.

Kansas Juvenile Justice Authority's (JJA) History and Community Focus

The juvenile justice reform process implemented in Kansas from 1997 to 2000 focused on prevention, intervention, and community-based services, with the premise that a youth should be placed in a JCF for rehabilitation and reform only as a last resort and that youth are more effectively rehabilitated and served within their own community. Prior to the transition, juvenile justice functions were the responsibility of several state agencies, including the Office of Judicial Administration (OJA); the Department of Social and Rehabilitation Services (SRS), which is now the Department for Children and Families (DCF); and KDOC. Other objectives included separating juvenile offenders from children in need of care in the delivery of services.

Due to the focus on serving youth in their own community, each county or group of cooperating counties is required by statute to make themselves eligible to receive state funding for the development, implementation, operation, and improvement of juvenile community correctional services. Each county, or the designee of a group of counties, is referred to as an administrative county and directly receives funding from the agency for operation of community juvenile justice services.

SB 367 will adjust the focus and funding mechanisms for some of this funding over the next several years.

Pivotal roles of the Community Programs Division include ensuring the community service continuum is efficient and effective in addressing the needs of the youth; building upon established collaborations with local units of government and other key stakeholders; and monitoring programs along the continuum of services from prevention and intervention to rehabilitative service delivery.

Juvenile Justice Reform Time Line

1993 and 1994. Research began on the proposed transition with a legislative review of juvenile crime and the creation of the Criminal Justice Coordinating Council, which was charged to study and develop policies and recommendations regarding juvenile justice reform.

1995. The Kansas Youth Authority (KYA) and JJA were created with the enactment of 1995 SB 312.

The mission of KYA was to develop policies related to the scope and function of the JJA. Specific areas studied included confinement, diversion, fines, restitution, community service, standard probation, intensive supervision, house arrest programs, electronic monitoring, structured school, day reporting centers, community residential care, treatment centers, and sanctions.

JJA was assigned to:

- Control and manage the operation of the state youth centers (now referred to as JCFs);
- Evaluate the rehabilitation of juveniles committed to JJA and prepare and submit periodic reports to the committing court;
- Consult with the state schools and courts on the development of programs for the reduction and prevention of delinquency and the treatment of juvenile offenders;
- Cooperate with other agencies that deal with the care and treatment of juvenile offenders;
- Advise local, state, and federal officials, public and private agencies, and lay groups on the need for and possible methods of reduction and prevention of delinquency and the treatment of juvenile offenders;
- Assemble and distribute information relating to delinquency and report on studies relating to community conditions that affect the problem of delinquency;

- Assist any community within the state by conducting a comprehensive survey of the community's available public and private resources, and recommend methods of establishing a community program for combating juvenile delinquency and crime; and
- Direct state money to providers of alternative placements in local communities, such as supervised release into the community, out-of-home placement, community services work, or other community-based service; provide assistance to such providers; and evaluate and monitor the performance of such providers relating to the provision of services.

1996. HB 2900, known as the Juvenile Justice Reform Act of 1996, outlined the powers and duties of the Commissioner of Juvenile Justice.

The bill also addressed the areas of security measures, intake and assessment, dual sentencing, construction of maximum security facility or facilities, child support and expense reimbursement, criminal expansion, disclosure of information, immediate intervention programs, adult presumption, parental involvement in dispositional options, parental responsibility, school attendance, parental rights, and immunization.

Further, the bill changed the date for the transfer of powers, duties, and functions regarding juvenile offenders from SRS and other state agencies to July 1, 1996. The bill stated KYA must develop a transition plan that included a juvenile placement matrix, aftercare services upon release from a JCF, coordination with SRS to consolidate the functions of juvenile offender and children in need of care intake and assessment services on a 24-hour basis, recommendations on how all juveniles in police custody should be processed, and the transfer from a state-based juvenile justice system to a community-based system according to judicial districts.

1997. The Legislature amended the Juvenile Justice Reform Act of 1996 with House Sub. for SB 69, including changes in the administration of the law. In addition, the amendments dealt with juvenile offender placements in an effort to maximize community-based placements and reserve state institutional placements for the most serious, chronic, and violent juvenile offenders.

Also included in this bill was the creation of the Joint Committee on Corrections and Juvenile Justice and the Kansas Advisory Group on Juvenile Justice and Delinquency Prevention, which took the place of KYA. On July 1, JJA began operations and assumed all the powers, duties, and functions concerning juvenile offenders from SRS.

Recent Reform Efforts

2013

Executive Reorganization Order (ERO) No. 42 abolished the Juvenile Justice Authority (JJA) and transferred the jurisdiction, powers, functions, and duties of the JJA and the Commissioner of Juvenile Justice to KDOC and the Secretary of Corrections, effective July 1, 2013. All officers and employees of the JJA engaged in the exercise of the powers, duties, and functions transferred by the ERO were transferred to the KDOC, unless they were not performing necessary services.

2014

Following an informational hearing on juvenile justice reform initiatives, the House Committee on Corrections and Juvenile Justice charged a subcommittee with evaluating reform proposals and recommending legislation on the topic. Various proposals were consolidated and passed by the Legislature in Senate Sub. for HB 2588. The provisions included:

- Requiring a standardized risk assessment tool or instrument be included as part of the pre-sentence investigation and report following an adjudication;
- Prohibiting the prosecution of any juvenile less than 12 years of age as an adult;

- Restructuring the placement matrix to make commitment to a JCF a departure sentence requiring a hearing and substantial and compelling reasons to impose such sentence for certain lower level offense categories;
- Allowing juvenile offenders serving minimum-term placement sentences under the matrix to receive "good time" credit;
- Requiring the Secretary of Corrections to take certain measures to evaluate youth residential centers (YRCs) and develop fee schedules and plans for related services;
- Prohibiting a child alleged or found to be a child in need of care from being placed in a juvenile detention facility unless certain conditions are met; and
- Creating a new alternative adjudication procedure for misdemeanor-level juvenile offenses to be utilized at the discretion of the county or district attorney with jurisdiction over the offense.

2015

Additional reform efforts continued with passage of HB 2336, which required the court to administer a risk assessment tool or review a risk assessment tool administered within the past six months before a juvenile offender can be placed in a juvenile detention center, under house arrest, or in the custody of the KDOC or can be committed to a sanctions house or to a JCF.

Further, to examine Kansas' juvenile justice system, leaders of the executive, judicial, and legislative branches of government established a bipartisan, inter-branch Juvenile Justice Workgroup. In cooperation with the Pew Charitable Trusts' Public Safety Performance Project, the Workgroup was charged with a comprehensive examination of the system to develop data-driven policies based upon research and built upon consensus among key stakeholders from across the state. The Workgroup recommendations were presented at its November 17, 2015, meeting. A complete list of the Workgroup's recommendations can be found at *https://www.doc.ks.gov/juvenile-services/Workgroup/overview*.

2016

The recommendations from the 2016 Workgroup were drafted into legislation and introduced as SB 367 in the 2016 Session.

While substantial changes were made to the bill during committee action and the conference committee process, the enacted bill nevertheless represented a comprehensive reform of the Kansas juvenile justice system.

Major provisions of the bill included the following.

Juveniles in custody. The bill narrows the persons authorized to take a juvenile into custody and makes delivery of a juvenile to the juvenile's parent the default in most instances. The bill also requires both release and referral determinations once a juvenile is taken into custody to be made by juvenile intake and assessment workers, who must be trained in evidence-based practices.

Immediate interventions and community-based programs. The bill requires KDOC and OJA to develop standards and procedures for an immediate intervention process and programs and alternative means of adjudication. The bill requires KDOC to plan and fund incentives for the development of immediate intervention programs, removes limitations on eligibility for such programs, requires immediate intervention be offered to certain juveniles, and requires juveniles making a first appearance without an attorney to be informed of the right to an immediate intervention.

Further, courts must appoint a multidisciplinary team to review cases when a juvenile does not substantially comply with the development of an immediate intervention plan.

Eligibility for alternative means of adjudication is changed from a juvenile committing a misdemeanor to a juvenile with fewer than two adjudications. The bill establishes overall case

length and probation length limits for all juvenile offenders except those adjudicated of the most serious felonies.

The bill also requires KDOC to consult with the Kansas Supreme Court in adopting rules and regulations for a statewide system of structured, community-based, graduated responses for technical probation violations, conditional release violations, and sentence condition violations, which community supervision officers will use based on the results of a risk and needs assessment. The community supervision officer must develop a case plan with the juvenile and the juvenile's family. Probation revocation may be considered only for a third or subsequent technical violation, subject to additional limitations. KDOC is required to develop an earned-time calculation system for the calculation of sentences. Similarly, the Kansas Supreme Court and KDOC must establish a system of earned discharge for juvenile probationers.

Criteria for detention and alternatives. KDOC and OJA are required to develop, implement, and validate a statewide detention risk assessment tool for each youth under consideration for detention.

The criteria for detention are amended to require certain detention risk assessment results or grounds to override such results. Courts must establish a specific term of detention when placing a juvenile in detention, which may not exceed the overall case length limit.

The bill prohibits placement in a juvenile detention center in certain circumstances and removes juvenile detention facilities as a placement option under the Revised Kansas Code for Care of Children, unless the child also is alleged to be a juvenile offender and the placement is authorized under the Juvenile Code. The permissible justifications for extended detention are narrowed, and a detention review hearing is required every 14 days a juvenile is in detention, except for juveniles charged with the most serious offenses.

The bill requires OJA and KDOC to adopt a single, uniform risk and needs assessment to be administered and used statewide in the post adjudication and predisposition process.

The bill narrows and eliminates some alternatives and amends the alternative allowing commitment to a JCF to allow placement in a JCF or YRC. Effective January 1, 2018, the Secretary of Corrections may contract for up to 50 non-foster home beds in YRCs for placement of juvenile offenders. The bill limits commitment to detention and adds certain short-term placement options if a juvenile has been adjudicated of certain sexual or human trafficking-related offenses. Further, KDOC must develop community integration programs for juveniles ready to transition to independent living.

The bill amends the placement matrix for commitment to a JCF to require a written finding before such placement, remove a departure sentence provision, create a serious offender category, remove two chronic offender categories, and create a rebuttable presumption certain offenders will be placed in a YRC instead of a JCF. The bill also requires a case plan be developed for every juvenile sentenced to a JCF, with input from the juvenile and the juvenile's family.

Adult prosecution. The bill limits extended jurisdiction juvenile prosecution to cases involving the most serious offenses and raises the age for adult prosecution from 12 to 14.

Implementation. The bill establishes a 19-member Kansas Juvenile Justice Oversight Committee to oversee implementation of reforms in the juvenile justice system and requires annual reports. (*Note:* The Oversight Committee is separate from the Joint Committee on Corrections and Juvenile Justice Oversight, established by KSA 46-2801 and charged in that statute with certain ongoing oversight duties related to the juvenile justice system. Additional members and duties were added to the Oversight Committee by 2017 House Sub. for SB 42, discussed in the following paragraph.) The bill adds a juvenile defense representative member to the previously existing juvenile corrections advisory boards and requires the boards to adhere to the goals of the Juvenile Code and coordinate with the Oversight

Committee. The boards must annually consider the availability of treatment programs, alternative incarceration programs, mental health treatment, and development of risk assessment tools, and report annually to KDOC and the Oversight Committee the costs of programs needed in its judicial district to reduce out-of-home placement and recidivism.

The bill requires KDOC and OJA to provide at least semiannual training on evidence-based programs and practices to individuals who work with juveniles. OJA is required to designate or develop a training protocol for judges, county and district attorneys, and defense attorneys who work in juvenile court. Further, the bill requires the Attorney General to collaborate with the Kansas Law Enforcement Training Center and the State Board of Education (KSBE) to create skill development training for responding effectively to misconduct in school, while minimizing student exposure to the juvenile justice system, and directs KSBE to require school districts to develop and approve memorandums of understanding with guidelines for referral of school-based behaviors to law enforcement or the juvenile justice system.

Funding. The bill creates the Kansas Juvenile Justice Improvement Fund (renamed the "Evidence-Based Programs Account of the State Genera Fund" by 2017 House Sub. for SB 42, discussed below), administered by KDOC, for the development and implementation of evidence-based community programs and practices for juvenile offenders and their families by community supervision offices. Each year, the Secretary of Corrections is required to certify actual or projected cost savings in state agency accounts from decreased reliance on incarceration in a JCF or YRC; and these amounts are then transferred to the fund.

2017

The Legislature passed House Sub. for SB 42 during the 2017 Session, which adjusted changes made by 2016 SB 367 and made further modifications to the juvenile justice system. Major provisions of this bill include the following.

Absconding from supervision. Among other changes regarding absconding from supervision, the bill allows a court to issue a warrant after reasonable efforts to locate a juvenile who has absconded are unsuccessful and to toll the probation term limits and overall case length limits (established by SB 367) while a juvenile has absconded.

Immediate intervention programs. The bill requires KDOC to establish and maintain a statewide searchable database containing information regarding juveniles who participate in an immediate intervention program.

The bill establishes that immediate intervention does not have to be offered to a juvenile charged with a misdemeanor sex offense, a juvenile who has previously participated in immediate intervention, or a juvenile who was originally charged with a felony but had the charge amended to a misdemeanor as a result of a plea agreement.

Sentencing and placement. The bill amends the sentencing alternatives and placement matrix to allow a court to commit a juvenile directly to a JCF or YRC placement for a term of 6-18 months, regardless of the risk level of the juvenile, upon a finding that a firearm was used in the commission of a felony offense by the juvenile.

The bill removes a three-month limit on short-term alternative placement allowed when a juvenile is adjudicated of certain sex offenses and certain other conditions are met.

Juvenile Justice Oversight Committee. The bill adds two members to the Oversight Committee—a youth member of the Kansas Advisory Group on Juvenile Justice and Delinquency Prevention (appointed by the chairperson of the Group) and a director of a juvenile detention facility (appointed by the Attorney General)—bringing its total membership to 21. The bill also provides two additional duties for the Oversight Committee: 1) study and create a plan to address the disparate treatment of and availability of resources for juveniles with mental health needs in the juvenile justice system, and 2) review portions of juvenile justice reform that require KDOC and OJA to

cooperate and make recommendations when there is no consensus between the two agencies.

2018

Further Adjustments

The Legislature passed HB 2454 during the 2018 Session, which made further adjustments to the juvenile justice system as reformed by SB 367. Major provisions of this bill include the following.

Detention hearings. The bill amended the statute in the Revised Kansas Juvenile Justice Code (Code) governing detention hearings to expand the permitted use of two-way electronic audio-visual communication between the juvenile and the judge. The bill further amended law related to detention review hearings by adding a provision stating such hearings are not required for a juvenile offender held in detention awaiting case disposition. The bill amended the Code statute governing post-adjudication orders and hearings to require, if a juvenile offender is being held in detention, that a dispositional hearing for sentencing take place within 45 days after the juvenile has been adjudicated.

Tolling of probation term and case length limits. The bill amended the statute governing probation term limits and overall case length limits in the Code to clarify that when such limits are tolled due to the offender absconding from supervision while on probation, the limits shall not begin to run again until the offender is located and brought back to the jurisdiction. The bill also clarified, if the juvenile fails to appear for the dispositional hearing, such limits shall not apply until the juvenile is brought before the court for disposition.

Duties of Oversight Committee. The bill amended one of the statutory duties of the Kansas Juvenile Justice Oversight Committee (Oversight Committee) to require the Oversight Committee to "monitor," rather than "calculate," any state expenditures that have been avoided by reductions in the number of youth placed in out-of-home placements. A corresponding requirement that a summary of such averted costs be included in the Oversight Committee's annual report was changed from "calculated by the committee" to "determined."

Juvenile Crisis Intervention Centers

The 2018 Legislature also passed House Sub. for SB 179, establishing a framework for juvenile crisis intervention centers, which will provide short-term observation, assessment, treatment, and case planning, in addition to referral, for juveniles experiencing a mental health crisis who are likely to cause harm to self or others. The bill provides intervention center requirements in several areas, including access to various services, construction and environmental features, and policies and procedures for operation and staff monitoring of entrances and exits. The bill also outlines circumstances for admission, prohibits admission for more than 30 days, and allows a parent with legal custody or a legal guardian of a juvenile to remove the juvenile from the center at any time.

The bill allows the Secretary of Corrections to enter into a memorandum of agreement with other cabinet agencies to provide funding for juvenile crisis intervention services of up to $2.0 million annually from the Evidence-Based Programs Account created by SB 367.

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Judiciary, Corrections, and Juvenile Justice

G-6 Kansas Prison Population, Capacity, and Related Facility Issues

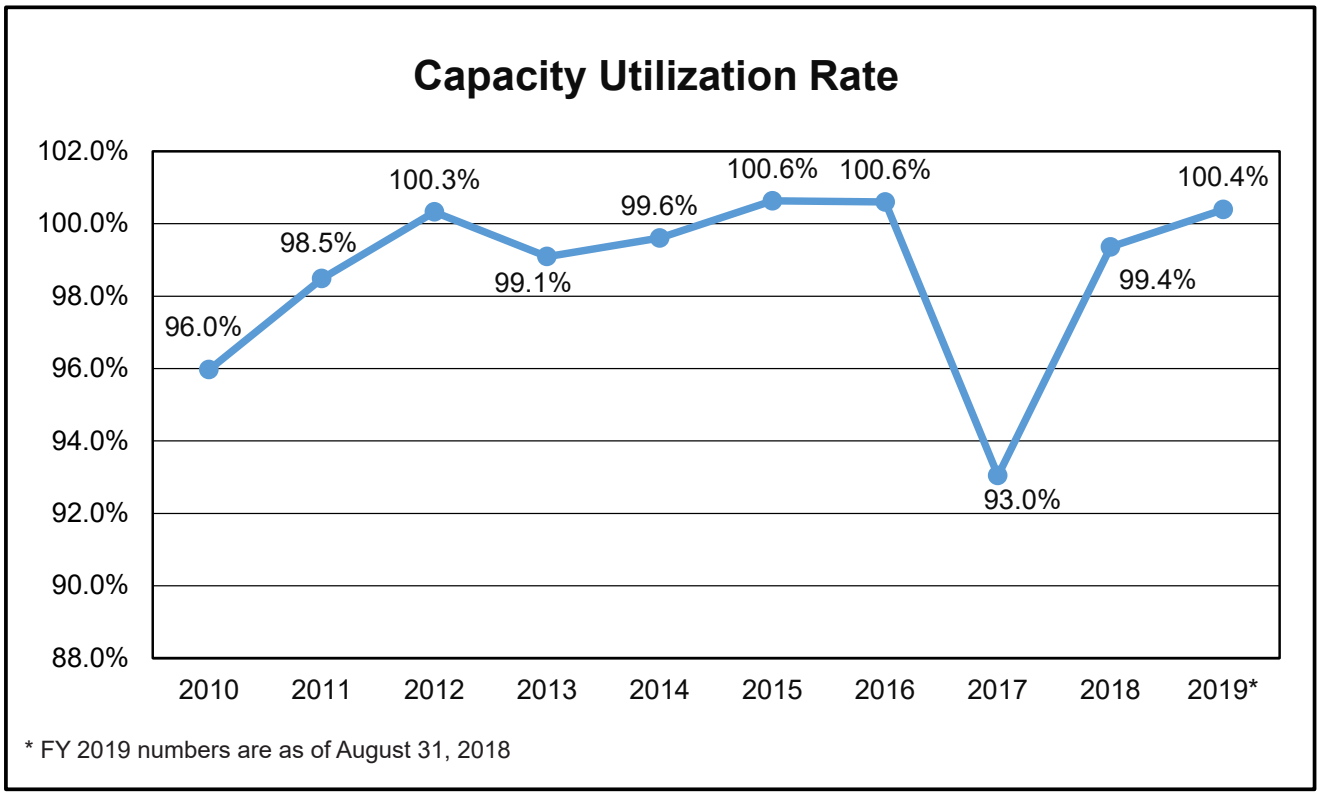
Background

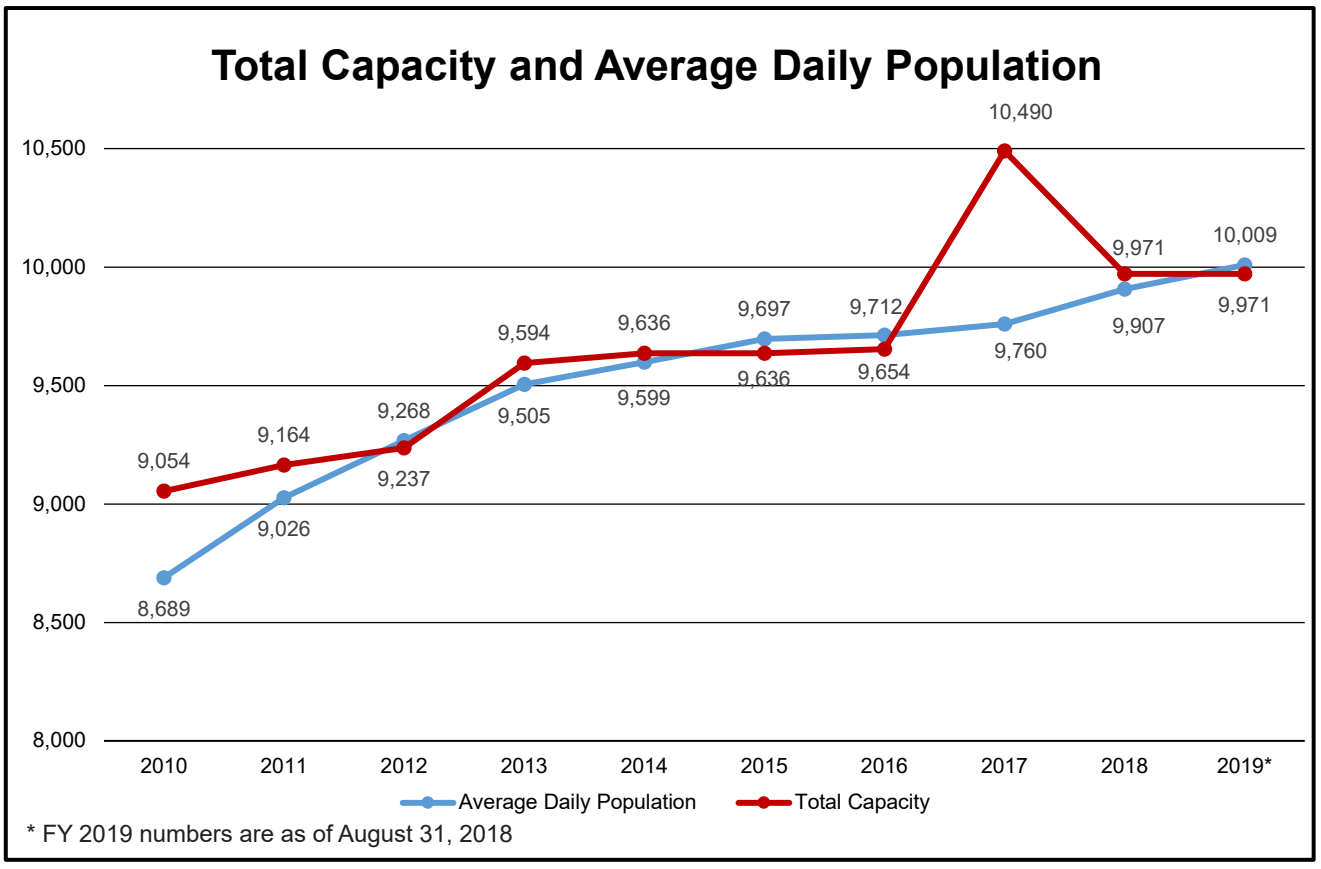
Historically, the Kansas Department of Corrections (KDOC) and state policymakers have had to address the issue of providing adequate correctional capacity for steady and prolonged growth in the inmate population. In 1863, the Kansas State Penitentiary, later known as Lansing Correctional Facility, opened as Kansas' first State-run correctional facility under the administration of the Board of Directors of the Penitentiary. Currently, the KDOC administers eight adult correctional facilities identified in the table below.

Correctional Facility	Year Opened	Capacity as of FY 2018
El Dorado CF	1991	1,955
Ellsworth CF	1987	913
Hutchinson CF	1895	1,862
Lansing CF	1863	1,906
Larned CMHF	1996	598
Norton CF	1987	975
Topeka CF	1961	903
Winfield CF	1984	804

The State gained control of its second State-run correctional facility in 1911 when the Board of Penal Institutions took control of the Kansas State Industrial Reformatory, later known as Hutchinson Correctional Facility, which had originally opened in 1895. In 1961, the State opened the Kansas State Reception and Diagnostic Center, followed by the Kansas Correctional Vocational Training Center in 1972. These two facilities were combined in 1990 to create the Topeka Correctional Facility.

In the 1980s, capacity at the correctional facilities did not keep pace with populations, which led to the Legislature establishing Winfield Correctional Facility in 1984 and Ellsworth, Norton, Osawatomie, and Stockton Correctional Facilities in 1987. A 1989 federal court order limited inmate populations at Lansing and Hutchinson and required improved conditions for inmates with mental health issues. The direct result of this order was construction of a new facility that became El Dorado Correctional Facility (EDCF) in 1991. The court


Capacity Utilization Rate
102.0%
100.0%
98.0%
96.0%
94.0%
92.0%
90.0%
88.0%
96.0%
98.5%
100.3%
99.1%
99.6%
100.6%
100.6%
93.0%
99.4%
100.4%
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019*
* FY 2019 numbers are as of August 31, 2018


Total Capacity and Average Daily Population
10,500
10,000
9,500
9,000
8,500
8,000
8,689
9,026
9,268
9,505
9,599
9,697
9,712
9,760
9,907
10,009
9,054
9,164
9,237
9,594
9,636
9,636
9,654
10,490
9,971
9,971
2010
2011
2012
2013
2014
2015
2016
2017
2018
2019*
Average Daily Population
Total Capacity
* FY 2019 numbers are as of August 31, 2018

order was terminated in 1996 following numerous changes to the correctional system, including the construction of Larned Correctional Mental Health Facility (LCMHF).

Budget reductions in FY 2009 prompted KDOC to suspend operations at three smaller minimum-custody facilities (Stockton, Osawatomie, and Toronto) and close the men's and women's conservation camps in Labette County. Additionally, the Kansas Department for Aging and Disability Services took control over the Osawatomie facility. Due to the increasing inmate population, the 2010 Legislature included a State General Fund appropriation for FY 2011, which allowed the reopening of Stockton Correctional Facility as a satellite unit of Norton Correctional Facility on September 1, 2010.

LCMHF has traditionally provided mental health services to inmates in need, but in May 2017, KDOC announced its intention to convert LCMHF into a prison for 18- to 25-year-old inmates. KDOC intends to move the inmates receiving mental health services to EDCF in the coming years. On November 1, 2017, the Secretary of Corrections stated 62 high-acuity behavioral beds were open at EDCF, and expressed KDOC's intent to open another 124 high-acuity behavioral health beds in EDCF's Individualized Reintegration Unit.

Calculating Capacity

KDOC calculates the capacity utilization rate by dividing the average daily population (ADP) by total capacity; in order to analyze the percentage of beds that are in use on an average day during a given fiscal year. In the past ten years, ADP has steadily risen every year, while total capacity has also generally followed that trend. During that time, the capacity utilization rate saw a peak of 100.6 percent in both FY 2015 and FY 2016, which was then followed by its lowest point of 93.0 percent in FY 2017. This 7.6 percent decline was due to the expansion of 800 double-bunked cells at EDCF, LCMHF, and the Norton Correctional Facility during FY 2017. However, the double-bunking did not continue to the end of FY 2018, when the total capacity fell by 519 beds from its highest point in FY 2017. On August 31, 2018, the ADP in FY 2019 was 10,009 inmates, and the capacity utilization rate was 100.4 percent, which are increases from FY 2018 of 36 inmates and 1.0 percent, respectively.

KDOC has a limited number of prison beds that are not counted in the official capacity, such as infirmary beds, which allows the population to exceed the official capacity. The August 31, 2018, inmate ADP in FY 2019 included 103 inmates held in non-KDOC facilities, which were primarily county jails and Larned State Hospital.

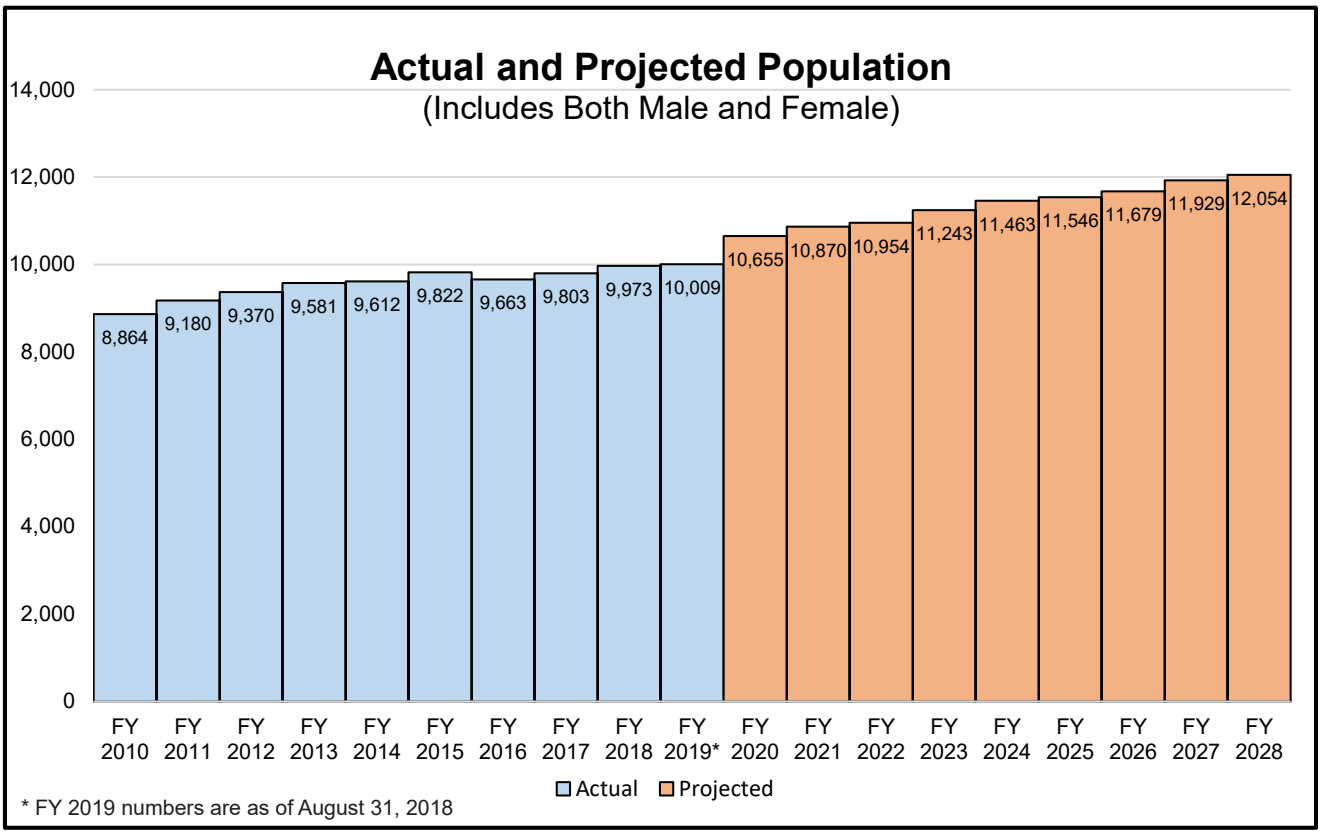
Actual and Projected Populations

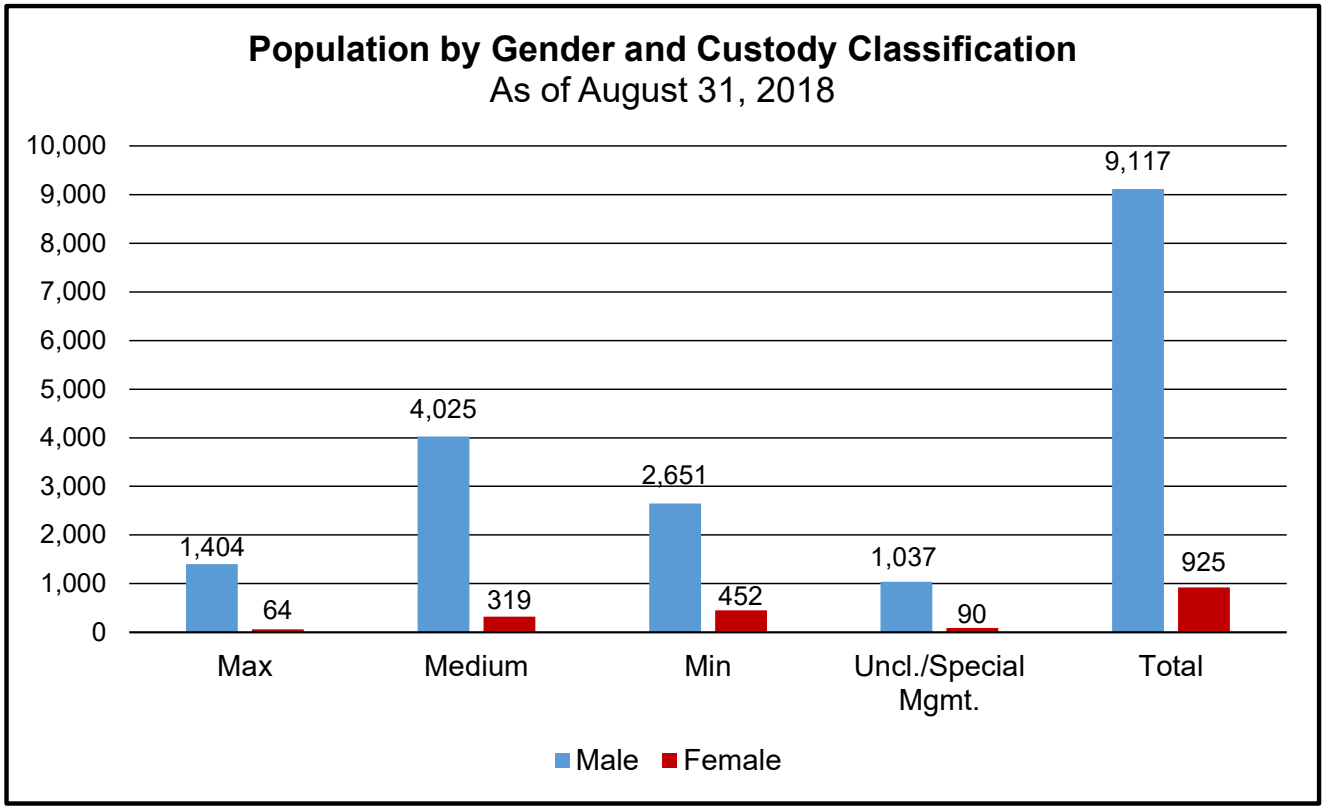
The FY 2019 prison population projections released by the Kansas Sentencing Commission (KSC) anticipate the inmate population will be 327 more than the total capacity by the end of FY 2019 and will exceed capacity by 2,083 inmates by the end of FY 2028.

In addition to total capacity, gender and custody classifications are tracked by KDOC. Issues with inadequate capacity are more common among the higher custody levels of inmates. This is due to the fact that higher custody level inmates cannot be placed in a lower custody level cell (*e.g.*, maximum inmates cannot be placed in medium or minimum cells). That is not the case for the lower custody level inmates, who can be placed in higher custody level cells. In addition, capacity in all-male or all-female facilities are not available for housing inmates of the opposite gender. The Population by Gender and Custody Classification chart on the following page displays the total inmate population by gender and custody classification for FY 2019, as of August 31, 2018.

The FY 2019 prison population projections released by the KSC anticipate the male inmate population will be over capacity by 256 inmates in FY 2019 and will increase for every year in its ten-year projection, when there will be 10,934 inmates, or 1,878 over capacity, in FY 2028.

The FY 2019 prison population projections show the female inmate population exceeding capacity by 63 inmates. The KSC projects that over ten years, the female population will steadily rise to


Actual and Projected Population
(Includes Both Male and Female)
14,000
12,000
10,000
8,000
6,000
4,000
2,000
0
8,864
9,180
9,370
9,581
9,612
9,822
9,663
9,803
9,973
10,009
10,655
10,870
10,954
11,243
11,463
11,546
11,679
11,929
12,054
FY 2010
FY 2011
FY 2012
FY 2013
FY 2014
FY 2015
FY 2016
FY 2017
FY 2018
FY 2019*
FY 2020
FY 2021
FY 2022
FY 2023
FY 2024
FY 2025
FY 2026
FY 2027
FY 2028
Actual
Projected
* FY 2019 numbers are as of August 31, 2018


Population by Gender and Custody Classification
As of August 31, 2018
10,000
9,000
8,000
7,000
6,000
5,000
4,000
3,000
2,000
1,000
0
1,404
64
4,025
319
2,651
452
1,037
90
9,117
925
Max
Medium
Min
Uncl./Special Mgmt.
Total
Male
Female

1,060 in 2021, then stay level until 2027, when the population will rise to 1,126, and finally fall to 1,120, or 205 above capacity, in FY 2028.

Actual and projected populations are detailed in the Actual and Projected Population chart.

Consequences of Operating Close to Capacity

According to KDOC, the following illustrates some of the consequences of operating close to capacity:

- Excessive inmate movement;
- More difficult-to-manage emergencies and separate inmates with conflicts (*e.g.*, gangs, grudges);
- Greater reliance on segregation and contract jail beds; and
- Inability to keep inmates near to their families, which creates more problematic releases.

Increasing Capacity through New Construction

During the 2007 Legislative Session, KDOC received bonding authority totaling $40.5 million for new construction, including adding cell houses at El Dorado, Stockton, and Ellsworth Correctional Facilities and a new facility in Yates Center. KDOC issued $1.7 million in bonds for architectural planning at the four proposed sites, but the balance of the bonding authority was rescinded during the 2008 and 2009 Legislative Sessions. KDOC completed planning for expansion of EDCF and beginning in FY 2017, included plans for construction on two new cell houses at EDCF in its five-year capital improvement plan at a total cost of $24.9 million. Each cell house would contain up to 256 beds depending on the combination of single- and double-occupancy cells.

During the October 4, 2016, meeting of the Joint Committee on State Building Construction, KDOC asked the Committee to recommend that its requests to finance the construction of two facilities at EDCF, then totaling $27.2 million all from the State General Fund for FY 2019, be deleted from its five-year capital improvement plan. KDOC anticipates, based on population projections, the construction of the facilities may be needed by FY 2020.

Construction on Medium and Maximum Unit at Lansing Correctional Facility

During the 2017 Legislative Session, KDOC brought plans before the Legislature to demolish an existing medium-security unit at LCF and construct a new facility in its place. KDOC asserts the new facility will reduce the need for staff, generating savings over time.

Provisions in 2017 Senate Sub. for HB 2002 allowed KDOC to enter into a lease-purchase agreement for the demolition, design, and construction of a new facility at LCF or, if more cost effective, allows the agency to bond with the Kansas Development Finance Authority to demolish, design, and construct a correctional institution at LCF, capping expenditures related to the project at $155.0 million. The provisions also require the Secretary of Corrections to advise and consult the State Building Advisory Commission for the use of an alternative project delivery procurement process and required KDOC to appear before the State Finance Council for approval of the decision.

On January 24, 2018, the State Finance Council approved a lease-to-own plan where a private company would build the 2,432-bed facility, and the State would purchase the facility through a 20-year lease for a total of $362 million. Ground broke on the new facility in April 2018, with a scheduled completion date of January 2020. In response to the approval of the lease-to-own plan, the 2018 Legislature passed SB 328, which requires prior legislative authorization if any agency wants to outsource the security operations of any State-run correctional facility. The bill further defined security operations as the supervision of inmates at a correctional facility by a correctional officer or warden.

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Judiciary, Corrections, and Juvenile Justice

G-7 Mental Health and the Criminal Justice System

Considerations for incarcerated and detained persons with mental health issues have become increasingly common in the criminal justice system in Kansas. An overview of recent legislation and available services, including crisis intervention, mental health courts, and Kansas Department of Corrections (KDOC) mental health services, follows.

Recent Legislation

Crisis Intervention Act—2017 Senate Sub. for HB 2053

The 2017 Legislature passed legislation related to the care and treatment of persons with mental illness and problems with substance abuse through Senate Sub. for HB 2053, also known as the Crisis Intervention Act (Act). The Act outlines requirements for the use of emergency observation and treatment (EOT) in a "crisis intervention center" (center), defined as an entity licensed by the Kansas Department for Aging and Disability Services that is open 24 hours a day, 365 days a year; equipped to serve voluntary and involuntary individuals in crisis due to mental illness, substance abuse, or a co-occurring condition; and uses certified peer specialists. EOT does not mean the person loses any civil right, property right, or legal capacity, except as ordered by a court. Admission alone does not create a presumption that a person is in need of a guardian or conservator, or both.

An individual may be admitted voluntarily or involuntarily based on the belief and factual circumstances supporting the belief that the person needs EOT due to mental illness or substance abuse and he or she is likely to cause harm to self or others if not immediately detained. Law enforcement can transport a person needing EOT to a center, and the center cannot refuse to accept a person for evaluation if the center is within the officer's jurisdiction.

The person's need for EOT must be evaluated within 4 hours after admission by the head of the center and no later than 23 hours after admission by a different behavioral health professional. If the head of the center determines the need for EOT exists after 48 hours, the head of the center must file an affidavit to that effect for review in the district court in the county where the center is located. If the head of the center determines the need for EOT

exists after 72 hours, the head of the center must immediately file a petition to find appropriate placement for the person.

The Act outlines the rights of every patient being treated in a center and requires the head of the center to advise any person in custody of his or her rights under the Act.

Senate Sub. for HB 2053 was supported by law enforcement agencies around the state after the agencies encountered frequent issues with the detention and custody of mentally ill persons. Several mental health advocacy groups were also in support of the bill. The bill was the product of a Judicial Council Advisory Committee created to study 2016 HB 2639, a bill which would have enacted the Emergency Observation and Treatment Act.

Juvenile Crisis Intervention Centers—2018 House Sub. for SB 179

The 2018 Legislature created and amended law to establish juvenile crisis intervention centers and procedures for admission of juveniles to such centers. For more information on 2018 House Sub. for SB 179, see article *G-5 Juvenile Services* in this Briefing Book.

Competency to Stand Trial—2018 HB 2549

The 2018 Legislature amended law related to the competency of a defendant to stand trial, expanding the list of places where a defendant may be committed for evaluation and treatment. The bill provides a court, in both misdemeanor and felony cases, may commit a defendant to the state security hospital or any appropriate state, county, or private institution or facility for a psychiatric or psychological examination and report to the court for determination of competency to stand trial. The bill also provides if a defendant is found incompetent to stand trial, the court must commit the defendant for evaluation and treatment to any appropriate state, county, or private institution or facility.

Under prior law, a defendant charged with a felony could be committed only to a state security hospital or any county or private institution for examination and report to the court and, if found incompetent to stand trial, could be committed only to a state security hospital or any appropriate county or private institution for evaluation and treatment. Under prior law, a defendant charged with a misdemeanor could be committed only to any appropriate state, county, or private institution for examination and report and, if found incompetent to stand trial, could be admitted only to these same institutions for evaluation and treatment.

The proponents of 2018 HB 2549 expressed the need for more flexibility in conducting competency evaluations to reduce strain on the state security hospital and to reduce incarceration time in county jails.

Kansas Department of Corrections Mental Health and Behavioral Health Services

KDOC facilities provide comprehensive health care through private companies under contract with KDOC. Each facility provides 24-hour mental health care for inmates, including on-site crisis intervention, use of designated hospital rooms or appropriate health facilities, and emergency on call mental health professional services when the emergency health facility is not located nearby. Mental health services are provided to inmates based upon psychiatric assessments. Specific programs and services are outlined below.

Larned Correctional Mental Health Facility

Historically, Larned Correctional Mental Health Facility has housed the most severely mentally ill adult male inmates within KDOC, along with a significant number of inmates with behavioral disorders that make them an unacceptable risk for housing in another facility. The Central Unit serves as a transitional unit for inmates who are not able to function in the general population of a traditional correctional institution for mental health reasons, but are not in need of psychiatric hospitalization. Inmates are assigned to this facility by mental health staff at other correctional institutions. In

May 2017, KDOC announced plans to convert the 150-bed maximum-security Central Unit to a medium-security unit to house certain offenders aged 18-25 with high recidivism potential. The 150 mental health inmates previously housed in Central Unit were subsequently transferred to El Dorado Correctional Facility (EDCF) in the summer of 2017. Those inmates will be housed within the behavioral health unit at EDCF (*http://www.hutchnews.com/cedbf438-576e-5a94-afd9-64b04ebc0d9b.html*).

Larned State Hospital

At Larned State Hospital, 115 beds are reserved for KDOC offenders who need a higher level of psychiatric care. There, inmates are provided mental health care and treatment in either the acute care or the residential rehabilitation program (RRP). The purpose of RRP is to provide psychiatric rehabilitation and vocational services to adult males referred from KDOC with the intent of preparing these individuals for successful reintegration into the community or back into KDOC services as determined on an individual basis.

El Dorado Correctional Facility

Fundamental Lessons in Psychology (FLIP). Directed at segregation inmates, FLIP consists of various psychological topics including: anger management, anxiety, assertiveness, cognitive self-change, depression, general mental health, grief, loss and forgiveness, men's issues/ adjustment and self-esteem.

Behavior Modification Program (BMP). BMP is a program designed to deal with transitioning segregation inmates in a stratified behavior modification program based on increased steps of privileges for demonstrated appropriate behavior and program compliance. The nine-month, cognitive-based program integrates inmates in a three-step process that includes portions of Thinking for a Change, Motivation for Change, PAD (Positive Attitude Development), and anger management programs. An additional three months of monitoring under intensive supervision is required under the program.

Ellsworth Correctional Facility

A variety of services are available, including mental health group counseling, intensive groups, individual counseling, psychiatric intervention, crisis intervention, psychological evaluations, activity therapy, discharge planning, and tele-psychiatry, to assist in the management of inmates on psychotropic drugs and on-call services. In addition, mental health professionals provide staff instruction on the assessment and management of the inmate population.

Norton Correctional Facility

The Behavioral Health Department provides individual and group therapy for inmates, including therapy groups for anger management and dialectical behavior therapy, and covering topics such as lifestyle changes, relationships, and parenting.

Alternative Sentencing Courts

Alternative sentencing courts are established as an alternative to incarceration for persons with mental health issues, substance abuse issues, or both, who are convicted of misdemeanors. These courts offer treatment, support, and counseling. Many times, those who suffer from mental health disorders also suffer from addiction to drugs, such as opioids. For some mental health courts, diagnosis of a major mental health disorder is required for participation. However, if the participant is also addicted to drugs, treatment for that addiction will coincide with treatment for the underlying mental health disorder. Kansas has not established a statewide program for drug treatment courts. However, the cities of Kansas City, Lawrence, Topeka, and Wichita have developed their own municipal- or county-level programs.

Wyandotte County sets aside a "care and treatment" docket for those who would benefit from the program. Judges can decide to mandate outpatient treatment or order a trip to Osawatomie State Hospital. In Douglas County, the county commission developed a behavioral health program for its courts, which opened in January

2017. More than $440,000 was set aside to fund the mental health court in 2016. The mission of the behavioral health court is to connect defendants with community support services and reduce criminal involvement of defendants who suffer from serious mental illness and co-occurring disorders, thereby enhancing public health and safety.

Topeka developed its alternative sentencing court in 2015 with a $91,000 grant from the U.S. Department of Justice and $25,000 from the Kansas Health Foundation. The court provides treatment, rather than jail time, for those charged with misdemeanor offenses and who are mentally ill or addicted to drugs or alcohol. The City of Wichita developed its mental health court in 2009 with a federal grant. The program is said to have improved the quality of life for its graduates, diminished recidivism, and saved taxpayers millions of dollars (*https://www.khi.org/news/article/advocates-of-kansas-mental-health-courts-say-lives-improved-taxpayer-dollar*).

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Judiciary, Corrections, and Juvenile Justice

G-8 Sentencing

The Kansas Sentencing Guidelines Act (KSGA) became effective July 1, 1993. Two grids containing the sentencing range for drug crimes and nondrug crimes were developed for use as a tool in sentencing. (*Note:* The source for the attached sentencing range grid for drug offenses and nondrug offenses is the *Kansas Sentencing Commission Guidelines, Desk Reference Manual, 2018*. These sentencing grids are provided at the end of this article for your convenience.)

The sentencing guidelines grids provide practitioners with an overview of presumptive felony sentences.

The determination of a felony sentence is based on two factors: the current crime of conviction and the offender's prior criminal history. The sentence contained in the grid box at the juncture of the severity level of the crime of conviction and the offender's criminal history category is the presumed sentence. [See KSA 21-6804(c).]

Off-Grid Crimes

The crimes of capital murder (KSA 2018 Supp. 21-5401), murder in the first degree (KSA 2018 Supp. 21-5402), terrorism (KSA 2018 Supp. 21-5421), illegal use of weapons of mass destruction (KSA 2018 Supp. 21-5422), and treason (KSA 2018 Supp. 21-5901) are designated as off-grid person crimes.

Kansas law provides for the imposition of the death penalty, under certain circumstances, for a conviction of capital murder (KSA 2018 Supp. 21-5401 and KSA 2018 Supp. 21-6617). Where the death penalty is not imposed, a conviction of capital murder carries a life sentence without possibility of parole (KSA 2018 Supp. 21-6620(a)).

The remaining off-grid person crimes require life sentences with varying parole eligibility periods. Persons convicted of premeditated first-degree murder committed prior to July 1, 2014, are eligible for parole after serving 25 years of the life sentence, unless the trier of fact finds there were aggravating circumstances justifying the imposition of the Hard 50 sentence (requiring 50 years to be served before parole eligibility).

Persons convicted of premeditated first-degree murder committed on or after July 1, 2014, are eligible for parole after serving 50 years of the life sentence, unless the sentencing judge, after a review of mitigating circumstances, finds substantial and compelling reasons to impose the Hard 25 sentence instead (KSA 2018 Supp. 21-6620(c)).

Persons convicted of felony murder committed prior to July 1, 2014, are parole eligible after serving 20 years of the life sentence. Persons convicted of felony murder convicted on or after July 1, 2014, are parole eligible after serving 25 years of the life sentence.

Persons convicted of terrorism, illegal use of weapons of mass destruction, or treason are parole eligible after serving 20 years of the life sentence (KSA 2018 Supp. 22-3717(b)(2)).

Also included in the off-grid group are certain sex offenses against victims under the age of 14: aggravated human trafficking (KSA 2018 Supp. 21-5426(b)), rape (KSA 2018 Supp. 21-5503), aggravated indecent liberties (KSA 2018 Supp. 21-5506(b)), aggravated criminal sodomy (KSA 2018 Supp. 21-5504(b)), commercial sexual exploitation of a child (KSA 2018 Supp. 21-6422), and sexual exploitation of a child (KSA 2018 Supp. 21-5510). Offenders sentenced for these off-grid crimes are parole eligible after 25 years in confinement for the first offense, parole eligible after 40 years in confinement for the second offense, or sentenced to life without parole if they have been convicted of two or more of these offenses in the past.

Drug Grid and Nondrug Grid

The drug grid is used for sentencing on drug crimes described in KSA Chapter 21, Article 57. The nondrug grid is used for sentencing on other felony crimes. In both grids, the criminal history categories make up the horizontal axis and the crime severity levels make up the vertical axis.

Each grid contains nine criminal history categories (*2018 Drug Grid*; *2018 Nondrug Grid*).

The drug grid contains five severity levels; the nondrug grid contains ten severity levels. A thick, black dispositional line cuts across both grids. Above the dispositional line are unshaded grid boxes, which are designated as presumptive prison sentences. Below the dispositional line are shaded grid boxes, which are designated as presumptive probation sentences.

The grids also contain boxes that have a dark shaded color through them, which are referred to as "border boxes." A border box has a presumptive prison sentence, but the sentencing court may choose to impose an optional nonprison sentence, which will not constitute a departure. The nondrug grid contains three border boxes, in levels 5-H, 5-I, and 6-G. The drug grid contains seven dark-shaded border boxes, in levels 4-E, 4-F, 4-G, 4-H, 4-I, 5-C, and 5-D. [See KSA 2018 Supp. 21-6804 and KSA 2018 Supp. 21-6805.]

Grid Boxes

Within each grid box are three numbers, which represent months of imprisonment. The three numbers provide the sentencing court with a range for sentencing. The sentencing court has discretion to sentence within the range. The middle number in the grid box is the standard number and is intended to be the appropriate sentence for typical cases. The upper and lower numbers should be used for cases involving aggravating or mitigating factors sufficient to warrant a departure, as explained in the next paragraph. [See KSA 2018 Supp. 21-6804 and KSA 2018 Supp. 21-6805.]

The sentencing court may depart upward to increase the length of a sentence up to double the duration within the grid box. The court also may depart downward to lower the duration of a presumptive sentence. [See KSA 2018 Supp. 21-6815, 21-6816, and 21-6817.] The court also may impose a dispositional departure, from prison to probation or from probation to prison (KSA 2018 Supp. 21-6818).

In *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001), the predecessor to KSA 21-6815 was found to be "unconstitutional on its face" for

the imposition of upward durational departure sentences by a judge and not a jury. In the 2002 Legislative Session, the departure provisions were amended to correct the upward durational departure problem arising from *Gould*. This change became effective on June 6, 2002. The jury now determines all of the aggravating factors that might enhance the maximum sentence, based upon the reasonable doubt standard. The trial court determines if the presentation of evidence regarding the aggravating factors will be presented during the trial of the matter or in a bifurcated jury proceeding following the trial (KSA 2018 Supp. 21-6817).

Probation

Probation is a procedure by which a convicted defendant is released after sentencing, subject to conditions imposed by the court and supervision by the probation service of the court or community corrections, generally without serving a period of imprisonment (although a felony offender may be sentenced to up to 60 days in county jail as a condition of probation). As noted above, a number of boxes on the sentencing grids are designated "presumptive probation," which means probation will be granted unless a departure sentence is imposed. An underlying prison sentence is still imposed in felony cases where probation is granted, and if the defendant is subsequently found to have violated a condition of probation, probation may be revoked and the defendant required to serve the underlying prison term. Other possible actions a court may take upon a violation of probation include continuation of probation, modification of probation conditions, or various periods of confinement in a county jail. In some cases, where a defendant has waived the right to a hearing on a probation condition violation, court services or community corrections may impose two- or three-day "quick dip" periods of confinement in a county jail.

Recommended probation terms range from under 12 to 36 months, depending on the severity level of the crime of conviction.

Sentencing Considerations

The sentencing court should consider all available alternatives in determining the appropriate sentence for each offender. The sentencing guidelines seek to establish equity among like offenders in similar case scenarios. Rehabilitative measures are still an integral part of the corrections process, and criminal justice professionals continue efforts to reestablish offenders within communities. The guidelines do not prohibit sentencing courts from departing from the prescribed sentence in atypical cases. The sentencing court is free to choose an appropriate sentence, or combination of sentences, for each case (KSA 2018 Supp. 21-6604).

Good Time and Program Credits

While incarcerated, offenders may earn (and forfeit) "good time" credits based upon factors like program and work participation, conduct, and the inmate's willingness to examine and confront past behavioral patterns that resulted in the commission of crimes. Depending on the severity level of the offender's crime, the offender may earn up to 15 percent or 20 percent of the prison part of the sentence in good time credits.

Additionally, offenders serving only a sentence for a nondrug severity level 4 or lower crime or a drug severity level 3 or lower crime may earn up to 120 days of credit that may be earned by inmates "for the successful completion of requirements for a general education diploma, a technical or vocational training program, a substance abuse treatment program or any other program designated by the secretary which has been shown to reduce offender's risk after release."

With a few exceptions for certain sex-related offenses, any good time or program credits earned and subtracted from an offender's prison sentence are not added to the postrelease supervision term (KSA 2018 Supp. 21-6821).

Postrelease Supervision

Once offenders have served the prison portion of a sentence, most must serve a term of postrelease supervision. For certain sex-related offenses, the postrelease supervision term is increased by the amount of any good time or program credits earned and subtracted from the prison portion of the offender's sentence. For crimes committed on or after July 1, 2012, offenders sentenced for drug severity levels 1-3 or nondrug severity levels 1-4 must serve 36 months of postrelease supervision, those sentenced for drug severity level 4 or nondrug severity levels 5-6 must serve 24 months, and those sentenced for drug severity level 5 or nondrug severity levels 7-10 must serve 12 months. These periods may be reduced based on an offender's compliance and performance while on postrelease supervision (KSA 2018 Supp. 22-3717(d)(1)).

While on postrelease supervision, an offender must comply with the conditions of postrelease supervision, which include reporting requirements; compliance with laws; restrictions on possession and use of weapons, drugs, and alcohol; employment and education requirements; restrictions on contact with victims or persons involved in illegal activity; and other conditions. A "technical violation" of the conditions of postrelease supervision (such as failure to report) will result in imprisonment for six months, reduced by up to three months based upon the offender's conduct during the imprisonment. A violation based upon conviction of a new felony or a new misdemeanor will result in a period of confinement as determined by the Prisoner Review Board, up to the remaining balance of the postrelease supervision period (KSA 2018 Supp. 75-5217).

Recent Notable Sentencing Guidelines Legislation

In 2006, the Kansas sentencing guidelines law dealing with upward departures was amended to add a new aggravating factor when the crime involved two or more participants and the defendant played a major role in the crime as an organizer, leader, recruiter, manager, or supervisor.

The law was amended further to add a new mitigating factor for defendants who have provided substantial assistance in the investigation or prosecution of another person who is alleged to have committed an offense. In considering this mitigating factor, the court may consider the following:

- The significance and usefulness of the defendant's assistance;
- The truthfulness, completeness, and reliability of any information;
- The nature and extent of the defendant's assistance;
- Any injury suffered or any danger of risk of injury to the defendant or the defendant's family; and
- The timeliness of the assistance.

In 2008, the Kansas sentencing guidelines were amended to provide the following:

- No downward dispositional departure can be imposed for any crime of extreme sexual violence. A downward durational departure can be allowed for any crime of extreme sexual violence to no less than 50 percent of the center of the grid range of the sentence for such crime; and
- A sentencing judge cannot consider social factors as mitigating factors in determining whether substantial and compelling reasons exist for a downward departure.

In 2010, the Kansas Criminal Code, including the sentencing guidelines, was recodified. The recodification took effect July 1, 2011. Citations in this article are to the recodified code.

In 2012, the Legislature passed Senate Sub. for Sub. for HB 2318, which changed the drug grid from a four-level grid to a five-level grid, adding a new level 2 with penalties falling between the existing first and second levels of the grid. The new grid also expanded the presumptive imprisonment boxes and the border boxes.

In June 2013, the U.S. Supreme Court's decision in *Alleyne v. U.S.*, 570 U.S. 2151, 133 S. Ct. 2151, 186 L. Ed. 2D 314 (2013), called the constitutionality of Kansas' Hard 50 sentencing statute (KSA 21-6620) into doubt. Since 1994, in cases where a defendant was convicted of premeditated first-degree murder, the statute had allowed the sentencing court to impose a life sentence without eligibility for parole for 50 years when the judge found one or more aggravating factors were present. The *Alleyne* decision indicated that such determinations must be made by the trier of fact (usually a jury) using a reasonable doubt standard, rather than by the sentencing judge.

In response to the *Alleyne* decision, Kansas Attorney General Derek Schmidt requested Governor Sam Brownback call the Kansas Legislature into Special Session "for the purpose of repairing" the Hard 50 sentence. The Governor subsequently called the Legislature into Special Session starting September 3, 2013, to respond to *Alleyne*.

Before the 2013 Special Session, the Special Committee on Judiciary met to review *Alleyne*, receive testimony, and report preliminary findings to the House and Senate Judiciary Committees at the commencement of the Special Session. The Special Committee recommended language for a bill that would institute a jury procedure for the Hard 50 determination.

At the Special Session, the Legislature considered and passed HB 2002, which was an amended version of the language proposed by the Special Committee. HB 2002 went into effect upon its publication in the *Kansas Register* (September 6, 2013).

In 2014, the Legislature passed HB 2490, which included amendments to the sentencing provisions for premeditated first-degree murder, attempted capital murder, and felony murder.

The bill increased the default sentence for premeditated first-degree murder committed on or after July 1, 2014, from the Hard 25 sentence to the Hard 50 sentence. The sentencing judge may impose the Hard 25 sentence if the judge reviews mitigating factors and finds substantial and compelling reasons to impose the lesser sentence.

The bill also imposed the Hard 25 sentence for attempted capital murder (previously a severity level 1 felony) and felony murder (previously a Hard 20 sentence).

If a defendant's criminal history when sentenced for any of these crimes would subject the defendant to imprisonment for a term exceeding the Hard 50 or Hard 25 sentence (as applicable), the defendant will be required to serve the mandatory minimum term equal to the sentence established under the sentencing guidelines.

In 2015, the Legislature passed HB 2051, which increased the amount of good time inmates sentenced for post-July 1, 2012, drug severity level 3 crimes may earn, to try to restore the general good time eligibility criteria to a similar state as it existed before the 2012 changes to the drug grid. The bill also increased the amount of time from 60 days to 90 days that may be earned by any eligible inmate for program credits.

In 2016, the Legislature passed three bills related to sentencing: HB 2151, HB 2447, and HB 2463. HB 2151 authorized the Secretary of Corrections to transfer certain low- to moderate-risk offenders to house arrest pursuant to community parenting release if the conditions listed in the bill are met and the Secretary determines the offender's placement in the program is in the child's best interests. The Secretary can return an offender to a correctional facility to serve the remaining sentence if the offender fails to comply with release requirements.

HB 2447 increased the maximum number of days an inmate's sentence may be shortened for earning program credits from 90 days to 120 days.

The bill also permitted the dismissal of parole, conditional release, or postrelease supervision violation charges to be conditioned upon the released inmate agreeing to credit being withheld for the period of time from the date the Secretary

of Corrections issued a warrant to the date the offender was arrested or returned to Kansas.

HB 2463 amended statutes governing the determination of criminal history to add nongrid felonies, nondrug severity level 5 felonies, and any drug severity level 1 through 4 felonies committed by an adult to the list of juvenile adjudications that will decay if the current crime of conviction is committed after the offender reaches age 25. The bill also allowed a court to continue or modify conditions of release for, or impose a 120- or 180-day prison sanction on, an offender who absconds from supervision, without having to first impose a 2- or 3-day jail sanction. Finally, the bill made a violation or an aggravated violation of the Kansas Offender Registration Act a person offense if the underlying crime (for which registration is required) is a person crime. If the underlying crime is a nonperson crime, the registration offense is a nonperson crime. Previously, a violation or aggravated violation of the Kansas Offender Registration Act was a person crime regardless of the designation of the underlying crime.

Legislation passed by the 2017 Legislature involving sentencing included SB 112 and HB 2092. SB 112, among other changes, enacts the Law Enforcement Protection Act. This act creates a special sentencing rule with enhanced penalties if a trier of fact finds beyond a reasonable doubt that an offender committed a nondrug felony offense (or an attempt or conspiracy to commit such offense) against a law enforcement officer while the officer was performing the officer's duty or solely due to the officer's status as a law enforcement officer.

HB 2092, among other changes, amends law related to mandatory minimum sentences. The bill clarifies that mandatory minimum sentences will not apply if, due to criminal history, the offender would be subject to presumptive imprisonment for a severity level 1 crime for a term longer than the mandatory minimum. In such case, the offender would serve a sentence equal to the longer term and would not be eligible for parole until the entire sentence is completed. In addition, the sentence could not be reduced by good time credits.

SENTENCING RANGE- DRUG OFFENSES

Categories→	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felony	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanors	1 Misdemeanor No Record
I	204 194 185	196 186 176	187 178 169	179 170 161	170 162 154	167 158 150	162 154 146	161 150 142	154 146 138
II	144 136 130	137 130 122	130 123 117	124 117 111	116 111 105	113 108 101	110 104 99	108 100 96	103 98 92
III	83 78 74	77 73 68	72 68 65	68 64 60	62 59 55	59 56 52	57 54 51	54 51 49	51 49 46
IV	51 49 46	47 44 41	42 40 37	36 34 32	32 30 28	26 24 23	23 22 20	19 18 17	16 15 14
V	42 40 37	36 34 32	32 30 28	26 24 23	22 20 18	18 17 16	16 15 14	14 13 12	12 11 10

Presumptive Probation

Border Box

Presumptive Imprisonment

- Fines not to exceed $500,000 (SL1-SL2), $300,000 (SL3-SL4), $100,000 (SL5)
- Severity level of offense increases one level if controlled substance or analog is distributed or possessed w/ intent to distribute on or w/in 1000 ft of any school property.

	Distribute or Possess w/ intent to Distribute								
Levels	Cocaine	Meth & Heroin	Marijuana	Manufacture (all)	Cultivate	Dosage Units	Postrelease	Probation	Good Time
I	≥ 1 kg	≥ 100 g	≥ 30 kg	2nd or Meth	>100 plants	>1000	36	36	15%
II	100 g - 1 kg	3.5 g - 100 g	450 g - 30 kg	1st	50-99 plants	100-999	36	36	15%
III	3.5 g - 100 g	1 g - 3.5 g	25 g - 450 g		5-49 plants	10-99	36	36	**20%
IV	< 3.5 g	< 1 g	< 25 g			<10	24	≤ 18	20%
V	Possession	Possession	Possession-3rd offense				12	*≤12	20%

* ≤ 18 months for 2003 SB123 offenders

*** Retroactive application for offense committed on or after July 1, 2012

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Appendix E

SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	123 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	69 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

Probation Terms are:
36 months recommended for felonies classified in Severity Levels 1-5
24 months recommended for felonies classified in Severity Levels 6-7
18 months (up to) for felonies classified in Severity Level 8
12 months (up to) for felonies classified in Severity Levels 9-10

Postrelease Supervision Terms are:
36 months for felonies classified in Severity Levels 1-4
24 months for felonies classified in Severity Levels 5-6
12 months for felonies classified in Severity Levels 7-10

Postrelease for felonies committed before 4/20/95 are:
24 months for felonies classified in Severity Levels 1-6
12 months for felonies classified in Severity Level 7-10

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LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

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Judiciary, Corrections, and Juvenile Justice

G-9 Sex Offenders and Sexually Violent Predators

In recent years, the Kansas Legislature has made significant amendments to the Kansas Offender Registration Act (Act) (KSA 2018 Supp. 22-4901 to 22-4911 and KSA 2018 Supp. 22-4913) to comply with the federal Adam Walsh Sex Offender Registration and Notification Act (SORNA). The purpose of the federal law is to protect the public, particularly children, from violent sex offenders by using a more comprehensive, nationalized system for registration of sex offenders. It calls for state conformity to various aspects of sex offender registration, including the information that must be collected, duration of registration requirement for classifications of offenders, verification of registry information, access to and sharing of information, and penalties for failure to register as required. Failure of a jurisdiction to comply would result in a 10 percent reduction in Byrne Law Enforcement Assistance grants. Eighteen states, Kansas included, substantially have implemented SORNA. The other states are Alabama, Colorado, Florida, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and Wyoming.

The Act outlines registration requirements for “offenders,” which is defined to include sex offenders, violent offenders, and drug offenders, in addition to persons required to register in other states or by a Kansas court for a crime that is not otherwise an offense requiring registration. The definitions of sex offenders, violent offenders, and drug offenders are based on the commission and conviction of designated crimes (KSA 2018 Supp. 22-4902). A first conviction of failure to comply with the provisions of the Act is a severity level 6 felony, a second conviction is a level 5 felony, and a third or subsequent conviction is a level 3 felony. Additionally, failure to comply with the Act for more than 180 consecutive days is considered an aggravated violation—a level 3 felony. Lower severity levels apply for violations that consist only of failure to pay the sheriff’s office the required registration fee. Designation of these offenses as person or nonperson crimes depends on the designation of the underlying offense requiring registration (KSA 22-4903).

Several entities collaborate to enforce the provisions of the Act. KSA 2018 Supp. 22-4904 lists the duties of each entity in its own subsection as follows:

- (a) Courts (at the time of conviction or adjudication);
- (b) Staff of a correctional facility;
- (c) Staff of a treatment facility;
- (d) Registering law enforcement agencies;
- (e) Kansas Bureau of Investigation (KBI);
- (f) Attorney General;
- (g) Kansas Department of Education;
- (h) Secretary of Health and Environment; and
- (i) The clerk of any court of record.

Registration Requirements

KSA 2018 Supp. 22-4905 describes registration requirements. An offender must register in person with the registering law enforcement agency within three business days of coming into any county or location of jurisdiction in which the offender resides or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school. Exceptions exist for anyone physically unable to register in person, at the discretion of the registering law enforcement agency. Additionally, sex offenders must report in person four times a year to the registering law enforcement agency in the county or location of jurisdiction in which the offender resides, maintains employment, or is attending school. Violent offenders and drug offenders, at the discretion of the registering law enforcement agency, are required to report in person three times each year and by certified letter one time each year. An offender must register during the month of the offender's birth, and every third, sixth, and ninth month occurring before and after the offender's birthday. With some exceptions, the offender must pay a $20 fee each time.

SB 20 (2013) amended this requirement to provide that registration is complete even when the offender does not remit the registration fee, and failure to remit full payment within 15 days of registration is a class A misdemeanor, or, if within 15 days of the most recent registration two or more full payments have not been remitted, a severity level 9 person felony.

Offenders also must register in person within three business days of commencement, change, or termination of residence, employment status, school attendance, or other information required on the registration form, with the registering law enforcement agency where last registered and provide written notice to the KBI. Similarly, an offender must register within three business days of any name change. Finally, the offender must submit to the taking of an updated photograph when registering or to document any changes in identifying characteristics; renew any driver's license or identification card annually; surrender any driver's licenses or identification cards from other jurisdictions when Kansas is the offender's primary residence (an exception exists for active duty members of the military and their immediate family); and read and sign registration forms indicating whether these requirements have been explained.

Special conditions exist for registration in certain circumstances. If in the custody of a correctional facility, the law requires offenders to register with that facility within three business days of arrival, but does not require them to update their registration until discharged, paroled, furloughed, or released on work or school release from a correctional facility. If the offender is involuntarily committed under the Kansas Sexually Violent Predator Act, the committing court must notify the registering law enforcement agency of the county where the offender resides during the commitment. The offender must register within three business days of arrival of the county of commitment, but is not required to update such registration until placement in a reintegration facility, on transitional release, or on conditional release, at which point the regular responsibility for compliance resumes. If receiving inpatient treatment at any treatment facility, the offender must inform the registering law enforcement agency of the offender's presence at the facility and the expected duration of the treatment.

If an offender is transient, the law requires the offender to report in person to the registering law

enforcement agency of the county or location of jurisdiction within three business days of arrival, and every 30 days thereafter, or more often at the discretion of the registering law enforcement agency. If traveling outside the United States, the offender must report in person to the registering law enforcement agency and the KBI 21 days prior to travel and provide an itinerary including destination, means of transport, and duration of travel. In an emergency, an offender must report within three business days of making arrangements for travel outside of the United States.

Duration of Registration

Pursuant to the Act, offenders are required to register for 15 or 25 years or for life, depending on the offense. Those crimes requiring registration for 15 years are capital murder; murder in the first degree; murder in the second degree; voluntary manslaughter; involuntary manslaughter; criminal restraint, when the victim is less than 18; promoting the sale of sexual relations; a sexually motivated crime; a person felony where a deadly weapon was used; sexual battery; manufacture or attempted manufacture of a controlled substance; possession of certain drug precursors; distribution of certain controlled substances; any of the following when one of the parties is less than 18—adultery, patronizing a prostitute, or lewd and lascivious behavior; attempt, conspiracy, or criminal solicitation of any of these crimes; and convictions of any person required by court order to register for an offense not otherwise required by the Act.

Those crimes requiring registration for 25 years are criminal sodomy, when one of the parties is less than 18; indecent solicitation of a child; electronic solicitation; aggravated incest; indecent liberties with a child; unlawful sexual relations; sexual exploitation of a child; aggravated sexual battery; promoting prostitution, if the person selling sexual relations is 14 through 17 years of age; or any attempt, conspiracy, or criminal solicitation of any of these crimes.

Those crimes requiring registration for life are second or subsequent convictions of an offense requiring registration; rape; aggravated indecent solicitation of a child; aggravated indecent liberties with a child; criminal sodomy; aggravated criminal sodomy; aggravated human trafficking; sexual exploitation of a child; promoting prostitution, if the person selling sexual relations is under 14 years of age; kidnapping; aggravated kidnapping; or any attempt, conspiracy, or criminal solicitation of any of these crimes. Additionally, any person declared a sexually violent predator is required to register for life.

Offenders 14 years of age or older who are adjudicated as a juvenile offender for an act that would be considered a sexually violent crime when committed by an adult, and which is a severity level 1 nondrug felony or an offgrid felony, also must register for life.

For offenders 14 years of age or older who are adjudicated as a juvenile offender for an act that would be considered a sexually violent crime when committed by an adult, and which is not a severity level 1 nondrug felony or an off-grid felony, a court may:

- Require registration until the offender reaches the age of 18, 5 years after adjudication or, if confined, 5 years after release from confinement, whichever occurs later;
- Not require registration if it finds on the record substantial and compelling reasons; or
- Require registration, but with the information not open to the public or posted on the Internet. (The offender would be required to provide a copy of such an order to the registering law enforcement agency at the time of registration, which in turn would forward the order to the KBI.) An offender required to register pursuant to the Act cannot expunge any conviction or part of the offender's criminal record while the offender is required to register.

Public Access to Offender Registration Information and the KBI Registered Offender Website

KSA 2018 Supp. 22-4909 provides that information provided by offenders pursuant to the Act is open to inspection by the public and can be accessed at a registering law enforcement agency, as well as KBI headquarters. Additionally, the KBI maintains a website with this information (http://www.accesskansas.org/kbi/ro.shtml), as do some registering law enforcement agencies. One of the provisions of this statute, added by 2012 HB 2568, prohibits disclosure of the address of any place where the offender is an employee or any other information about where the offender works on a website sponsored or created by a registering law enforcement agency or the KBI. While that information is not available online, it remains publicly available and may be obtained by contacting the appropriate registering law enforcement agency or by signing up for community notification through the KBI website.

Additionally, when a court orders expungement of a conviction or adjudication that requires registration, the offender must continue registering, although the registration is not open to inspection by the public or posted on the Internet.

If the offender has an additional conviction or adjudication that requires registration that is not expunged, registration for that conviction or adjudication remains open to the public and may be posted on the Internet, unless the registration is ordered restricted.

Court Decisions Regarding Offender Registration

In *State v. Myers*, 260 Kan. 669 (1996), the Kansas Supreme Court rejected an *ex post facto* challenge to the registration requirements, holding they did not unconstitutionally increase the punishment for the applicable crimes. However, the *Myers* court did hold that the public disclosure of registrant information would be punitive and an *ex post facto* violation when imposed retroactively.

Subsequent Kansas appellate court decisions noted that the *Myers* holding that public disclosure applied retroactively is unconstitutional was cast into doubt by the U.S. Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2D 164 (2003). The Smith court held that Alaska's offender registration scheme, including public disclosure of registrant information *via* a website, was nonpunitive and its retroactive application not an *ex post facto* violation. (See *State v. Brown*, No. 107,512, unpublished opinion filed May 24, 2013.) A petition for review in Brown was filed June 24, 2013, but was placed on hold in January 2014.

In April 2016, the Kansas Supreme Court held in three cases challenging the retroactive application of increased registration periods on *ex post facto* grounds that the 2011 version of the Act was punitive in effect and therefore could not be applied retroactively. (See *Doe v. Thompson*, 304 Kan. 291 (2016); *State v. Buser*, 304 Kan. 181 (2016); and *State v. Redmond*, 304 Kan. 283 (2016).)

However, the same day the Court subsequently released an opinion in a case challenging lifetime postrelease registration for sex offenders under the Act as an unconstitutional cruel or unusual punishment. (See *State. v. Petersen-Beard*, 304 Kan. 192 (2016).) Using Smith and its progeny as a template for analysis, the Petersen-Beard court held that registration did not constitute punishment, the analysis of whether the requirements constitute punishment is identical for all constitutional provisions, and therefore the contrary holdings of Thompson, Buser, and Redmond are overruled. (For a procedural description of how these cases came to be issued and overruled the same day, see Justice Johnson's dissent in *Petersen-Beard*.)

In August 2017, the Kansas Supreme Court explicitly extended the holding of Petersen-Beard in a case challenging retroactive application of tolling requirements for sex offender registration under KORA, stating that such retroactive application does not violate the *ex post facto*

clause. (See *State v. Reed*, 306 Kan. 899, 399 P.3d 865 (2017).)

In a decision issued the same day as Reed, the court declined to hold that retroactive application of increased registration requirements for drug offenders under KORA violates the *ex post facto* clause. (See *State v. Meredith*, 306 Kan. 906, 399 P.3d 859 (2017).) However, the Meredith court stated that its decision, due to an insufficient record on appeal, would not "fully foreclose future *ex post facto* challenges to KORA registration for non-sex offenders," but that future challenges would have to distinguish the effects of KORA on such offenders from its effect on sex offenders.

Development of Sex Offender Policy

Consistent with Kansas' early compliance with SORNA, the Kansas Legislature has been at the forefront of state and federal efforts to deal with the problem of sex offenders and sex predators. In addition to the SORNA amendments, since 1993, the Kansas Legislature has passed the Kansas Offender Registration Act (Act); passed the Civil Commitment of Sexually Violent Predators Act; reinstated the death penalty for various acts of intentional and premeditated murder following the rape or sodomy of the victim or following the kidnapping of the victim; made life without parole the sentence for those persons convicted of a capital murder crime who are not given the sentence of death; nearly quadrupled the length of time more serious offenders, including sex offenders, serve in prison; lengthened the statute of limitations for sex crimes; and required DNA testing.

Legislation enacted in 2006 (SB 506) authorized the creation of the Sex Offender Policy Board (SOPB) under the auspices of the Kansas Criminal Justice Coordinating Council (KCJCC). The bill established the SOPB to consult with and advise the KCJCC on issues and policies relating to the treatment, sentencing, rehabilitation, reintegration, and supervision of sex offenders and to report its findings to the KCJCC, Governor, Attorney General, Chief Justice of the Supreme Court, the Chief Clerk of the House of Representatives, and the Secretary of the Senate. The SOPB's first report examined four topics: utilization of electronic monitoring, public notification pertaining to sex offenders, management of juvenile sex offenders, and restrictions on the residence of released sex offenders. The second report addressed the topics of treatment and supervision standards for sexual offenders, suitability of lifetime release supervision, and safety education and prevention strategies for the public.

Sex Offender Residency Restrictions

Legislation enacted in 2006 (SB 506) also prohibited cities and counties from adopting or enforcing any ordinance, resolution, or regulation establishing residential restrictions for offenders required to register under the Act. This provision was scheduled to expire on June 30, 2008. During the 2006 Interim, the Special Committee on Judiciary was charged by the Legislative Coordinating Council with studying actions by other states and local jurisdictions regarding residency and proximity restrictions for sex offenders to discover any serious unintended consequences of such restriction and identifying actions Kansas might take that actually achieve the intended outcome of increasing public safety. The Committee held a joint hearing with the SOPB to take testimony from experts in the field. The Committee recommended the Legislature wait to receive the report from the SOPB on the topic before any legislative action was taken.

On January 8, 2007, the SOPB issued a report on its findings regarding sex offender residency restrictions, with the following conclusions:

- Although residency restrictions appear to have strong public support, the SOPB found no evidence to support their efficacy. It is imperative that policymakers enact laws that actually will make the public safe and not laws giving the public a false sense of security;
- It is recommended the Legislature make permanent the moratorium on residency restrictions. However, the moratorium should not be intended to interfere with a locality's ability to regulate through

zoning the location of congregate dwellings for offenders, such as group homes;

- Residency restrictions should be determined based on individually identified risk factors;
- The most effective alternative for protecting children is a comprehensive education program. It is recommended the necessary resources be provided to an agency determined appropriate by the Legislature to educate Kansas parents, children, and communities regarding effective ways to prevent and respond to sexual abuse. Such an education program should include all victims and potential victims of child sexual abuse; and
- In order for an effective model policy to be developed, the issue of sex offender residency restrictions should be referred to the Council of State Governments, the National Governors Association, and similar organizations to prevent states and localities from shifting the population and potential problems of managing sex offenders back and forth among states.

During the 2008 Legislative Session, SB 536 was enacted to:

- Eliminate the sunset provision on the prohibition on cities and counties from adopting or enforcing any ordinance, resolution, or regulation establishing residential restrictions for offenders;
- Add a provision to exempt any city or county residential licensing or zoning program for correctional placement residences that regulates housing for such offenders from the prohibition from adopting or enforcing offender residency restrictions;
- Add a provision that defines "correctional placement residence" to mean a facility that provides residential services for offenders who reside or have been placed in the facility as part of a criminal sentence or for voluntary treatment services for alcohol or drug abuse; and
- Clarify that a correctional placement residence does not include a single or multi-family dwelling or commercial residential building that provides residence to persons other than those placed in the facility as part of a criminal sentence or for voluntary treatment services for alcohol or drug abuse.

During the 2010 Interim, the Joint Committee on Corrections and Juvenile Justice Oversight studied the issue of residency restrictions and concluded that sex offender residency restrictions have no demonstrated efficacy as a means of protecting public safety.

Commitment of Sexually Violent Predators in Kansas

In Kansas, a sexually violent predator is a person who has been convicted of or charged with a "sexually violent offense" and who suffers from a mental abnormality or personality disorder, which makes the person likely to engage in repeat acts of sexual violence and who has serious difficulty in controlling such person's dangerous behavior. Sexually violent predators are distinct from other sex offenders due to a higher risk to re-offend if their mental abnormality or personality disorder is left untreated. Those crimes considered "sexually violent offenses" are rape, KSA 2018 Supp. 21-5503; indecent liberties with a child and aggravated indecent liberties, KSA 2018 Supp. 21-5506; criminal sodomy and aggravated criminal sodomy, KSA 2018 Supp. 21-5504; indecent solicitation of a child and aggravated indecent solicitation, KSA 2018 Supp. 21-5508; sexual exploitation of a child, KSA 2018 Supp. 21-5510; aggravated sexual battery, KSA 2018 Supp. 21-5505; and aggravated incest, KSA 2018 Supp. 21-5604. "Mental abnormality" is defined as a congenital or acquired condition affecting the emotional or volitional capacity, which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others. "Likely to engage in repeat acts of sexual violence" means the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health

and safety of others. Pursuant to the Kansas Sexually Violent Predator Act (KSA 59-29a01 *et seq.*), originally enacted in 1994, a sexually violent predator can be involuntarily committed to the Sexual Predator Treatment Program (SPTP) at Larned State Hospital. Civil commitment is different from a criminal conviction. Instead of having a definitive time frame, civil commitment continues until the offender's mental abnormality or personality disorder has changed to the extent that he or she is safe to be released. Commitment can be accomplished only following a civil trial in which the court or a jury finds that a person is a sexually violent predator. A sexually violent predator would be required to complete the three phases of the treatment program, which include two inpatient phases at Larned State Hospital and one outpatient phase at one of the reintegration facilities. There is no time limit for completion of each phase. The offender must meet the predetermined requirements of the phase to progress.

Upon release from the secure facility, a person would go to a transitional release facility. These facilities cannot be located within 2,000 feet of a licensed child care facility, an established place of worship, any residence in which a child under 18 years of age resides, or a school or facility used for extracurricular activities of pupils enrolled in kindergarten through grade 12 (KSA 59-29a11(b)). Additionally, no more than 16 sexually violent predators may be placed in any one county on transitional release.

Once the court determines a person on transitional release may proceed to conditional release, the person must serve a minimum of five years in conditional release with no violations of the person's treatment plan before petitioning for final discharge.

The Secretary for Aging and Disability Services is required to issue an annual report to the Governor and Legislature detailing activities regarding transitional and conditional release of sexually violent predators. Such details include their number and location, the number of those who have been returned to treatment at Larned State Hospital and the reasons for the return, and any plans for the development of additional transitional or conditional release facilities.

Recent Legislation and Related Activity

In 2013 and 2015, the Legislative Division of Post Audit (LPA) completed a two-part performance audit of the SPTP that looked at the questions of how the Kansas SPTP compared to similar programs in other states and best practice, what actions could be taken to reduce the number of offenders committed to the SPTP, and whether the SPTP is appropriately managed to ensure the safety and well-being of program staff and offenders. Further information regarding this performance audit, including the reports, may be found on the LPA website: *www.kslpa.org*.

During the 2015 Session, House Sub. for SB 12 was enacted. This bill created and amended law governing the civil commitment of sexually violent predators and the SPTP. The bill's extensive provisions included the following:

- Named the continuing and new law governing such civil commitment the "Kansas Sexually Violent Predator Act";
- Adjusted the processes for identifying and evaluating persons who may meet the criteria of a sexually violent predator;
- Adjusted the processes for filing the petition alleging a person is a sexually violent predator and conducting the probable cause hearing and trial on such petition;
- Adjusted processes for post-commitment hearings and annual examinations;
- Adjusted standards and processes for transitional release, conditional release, and final discharge;
- Increased the limit on sexually violent predators who may be placed in any one county on transitional or conditional release from 8 to 16;
- Amended the statute setting forth rights and rules of conduct for sexually violent predators;

- Incorporated the Kansas Administrative Procedure Act, Kansas Judicial Review Act, and Office of Administrative Hearings into the procedures for addressing actions taken by the Kansas Department for Aging and Disability Services regarding SPTP residents; and
- Adjusted *habeas corpus* provisions for persons committed under the Act.

During the 2016 Session, SB 407 was enacted, which modified registration requirements for committed offenders and revived a statute in the Sexually Violent Predator Act related to transitional release that was inadvertently repealed by 2015 House Sub. for SB 12.

During the 2017 Session, HB 2128 was enacted, which amended the procedures for annual review, transitional release, and conditional release for committed offenders.

During the 2018 Session, SB 266 was enacted, which amended various provisions within the Act to, among other things, adjust procedures related to annual review, petition for final discharge, conditional release, and individual person management plans and appeals.

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