

KANSAS LEGISLATIVE RESEARCH DEPARTMENT

68-West-Statehouse, 300 SW 10th Ave.
Topeka, Kansas 66612-1504
(785) 296-3181 • FAX (785) 296-3824

kslegres@klrd.ks.gov

<http://www.kslegislature.org/klrd>

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SHAWNEE COUNTY DISTRICT COURT DECISION ON CHIEF JUDGE ELECTION IN *SOLOMON V. STATE*

Shawnee County District Court Judge Larry D. Hendricks issued a memorandum decision and order in *Solomon v. State* on Tuesday, September 2, 2015. The court found § 11 of 2014 Senate Sub. for House Bill 2338 (HB 2338), establishing elections for chief judges of judicial districts, unconstitutional as a violation of the separation of powers doctrine of the *Kansas Constitution*. The court invalidated the remainder of HB 2338 (containing the FY 2015 appropriations to the Judicial Branch, docket fee and filing fee revenue provisions, district court budgeting procedures, and provisions related to filling judicial vacancies) pursuant to the nonseverability provision contained in HB 2338. The court declined to address the effect of its decision on 2015 HB 2005 (HB 2005), which contains a nonseverability provision invalidating its contents in their entirety if any part of HB 2338 is held to be invalid or unconstitutional. HB 2005 contains the FY 2016 and FY 2017 appropriations to the Judicial Branch, extends the Judicial Branch surcharge and provisions related to docket fee revenues, and creates a dispositive motion filing fee.

This memorandum summarizes the legislative and case history, the decision and order, and the status of the case as of the morning of September 3, 2015.

This memorandum is not intended to be a full legal analysis of the September 2, 2015, memorandum decision and order, but rather a summary discussion of important points of the decision and its possible affect on other statutory and appropriations provisions. A full legal analysis of the decision and order will be provided at a later date by the Revisor of Statutes.

Legislative History

The 2014 Legislature passed HB 2338, which appropriated \$2.0 million in additional State General Fund dollars for the Judicial Branch in FY 2015, increased docket fee revenue to the Judicial Branch, created statutory appellate and summary judgment filing fees, and modified statutes governing Judicial Branch operations including budgeting, the election of chief judges, and allowing for a delay in filling judicial vacancies for up to 120 days. The bill also deleted the statutory requirement for longevity payments to Judicial Branch non-judicial staff. The bill contained a nonseverability provision invalidating its contents in full if any part was stayed or held to be invalid or unconstitutional. (Full summaries of HB 2338 and HB 2005 are attached to this memo.)

Regarding chief judge elections, the bill established that the district court judges in each judicial district shall elect a district judge to serve as chief judge and shall determine the procedure for such election. Similarly, the judges of the Court of Appeals shall elect a judge of the Court of Appeals to serve as chief judge. The Court of Appeals shall determine the

procedure for such election. The bill provided that each chief judge designated by the Supreme Court on July 1, 2014, shall be allowed to serve as chief judge through January 1, 2016.

Selection of chief judges of judicial districts was previously governed by a rule of the Kansas Supreme Court that provided the Supreme Court would appoint a chief judge in each judicial district for two-year terms. Kan. Sup. Ct. R. 107(a).

Solomon v. State

In February 2015, the Chief Judge of the 30th Judicial District, Larry T. Solomon, filed a petition for declaratory judgment in Shawnee County District Court, asking the court to declare the provision of HB 2338 establishing chief judge elections for judicial districts unconstitutional as a violation of Article III, Sec. 1 of the *Kansas Constitution* and the separation of powers doctrine, and to invalidate the rest of the bill pursuant to the nonseverability clause.

Following briefing on a motion to dismiss filed by the State of Kansas and a cross-motion for summary judgment filed by Judge Solomon, the court held oral arguments on August 28 before issuing its memorandum decision and order on September 2.

In its decision, the court first rejected the State's arguments that the case should be dismissed for lack of standing or ripeness. Regarding standing, the court held that Judge Solomon suffered sufficient injury due to uncertainty the legislation caused regarding who would review his performance as Chief Judge and retain him in his position. Regarding ripeness, the court held that the loss of the right to a certain process governing the selection and retention of chief judges occurred when HB 2338 became law.

The court proceeded to consider whether the appointment of chief judges falls under the "general administrative authority over all courts in this state" that is granted to the Kansas Supreme Court in Article 3, Sec. 1 of the *Kansas Constitution*, and, if so, whether the chief judge election provision violated the separation of powers doctrine. After concluding that the appointment of chief judges does indeed fall within the administrative authority granted to the Supreme Court by the *Kansas Constitution*, the court determined that, under *State v. Mitchell*, 234 Kan. 185 (1983), it must next examine whether the election provision constituted "significant interference" with this authority, constituting a violation of the separation of powers doctrine.

In making this examination, the court utilized the following four factors set forth in *State ex rel. Morrison v. Sebelius*, 285 Kan. 875 (2008), for determining whether there has been significant interference by a branch of government:

1. **Essential nature of the power being exercised.** The court concluded that the position of chief district court judge is an extension of the Supreme Court's administrative authority explicitly granted by the *Kansas Constitution* and also that the selection of chief judges is inherent in the administrative authority, weighing in favor of Judge Solomon.
2. **Degree of control exercised by the Legislature over the Judiciary under the provision.** Because the provision takes the power of selecting the chief district judge, a position through which the Supreme Court exercises its constitutional administrative authority, away from the Supreme Court, the court concluded this factor weighs in favor of Judge Solomon.

3. **Objective sought to be attained.** The court, like the State, afforded little weight to this element but noted that this element weighed equally in favor of Judge Solomon and the State.
4. **Practical result of the bleeding of powers as shown by actual experience over a period of time.** While noting that experiences in other states with similar election provisions may weigh in favor of the State, the court concluded that the weight of the other factors in favor of Judge Solomon's position required it to rule that the election provision violates the separation of powers doctrine.

The court proceeded to invalidate the remaining provisions of HB 2338 pursuant to the nonseverability clause, but noted the effect the decision will have on 2015 HB 2005 "exceeds the scope of this Memorandum Decision and Order" and so "the Court declines to address it."

Status of Case and its Effect on HB 2338 and HB 2005

The State filed this morning (September 3) an unopposed motion for stay of the decision pending appeal, noting its intent to immediately appeal the Court's decision. The court granted this motion. Thus, any possible effect of the court's decision on the provisions of HB 2338 and HB 2005 will be delayed until the completion of the appellate process.

Should the court's decision eventually be upheld by the appellate courts in its current form, then the decision and nonseverability clauses would potentially cause all provisions of HB 2338 and HB 2005 to become null and void, including:

- Extension of Judicial Branch surcharge until June 30, 2017;
- Creation of Judicial Branch Electronic Filing and Centralized Case Management Fund and direction of docket fee revenue to this fund through 2018;
- Creation of the dispositive motion filing fee and statutory appellate filing fees;
- Increase and extension of various docket fees;
- Reduction of small claims cases docket fees;
- FY 2016 and FY 2017 Judicial Branch appropriations and special revenue fund expenditure authority;
- Chief judge elections;
- Optional local budgeting procedure for judicial districts; and
- Extension of time to fill judicial vacancies.

As developments warrant, this memorandum will be updated or a new memorandum will be created to reflect the current status of the case and the statutory and appropriations provisions potentially affected by it.

Judicial Branch—FY 2015 Appropriation, Docket Fee Revenue, Budgeting, Chief Judge Election, Judicial Vacancies, Longevity Payments; Senate Sub. for HB 2338

Senate Sub. for HB 2338 appropriates \$2.0 million in additional State General funds for the Judicial Branch in FY 2015, increases docket fee revenue to the Judicial Branch, and modifies statutes governing Judicial Branch operations concerning budgeting, the election of chief judges, and allowing for a delay in filling judicial vacancies for up to 120 days. The bill also deletes the statutory requirement for longevity payments to Judicial Branch non-judicial staff. The provisions of the bill are non-severable.

Appropriations

The bill appropriates an additional \$2.0 million, all from the State General Fund, for the Judicial Branch. The additional appropriation provides a State General Fund budget of \$97,783,948 for FY 2015.

The bill also designates that docket fees previously deposited in various special revenue funds shall be deposited in the Judicial Branch Docket Fee Fund from FY 2016 forward, making permanent a budget proviso effective for FY 2014 and FY 2015.

Docket Fees

The bill creates statutory filing fees for appeals to the Court of Appeals or the Supreme Court in the amount of \$145 and grants the Supreme Court the authority to impose an additional charge of up to \$10 from July 1, 2014, through July 1, 2015, to fund the costs of non-judicial personnel. (Appellate court filing fees currently are set at \$125 by Supreme Court rule.) A motion for summary judgment filing fee of \$195 is created, as well as a garnishment request fee of \$7.50. The Supreme Court is authorized to impose an additional charge of up to \$12.50 for garnishment requests to fund the costs of non-judicial personnel. The summary judgment filing fee does not apply in limited actions cases under Chapter 61, and the State of Kansas and its municipalities are exempt from payment of this fee, as well as the appellate filing fees and garnishment request fee. Each of these new fees goes into effect on July 1, 2014, and for each a poverty affidavit is allowed in lieu of the fee.

The bill increases existing docket fees as follows:

- For a petition for expungement of conviction or related arrest records, from \$100 to \$176 for the period July 1, 2013, through July 1, 2015;
- For a petition for expungement of an arrest record, from \$100 to \$176;
- In a traffic, cigarette or tobacco, or fish and game violation case, from \$74 to \$86 beginning July 1, 2014;
- For a petition for expungement of juvenile records or files, from \$100 to \$176 for the period July 1, 2013, through July 1, 2015;

- For the filing of an out-of-state probate decree, from \$108.50 to \$173, beginning July 1, 2014; and
- For cases under KSA Chapter 60, from \$154 to \$173, beginning July 1, 2014.

The bill also extends the time for the Supreme Court to impose an additional fee in juvenile and conviction expungement cases and Chapter 60 cases to fund non-judicial personnel to July 1, 2015.

The bill reduces the docket fees in small claims cases from \$37 to \$35 (claims under \$500) and from \$57 to \$55 (claims over \$500) beginning July 1, 2014.

The bill creates the Electronic Filing and Centralized Case Management Fund and directs that expenditures from the fund be used to create, implement, and manage an electronic filing and centralized case management system for the state court system.

For FYs 2015, 2016, and 2017, the bill directs the first \$3.1 million of the balance of docket fees received by the state treasurer from clerks of the district court to the fund created by the bill. Beginning in FY 2018, the first \$1.0 million of the docket fees received shall be directed to the new fund.

The bill updates agency references to reflect current agency authority and responsibilities.

Judicial Branch Budgeting Procedure

The bill enacts new law to allow, for the fiscal year ending June 30, 2016, and each subsequent fiscal year, the chief judge in a judicial district to elect to be responsible for preparing and submitting a budget for the judicial district to the Chief Justice of the Kansas Supreme Court. A chief judge electing this responsibility is required to notify the Chief Justice of this decision by August 1 of the preceding fiscal year, and the chief judge is required to submit, on or before June 30 of each fiscal year, the budget for the ensuing fiscal year based upon the dollar amount allocated to the district by the Chief Justice for such fiscal year.

Subject to appropriations, the Chief Justice shall have the final authority over the annual amount allocated to each judicial district budget. After the Legislature makes Judicial Branch appropriations each year, the Chief Justice will determine the budgeted amount for each judicial district and notify each chief judge of that amount. Once the amount of each judicial district budget is established by the Chief Justice, the chief judge of each district shall have control of the expenditures under the budget, except for salaries mandated by law, and all lawful claims by a chief judge within the limits of the district budget will be approved by the judicial administrator. The chief judge of each district shall determine the compensation of personnel in the district and shall have the authority to hire, promote, suspend, demote, and dismiss personnel as necessary to carry out the functions and duties of the district.

If it appears the resources of any Judicial Branch special revenue fund are likely to be insufficient to cover the appropriations made against such fund for the fiscal year, the Chief Justice is responsible for determining any allotment system to assure expenditures will not

exceed available resources of any such fund for the fiscal year, and chief judges who have elected the responsibility for the district budget will be required to follow this allotment system.

The bill removes from the Supreme Court's judicial personnel classification system any nonjudicial personnel who will be subject to the authority of a chief judge who has elected responsibility for the district budget, and the bill states that the classification system is not to infringe upon the authority of a chief judge who has elected budget responsibility.

The bill clarifies that a departmental justice does not have the authority to make or change any budget decisions made by the chief judge of a district court.

The bill amends statutes relating to judicial departments, district court rules, district court clerks, district court nonjudicial personnel, court services officers, county budgets for court operations, court reporters, and state employee compensation philosophy to be consistent with the new budget process and authority established by the bill.

Certain provisions (related to the judicial personnel classification system and compensation, probation and parole officer, and district court employees) tied to specific dates in 1978 and 1979 are removed, and references to certain agencies and boards are updated to reflect reorganization.

Chief Judge Elections

The bill establishes that the district court judges in each judicial district shall elect a district judge to serve as chief judge and shall determine the procedure for such election. Similarly, the judges of the Court of Appeals shall elect a judge of the Court of Appeals to serve as chief judge. The Court of Appeals shall determine the procedure for such election. The bill provides that each chief judge designated by the Supreme Court on July 1, 2014, shall be allowed to serve as chief judge through January 1, 2016.

Judicial Vacancies

The bill amends the law concerning the filling of judicial vacancies. The bill requires the Chief Justice of the Supreme Court to provide notice of a vacancy in the office of district court judge or district magistrate court judge to the chairperson of the district judicial nominating commission in such district not later than 120 days following the date the vacancy occurs or will occur. Once the nominating commission has submitted the required number of nominations to the Governor, the bill increases from 30 to 60 the number of days within which the Governor must make an appointment. Similarly, the bill increases from 30 to 60 the number of days within which the Chief Justice must make an appointment if the Governor fails to make an appointment within the allotted time.

In judicial districts where judges are elected, the bill requires the Clerk of the Supreme Court to provide notice of a vacancy in the office of district court judge to the Governor not later than 120 days following the date the vacancy occurs or will occur. Further, the bill increases from 60 to 90 the number of days within which the Governor must make an appointment following receipt of such notice.

Judicial Branch—FY 2016 and FY 2017 Appropriations, Electronic Filing and Management Fund, Docket Fee Fund, Judicial Branch Surcharge Sunset Extension, Dispositive Motion Filing Fee; HB 2005

HB 2005 appropriates \$131.2 million, including \$101.9 million from the State General Fund in FY 2016, and \$138.5 million, including \$105.7 million from the State General Fund, in FY 2017 all from the State General Fund, for Judicial Branch operations. Additionally, the bill creates or amends law related to docket fees, dispositive motion filing fees, and the Electronic Filing and Management Fund.

The provisions of the bill are non-severable internally and non-severable from the provisions of 2014 Senate Sub. for HB 2338, unless the appropriations to the Judicial Branch for FY 2016 or FY 2017 are reduced below the amounts appropriated in the bill by another act of the 2015 or 2016 regular session of the Legislature.

Appropriations

FY 2016. The bill appropriates \$131.2 million, including \$101.9 million from the State General Fund (an SGF reduction of \$18.0 million, or 12.3 percent, from the FY 2016 Judicial Branch budget request). The bill adds \$5.2 million, all from the State General Fund, to the FY 2016 Governor's recommendation. The bill extends the authority from FY 2015 into FY 2016 for the Chief Justice to transfer funds from the Electronic Filing and Management Fund to the Judicial Branch Docket Fee Fund with notice provided to the Director of Legislative Research.

Major changes include:

- An increase of \$3.5 million, all from the State General Fund, for reduced docket fee and DUI Reinstatement Fee revenue in FY 2016;
- An increase of \$2.5 million, all from the State General Fund, for employer retirement contributions and other fringe benefit costs;
- An increase of \$156,000 for contractual services expenditures for in-state travel, training, and Office of Information Technology Services (OITS) fees; and
- A reduction of \$1.1 million, including \$882,275 from the State General Fund, for implementation of SB 228, which reduces employer contributions for employee retirement.

FY 2017. The bill appropriates \$138.5 million, including \$105.7 million from the State General Fund (an SGF reduction of \$20.9 million, or 13.1 percent, from the FY 2017 Judicial Branch budget request). The bill adds \$9.0 million, all from the State General Fund, to the FY 2017 Governor's recommendation.

Major changes include:

- An increase of \$4.5 million, all from the State General Fund, for reduced docket fee and DUI Reinstatement Fee revenue;
- An increase of \$2.1 million, all from the State General Fund, for employer retirement contributions and other fringe benefit costs;
- An increase of \$4.1 million, all from the State General Fund, for expenditures related to the 27th payroll; and
- A reduction of \$2.1 million, including \$1.8 million from the State General Fund, for implementation of SB 228, which reduces employer contributions for employee retirement.

Statutory Fee and Fund Provisions

The bill extends for two years, until June 30, 2017, the Judicial Branch surcharge the Legislature authorized in 2010 Senate Sub. for HB 2476 to fund non-judicial personnel.

The bill also extends, from 2017 to 2018, a provision directing the first \$3.1 million collected in docket fee revenues to the Electronic Filing and Management Fund, and delays, from 2018 until 2019, a provision reducing this amount to \$1.0 million.

The bill creates a dispositive motion filing fee of \$195 and defines “dispositive motion” to include a motion to dismiss, a motion for judgment on the pleadings, a motion for summary judgment or partial summary judgment, or a motion for judgment as a matter of law. The fee will be applied to any motion seeking any of these dispositions, regardless of the title of the motion. The fee will not apply in limited actions under Chapter 61 (Kansas Statutes Annotated), and the State of Kansas and municipalities are exempt from paying the fee. The fee may be taxed as a cost, and a poverty affidavit is allowed in lieu of the fee.

The bill strikes the previously-existing filing fee for motions for summary judgment.

(Note: The bill appears to raise the docket fee for a petition for expungement, but this change is continuing law, enacted by 2014 Senate Sub. for HB 2338 and included in this bill to reconcile different versions of the statutes in which the provision appears.)