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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 memorandum 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). According to KSA 2019 Supp. 60-4104, certain conduct can lead to civil asset forfeiture even without prosecution or conviction. Such conduct includes, but is not limited to: theft, prostitution, human trafficking, and forgery. According to KSA 2019 Supp. 60-4105, every kind of property used during such conduct giving rise to forfeiture, or obtained as a result of conduct giving rise to forfeiture, is subject to forfeiture.

There are certain exceptions provided in KSA 2019 Supp. 60-4106. For example, KSA 2019 Supp. 60-4106(a)(1) provides real property or interests in real property cannot be seized unless the conduct leading to forfeiture is a felony. KSA 2019 Supp. 60-4106(a)(3) provides 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 a court, if they have probable cause to believe the property is subject to forfeiture under the statutes, or constructively, with notice (KSA 2019 Supp. 60-4107). Under KSA 2019 Supp. 60-4107(d), the seizing agency must make reasonable efforts within 30 days of the seizure of property to give notice of such 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 either, will represent the Kansas law enforcement agency in a forfeiture action. KSA 2019 Supp. 60-4107(g)-(j) provides procedures the law enforcement agency must follow to secure representation in such a proceeding. The 2018 Legislature amended this section to provide when 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. Such 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 2019 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 2019 Supp. 60-4109(a)(1)).

Under KSA 2019 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 2019 Supp. 60-4109(a)(2), if the owner files a petition for exemption to forfeiture under KSA 2019 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 2019 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 long as it contains certain information.

Burden of Proof and Court Findings

Under KSA 2019 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. The burden of proof then 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 2019 Supp. 60-4113(i)). However, under KSA 2019 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.

In February 2019, in the case *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the U.S. Supreme Court held the excessive fines clause of the Eighth Amendment is an incorporated protection applicable to states under the Fourteenth Amendment's due process clause and, based on its previous decision in *Austin v. United States*, 113 S. Ct. 602 (1993), rejected Indiana's argument that civil *in rem* forfeitures do not fall within the excessive fines clause. Thus, a state civil forfeiture may not violate the Eighth Amendment prohibition on excessive fines. However, the *Timbs* decision did not address what level of civil forfeiture would constitute an excessive fine, and it is not yet clear how the analysis of this question would compare to the proportionality analysis required under KSA 2019 Supp. 60-4106(c).

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 2019 Supp. 60-4117(a)(1) and (a)(2)). The law enforcement agency may also sell the property. KSA 2019 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 2019 Supp. 60-4117(a)(3)(B)).

Under KSA 2019 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 allowing 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

Legislation passed in 2018 (HB 2459) required the Kansas Bureau of Investigation (KBI) to establish, on or before July 1, 2019, the Kansas Asset Seizure and Forfeiture Repository to gather information concerning each seizure for forfeiture made by a seizing agency pursuant to SASFA. The information gathered must include, but is not 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 location, date, and time of the seizure and a description of the initiating law enforcement activity leading to the seizure;
- 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.

The KBI has established a website, <https://kasfr.kbi.ks.gov>, to facilitate the submission of the required reports and to make information from the reports publicly available.

Recent Kansas Legislation

2019 HB 2193

The bill sought to amend K.S.A. 2019 Supp. 60-4112, which explains judicial forfeiture provisions. The bill would have precluded civil proceedings when there was an acquittal or dismissal in a criminal proceeding, and made discovery delays available pending appeal by the defendant in a civil proceeding during a related criminal proceeding alleging the same conduct. Additionally, the bill would have required that when a person with criminal charges related to the conduct giving rise to the forfeiture was acquitted of the criminal charge, or the criminal charge was dismissed, the seized property would be returned in the same condition the property was in when it was seized. The bill was referred to Committee on Judiciary and died in such Committee.

2018 HB 2459

The 2018 Legislature amended several provisions within SASFA to adjust procedural and timing requirements and created a new section of law requiring 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 memorandum) 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 broad discretion over the use of forfeiture proceeds could create a risk of use for operating funds, certain agencies had conflicts of interest or lacked controls for drug buys, and 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 2019 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.