Kansas and Federal Civil Procedure Updates

Lumen Mulligan
Associate Dean for Faculty
and Professor of Law

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University of Kansas School of Law

Recent Developments CLE – Kansas and Federal Civil Pro. Updates
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Prof. Lumen Mulligan

Chapter 60 Cases and Statutory Amendments of Note

60-203. Commencement of action

Cases

Addressing K.S.A. 60-203(a), the supreme court held that plaintiff's motion for additional time for service, 115 days after suing, untimely. The court emphasized that 60-203(a) relies on the word "extend" and a court cannot "extend" a deadline after it has passed because there is nothing left to extend. Hence, the statute of limitations barred plaintiff's claims because the district court could not extend the 90-day timeframe after it had expired. *Read v. Miller*, 247 Kan. 557, 802 P.2d 528 (1990).

In *Scott v. Ewing*, — P.3d —, 2019 WL 847675 (Kan. Ct. App. Feb. 22, 2019), the court of appeals held that K.S.A. 60-203(a)'s requirement to move for—see *Read v. Miller*, 247 Kan. 557, 802 P.2d 528 (1990)—and be granted—see *Tharp v. Lee*, 32 Kan. App. 2d 628, 87 P.3d 323 (2004)—an extension for service before the 90-day timeline expires does not apply to motions to amend under K.S.A. 60-215(a)(2). The *Scott* court further held that a motion to amend filed before the statute of limitations runs tolls further running of the statute when the statute would otherwise have run while the parties await the district court's ruling. This result follows because 60-215(a)(2) puts no timeline upon the district court's decision to grant leave to amend.

60-206. Time, computation and extension; accessibility of court; definitions

Cases

Plaintiff's tort claim, resulting from negligent use of fireworks, accrued on July 4, 2015. The two-year statute of limitations expired, therefore, on July 5, 2017, because K.S.A. 60-206(a)(1)(C) states that if a time period ends on a legal holiday the temporal period extends to the next day that is not a Saturday, Sunday, or legal holiday. *Scott v. Ewing*, — P.3d —, 2019 WL 847675 (Kan. Ct. App. Feb. 22, 2019).

60-211. Signing of pleadings, motions and other papers; representations to the court; sanctions

Cases

The prevailing objector in a derivative class action sought an "incentive fee or expense reimbursement." The court of appeals noted that, under Kansas law, courts may award attorney

fee only when given statutory authority or by agreement of the parties. Here, the objector did not rely upon explicit statutory authority or party agreement in making his request; therefore, no award was made. But, in dicta, the court of appeals posited that the objector could have sought attorney fees for abuse of judicial process under K.S.A. 60-211(c). *Ross-Williams on behalf of Sprint Nextel Corp. v. Bennett,* 55 Kan. App. 2d 524, 419 P.3d 608 (2018), review denied (Nov. 21, 2018).

60-212. Defenses and objections; presentations, when and how; certain motions; waiver

Cases

The federal Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C.A. § 1408(c)(4), does not deprive Kansas state courts of subject-matter jurisdiction. Rather, it preempts state long-arm jurisdiction. This results in the limiting of the exercise of personal jurisdiction to the state of the service member's residence, other than because of military assignment, of the service member's domicile, or where the service member consents to the jurisdiction of the court. In this case, the service member consented to personal jurisdiction in Kansas by failing to timely object to personal jurisdiction under K.S.A. 60-212(h). *Matter of Marriage of Williams*, 307 Kan. 960, 417 P.3d 1033 (2018).

60-215. Amended and supplemental pleadings

Cases

In *Scott v. Ewing*, — P.3d —, 2019 WL 847675 (Kan. Ct. App. Feb. 22, 2019), the court of appeals held that K.S.A. 60-203(a)'s requirement to move for—see *Read v. Miller*, 247 Kan. 557, 802 P.2d 528 (1990)—and be granted—see *Tharp v. Lee*, 32 Kan. App. 2d 628, 87 P.3d 323 (2004)—an extension for service before the 90-day timeline expires does not apply to motions to amend under K.S.A. 60-215(a)(2). The *Scott* court further held that a motion to amend filed before the statute of limitations runs tolls further running of the statute when the statute would otherwise have run while the parties await the district court's ruling. This result follows because 60-215(a)(2) puts no timeline upon the district court's decision to grant leave to amend.

60-217. Parties; Capacity

Cases

As an *Erie* guess embodied in part of a res judicata analysis, the federal district court held that under Kansas law governmental employees sued in their individual capacity are not in privity with their governmental employer. *Klaassen v. Atkinson*, 348 F. Supp. 3d 1106, 1162 (D. Kan. 2018).

60-223a. Derivative actions

Cases

As it relates to standing, the plain text of K.S.A. 60-223a(b)(1) does not require that the objector continue to be a shareholder or member after the filing of a derivative action. The text only requires that the objector was a shareholder or member at the time of the transaction complained of in the verified petition. *Ross-Williams on behalf of Sprint Nextel Corp. v. Bennett,* 55 Kan. App. 2d 524, 419 P.3d 608 (2018), review denied (Nov. 21, 2018).

In Kansas, courts do not have the free-standing equitable power to award attorney fees; they require statutory authority or an agreement by the parties to make such an award. Unlike K.S.A. 60-223(h)—which allows for the award of reasonable attorney fees in class actions—there is no provision in K.S.A. 60-223a allowing courts to award attorney fees in derivative class actions. As such, attorney fees may only be award by agreement of the parties in the derivative-class-action setting. *Ross-Williams on behalf of Sprint Nextel Corp. v. Bennett,* 55 Kan. App. 2d 524, 419 P.3d 608 (2018), review denied (Nov. 21, 2018).

K.S.A. 60-223a(d) requires that a district court independently scrutinize proposed settlements of a derivative action to determine whether it is reasonable and fair. In conducting this examination of proposed settlements, the district court need not look to a specific list of factors, but rather it performs a logical and independent analysis of all of the relevant circumstances affecting a particular settlement. That said, this scrutiny of proposed settlements generally must examine the surrounding circumstances that led to the settlement, looking for indicia of fraud or collusion. Moreover, in evaluating fairness and reasonableness, the district court should place special weight on the net benefit to the corporation or unincorporated association, including pecuniary and non-pecuniary elements. To that end, the district court must be particularly diligent in exercising its duty to scrutinize a proposed settlement in a derivative action that includes an award of attorney fees but does not include monetary relief for the corporation and its shareholders or the unincorporated association and its members. *Ross-Williams on behalf of Sprint Nextel Corp. v. Bennett,* 55 Kan. App. 2d 524, 419 P.3d 608 (2018), review denied (Nov. 21, 2018).

Kansas appellate courts review a district court's approval of a settlement in a derivative action under an abuse of discretion standard. *Ross-Williams on behalf of Sprint Nextel Corp. v. Bennett,* 55 Kan. App. 2d 524, 419 P.3d 608 (2018), review denied (Nov. 21, 2018).

In a derivative action in which the parties agree to an award of attorney fees, the district court must determine the reasonableness of the requested attorney fees in light of the eight factors set forth in Kansas Rules of Professional Conduct 1.5(a) (2018 Kan. S. Ct. R. 294). Appellate courts review both the district court's determination of the reasonableness of requested attorney fees as well as the actual award of attorney fees under an abuse of discretion standard. *Ross-Williams on behalf of Sprint Nextel Corp. v. Bennett,* 55 Kan. App. 2d 524, 419 P.3d 608 (2018), review denied (Nov. 21, 2018).

60-225. Substitution of parties

Cases

Here, the wife passed before her counsel submitted a journal entry memorializing the settlement agreement in a separate maintenance action with her husband. The district court granted the wife's adult son's motion to serve as a substitute party in the action. The court of appeals reversed. It ruled that the death of either spouse in a divorce or separate maintenance action, if it occurs before the filing of the journal entry, terminates the action. The death causes the district court to lose jurisdiction and any pending property settlement agreements, agreed to as part of the divorce or separate maintenance action, become void. As such, K.S.A. 60-225(a) does not empower the substitution of a party in such an action, because K.S.A. 60-1801 does not declare that divorce or separation maintenance survives death of a party. *Matter of Marriage of Towle & Legare*, — P.3d —, 2019 WL 1213184 (Kan. Ct. App. Mar. 15, 2019).

60-235. Physical and mental examinations

Cases

If whether a person is an heir is contested in a probate proceeding, the district court has the authority to order DNA testing to help determine the contested issue. *Matter of Estate of Fechner*, 56 Kan. App. 2d 519, 432 P.3d 93 (2018).

60-237. Compelling discovery; failure to comply; sanctions; failure to preserve electronically stored information

Cases

K.S.A. 60-237 does not permit post-criminal-conviction discovery. *State v. Robinson,* 309 Kan. 159, 432 P.3d 75 (2019).

60-256. Summary judgment; filing fee

Cases

Generally, granting summary judgment in negligence cases must be done with caution; but an exception applies when the only question presented is one of law. *Manley v. Hallbauer*, 308 Kan. 723, 423 P.3d 480 (2018).

When the evidence pertaining to the existence of a contract, or the content of its terms, is conflicting or permits more than one inference, a question of fact is presented. Whether undisputed facts establish the existence and terms of a contract, however, raises a question of law for the court's determination. On these facts, there arose a genuine issue of material fact regarding whether the legal malpractice insurer's issuance of a reservation of rights letter was untimely. *Becker v. The Bar Plan Mut. Ins. Co*., 308 Kan. 1307, 429 P.3d 212 (2018).

60-258. Entry of judgment

Cases

Here, the wife passed before her counsel submitted a journal entry memorializing the settlement agreement in a separate maintenance action with her husband. The district court granted the wife's adult son's motion to serve as a substitute party in the action. The court of appeals reversed. It ruled that the death of either spouse in a divorce or separate maintenance action, if it occurs before the filing of the journal entry, terminates the action. The death causes the district court to lose jurisdiction and any pending property settlement agreements, agreed to as part of the divorce or separate maintenance action, become void. As such, K.S.A. 60-225(a) does not empower the substitution of a party in such an action, because K.S.A. 60-1801 does not declare that divorce or separation maintenance survives death of a party. *Matter of Marriage of Towle & Legare*, — P.3d —, 2019 WL 1213184 (Kan. Ct. App. Mar. 15, 2019).

Defendant was convicted of three counts of theft in 2003. He was also ordered to pay $8,450 in restitution as part of his sentence. In 2017, criminal defendant filed a motion with the district court to release his judgment because it had remained dormant for the statutory period of seven years, which the district court granted. The state appealed. The court of appeals held that the state's notice of appeal, filed 27 days after trial court filed its journal entry of decision to release the restitution judgment, was timely. Although criminal defendant argued that the restitution judgment stemmed from criminal case with a 14-day appeal period, the appellate court held that dormant restitution judgments were governed by civil procedure statutes, and thus were subject to a 30-day appeal period for civil actions. *State v. Dwyer*, — P.3d —, 2019 WL 1213186 (Kan. Ct. App. Mar. 15, 2019).

60-261. Harmless error

Cases

A defendant who appeals the admission of a witness' testimony about the defendant's other crimes or civil wrongs under K.S.A. 60-455 without challenging the same or similar testimony admitted through other witnesses, when the unchallenged testimony is as prejudicial as the contested testimony, is not entitled to reversal. Any error arising out of the admission of the contested testimony is harmless. *State v. Anderson*, 308 Kan. 1251, 427 P.3d 847 (2018).

In a "cumulative error" analysis, if any of the errors being aggregated are constitutional in nature, the cumulative error must be harmless beyond a reasonable doubt. *State v. Williams*, 308 Kan. 1439, 430 P.3d 448 (2018).

In *Reverse Mortg. Sols., Inc. v. Goldwyn*, 56 Kan. App. 2d 129, 425 P.3d 617 (2018), the district court initially granted a motion to confirm the sheriff's sale of real property before the time for other parties to respond had expired, which constituted error. Nevertheless, the district court held a hearing later on a motion to reconsider its sheriff's-sale order. Because the district court's substantive ruling was not an abuse of discretion on the merits, and it ultimately gave all parties the chance to be heard, the court of appeals held that the district court's initial error in approving the sheriff's sale harmless.

60-304. Service of process, on whom made

Proposed Legislation. PASSED HOUSE. IN SENATE JUD. COMMITTEE APR. 24, 2019

2019 Kansas House Bill No. 2105, Kansas Eighty-Eighth Legislature 2019 Regular Session

Sec. 50. K.S.A. 2018 Supp. 60-304 is hereby amended to read as follows:

60-304. As used in this section, "serving" means making service by any of the methods described in K.S.A. 60-303, and amendments thereto, unless a specific method of making service is prescribed in this section. Except for service by publication under K.S.A. 60-307, and amendments thereto, service of process under this article must be made as follows:
(a) Individual. On an individual other than a minor or a disabled person, by serving the individual or by serving an agent authorized by appointment or by law to receive service of process. If the agent is one designated by statute to receive service, such further notice as the statute requires must be given. Service by return receipt delivery must be addressed to an individual at the individual's dwelling or usual place of abode and to an authorized agent at the agent's usual or designated address. If the sheriff, party or party's attorney files a return of service stating that the return receipt delivery to the individual at the individual's dwelling or usual place of abode was refused or unclaimed and that a business address is known for the individual, the sheriff, party or party's attorney may complete service by return receipt delivery, addressed to the individual at the individual's business address.
(b) Minor. On a minor, by serving:
(1) The minor; and
(2) either:
(A) The minor's guardian or conservator, if the minor has one within this state;
(B) the minor's father, mother or other person having the minor's care or control or with whom the minor resides; or
(C) if service cannot be made as specified in paragraphs (A) or (B), as provided by order of the court.
Service by return receipt delivery must be addressed to an individual at the individual's dwelling or usual place of abode and to a corporate guardian or conservator at the guardian's or conservator's usual place of business.
(c) Disabled person. On a disabled person, as defined in K.S.A. 77-201, and amendments thereto, by:
(1) Serving:
(A) The person's guardian, conservator or a competent adult member of the person's family with whom the person resides;
(B) if the person resides in an institution, the director or chief executive officer of the institution; or
(C) if service cannot be made as specified in paragraphs (A) or (B), as provided by order of the court; and
(2) unless the court otherwise orders, serving the disabled person.

Service by return receipt delivery must be addressed to the director or chief executive officer of an institution at the institution, to any other individual at the individual's dwelling or usual place of abode, and to a corporate guardian or conservator at the guardian's or conservator's usual place of business.

(d) Governmental bodies. On:

(1) A county, by serving one of the county commissioners, the county clerk or the county treasurer;

(2) a township, by serving the clerk or a trustee;

(3) a city, by serving the clerk or the mayor;

(4) any other public corporation, body politic, district or authority, by serving the clerk or secretary or, if the clerk or secretary is not found, any officer, director or manager thereof; and

(5) the state or any governmental agency of the state, when subject to suit, by serving the attorney general or an assistant attorney general.

Service by return receipt delivery must be addressed to the appropriate official at the official's governmental office. Income withholding orders for support and orders of garnishment of earnings of state officers and employees must be served on the state or governmental agency of the state in the manner provided by K.S.A. 60-723, and amendments thereto.

(e) Corporations, domestic or foreign limited liability companies, domestic or foreign limited partnerships, domestic or foreign limited liability partnerships and partnerships. On a domestic or foreign corporation, domestic or foreign limited liability company, domestic or foreign limited partnership, domestic or foreign limited liability partnership or a partnership or other unincorporated association that is subject to suit in a common name, by:

(1) Serving an officer, manager, partner or a resident, managing or general agent;

(2) leaving a copy of the summons and petition or other document at any of its business offices with the person having charge thereof; or

(3) serving any agent authorized by appointment or by law to receive service of process, and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Service by return receipt delivery on an officer, partner or agent must be addressed to the person at the person's usual place of business.

(f) Resident agent for a corporation, limited liability company, limited partnership or limited liability partnership. A domestic corporation, domestic limited liability company or domestic limited partnership, and, if it is authorized to transact business or transacts business without authority in this state, a foreign corporation, foreign limited liability company or foreign limited partnership irrevocably authorizes the secretary of state as its agent to accept on its behalf service of process, or any notice or demand required or permitted by law to be served on it, when: (1) It fails to appoint or maintain in this state a resident agent on whom service may be had; or (2) its resident agent cannot with reasonable diligence be found at the registered office in this state. Service on the secretary of state of any process, notice or demand must be made by delivering to the secretary of state, by personal service or by return receipt delivery, the original and two copies of the process and two copies of the petition, notice or demand. When any process, notice or demand is served on the secretary of state, the secretary must promptly forward a copy of it by return receipt delivery, addressed to the corporation, limited liability company or limited partnership at its principal office as it appears in the records of the secretary of state, or at the registered or principal office of the corporation, limited liability company or limited partnership in the state of its incorporation or formation. The secretary of state must keep a record of all

processes, notices and demands served on the secretary under this subsection, and must record the time of the service and the action taken by the secretary. A fee of $40 must be paid to the secretary of state by the party requesting the service of process, to cover the cost of serving process, except the secretary of state may waive the fee for state agencies. The fee must not be included in or paid from any deposit as security for costs or the docket fee required by K.S.A. 60-2001 or 61-4001, and amendments thereto.

(g) Insurance companies or associations. Service of summons or other process on any insurance company or association, organized under the laws of this state, may also be made by serving the commissioner of insurance in the same manner as provided for service on foreign insurance companies or associations.

(h) Service on an employee. If a party or a party's agent or attorney files an affidavit or a declaration pursuant to K.S.A. 53-601, and amendments thereto, that to the best of the affiant's or declarant's knowledge and belief the person to be served is employed in this state, and is a nonresident or that the place of residence of the person is unknown, the affiant or declarant may request that the sheriff or other duly authorized person direct an officer, partner, managing or general agent or the individual having charge of the place at which the person to be served is employed, to make the person available to permit the sheriff or other duly authorized person to serve the summons or other process.

(i) Service on a series of a limited liability company. On a series established under a domestic or foreign limited liability company by service on such domestic or foreign limited liability company in the same manner as described in subsections (e) and (f), but if service is made on the resident, managing, general or other agent of the limited liability company upon which service may be made or the secretary of state on behalf of any such series, such service shall include the name of the limited liability company and the name of such series.

60-308. Service outside state

The federal Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C.A. § 1408(c)(4), does not deprive Kansas state courts of subject-matter jurisdiction. Rather, it preempts state long-arm jurisdiction. This results in the limiting of the exercise of personal jurisdiction to the state of the service member's residence, other than because of military assignment, of the service member's domicile, or where the service member consents to the jurisdiction of the court. In this case, the service member consented to personal jurisdiction in Kansas by failing to timely object to personal jurisdiction under K.S.A. 60-212(h). *Matter of Marriage of Williams*, 307 Kan. 960, 417 P.3d 1033 (2018).

Article 4. Rules of Evidence

60-401. Definitions

Cases

Criminal defendant's musical preferences are irrelevant to the issue credibility of his statement that he request his trial attorney to enter a timely appeal. Similarly, his tattoos and brands were irrelevant to the issue of the defendant’s credibility regarding whether he told his attorney he wanted to appeal his life sentence. *State v. Smith*, 308 Kan. 778, 785, 423 P.3d 530, 536 (2018).

60-404. Effect of erroneous admission of evidence

On appeal from summary judgment ruling that not-for-profit corporation that operated county hospital was a public agency subject to the Kansas Open Records Act (KORA), the Supreme Court exercised its discretion to address the state's argument, raised for the first time on review in the high court, that county hospital was an instrumentality of political and taxing subdivision of the state. Because this instrumentality argument was not evidentiary in nature, K.S.A. 60-404's preservation provisions did not apply. *State v. Great Plains of Kiowa Cty., Inc.*, 308 Kan. 950, 425 P.3d 290 (2018).

60-405. Effect of erroneous exclusion of evidence

In attorney disciplinary proceeding, respondent-attorney failed to preserve for review his claim that reports of attorneys who investigated complaints against him were fell under a hearsay exception and that the failure to admit these reports violated due process. *Matter of Crandall*, 308 Kan. 1526, 430 P.3d 902 (2018)

60-409. Facts which must or may be judicially noticed

In determining criminal defendant's credibility as to whether he told his attorney he wanted to appeal his life sentence, trial court could not properly consider the issue of defendant's musical preferences, where the issue had never been mentioned before the court, there was no evidence in the record to point to what defendant's musical preferences might have been at the time in question, and there was no effort made by the court to take judicial notice. *State v. Smith*, 308 Kan. 778, 423 P.3d 530 (2018).

60-410. Determination as to propriety of judicial notice and tenor of matter noticed

In determining criminal defendant's credibility as to whether he told his attorney he wanted to appeal his life sentence, trial court could not properly consider the issue of defendant's musical preferences, where the issue had never been mentioned before the court, there was no evidence in the record to point to what defendant's musical preferences might have been at the time in question, and there was no effort made by the court to take judicial notice. Similarly, the trial court could not properly consider prison records, sua sponte requested, containing list and photographs of defendant's "tattoos and brands" because there was no mention of tattoos or brands during the hearings. *State v. Smith*, 308 Kan. 778, 423 P.3d 530 (2018).

60-412. Judicial notice in proceedings subsequent to trial

In determining criminal defendant's credibility as to whether he told his attorney he wanted to appeal his life sentence, the trial court could not properly consider prison records, sua sponte requested, containing list and photographs of defendant's "tattoos and brands" because there was no mention of tattoos or brands during hearings, and judge made no attempt to meet substantive or procedural requirements of judicial notice. *State v. Smith*, 308 Kan. 778, 423 P.3d 530 (2018).

60-455. Other crimes or civil wrongs

A defendant who appeals the admission of a witness' testimony about the defendant's other crimes or civil wrongs under K.S.A. 60-455 without challenging the same or similar testimony admitted through other witnesses, when the unchallenged testimony is as prejudicial as the contested testimony, is not entitled to reversal. Any error arising out of the admission of the contested testimony is harmless. *State v. Anderson*, 308 Kan. 1251, 427 P.3d 847 (2018).

Evidence of discord in a marital relationship that does not amount to a crime or civil wrong is not subject to the limitations of K.S.A. 60-455. *State v. Campbell*, 308 Kan. 763, 423 P.3d 539 (2018).

A trial court's failure to provide a limiting instruction on the evidence in defendant's stipulation to a prior felony conviction, as required by K.S.A. 60-455, was not clear error and did not prejudice defendant, during prosecution for first-degree murder. This result follows because the weight of the evidence of defendant's guilt was strong, the stipulation merely told the jury that the defendant had a prior felony conviction, and the stipulation did not specify the crime or provide details of the circumstances of the crime. *State v. Sims*, 308 Kan. 1488, 431 P.3d 288 (2018).

60-456. Testimony in form of opinion or inferences

When a district court permits a witness to testify as an expert, the court cannot regulate the factors or mental process used by the expert in reaching his opinion or conclusion on the case; rather, the factors and mental processes used by the expert can only be challenged by cross-examination testing the witness' credibility. *Castleberry v. DeBrot*, 308 Kan. 791, 424 P.3d 495 (2018).

In *Matter of Cone*, — Kan. —, 435 P.3d 45 (Kan. 2019), the Kansas supreme court provides a sound overview of the Daubert standard and its application under revised K.S.A. 60-456(b).

60-473. Peer support counseling session communication privilege; emergency services personnel and law enforcement personnel

New statutory text:

(a) For the purposes of this section:
(1) "Emergency services personnel" means any employee or volunteer of an emergency services provider who is engaged in providing or supporting firefighting, dispatching services and emergency medical services.
(2) "Emergency services provider" means any public employer that employs persons to provide firefighting, dispatching services and emergency medical services.
(3) "Employee assistance program" means a program established by a law enforcement agency ~~or~~, emergency services provider or the Kansas national guard to provide professional counseling or support services to employees of a law enforcement agency, emergency services provider,

national guard member or a professional mental health provider associated with a peer support team.
(4) "Law enforcement agency" means any public agency that employs law enforcement officers.
(5) "Law enforcement personnel" means a law enforcement officer, as defined in K.S.A. 22-2202 or 74-5602, and amendments thereto, an employee or volunteer of a law enforcement agency.
(6) "National guard member" means a regularly enlisted, officer or civilian member of the Kansas national guard.
(7) "Peer support counseling session" means any session conducted by a peer support specialist that is called or requested in response to a critical incident or traumatic event involving the personnel of the law enforcement agency ~~or,~~ emergency services provider or the Kansas national guard.
(~~7~~)(8) "Peer support specialist" is a person:
(A) Designated by a law enforcement agency, emergency services provider, the Kansas national guard, employee assistance program or peer support team leader to lead, moderate or assist in a peer support counseling session;
(B) who is a member of a peer support team; and
(C) has received training in counseling and providing emotional and moral support to law enforcement officers ~~or,~~ emergency services personnel or national guard members who have been involved in emotionally traumatic incidents by reason of their employment.
(~~8~~)(9) "Peer support team" means a group of peer support specialists serving one or more law enforcement providers or emergency services providers.
(b) Any communication made by a participant or peer support specialist in a peer support counseling session pursuant to this section, and any oral or written information conveyed in or as the result of the peer support counseling session, are confidential and may not be disclosed by any person participating in the peer support counseling session.
(c) Any communication relating to a peer support counseling session made confidential under subsection (b) that is made between peer support specialists, between peer support specialists and the supervisors or staff of an employee assistance program, or between the supervisors or staff of an employee assistance program, is confidential and may not be disclosed.
(d) The provisions of this section apply only to peer support counseling sessions conducted by a peer support specialist.
(e) (1) The provisions of this section apply to all oral communications, notes, records and reports arising out of a peer support counseling session.
~~(~~2) Any notes, records or reports arising out of a peer support counseling session shall not be public records and shall not be subject to the open records act, K.S.A. 45-215 et seq., and amendments thereto. The provisions of this paragraph shall ~~expire on July 1, 2020 2024, unless the legislature acts to reenact such provisions. The provisions of this paragraph shall be reviewed by the legislature prior to July 1, 2020 2024~~ not be required to be reviewed by the legislature and shall not expire in accordance with K.S.A. 45-229, and amendments thereto.
~~(3) Any notes, records or reports arising out of a peer support counseling session relating to national guard members shall be confidential and exempt from the open records act, K.S.A. 45-215 et seq., and amendments thereto. The provisions of this paragraph shall expire on July 1, 2024, unless the legislature acts to reenact such provisions prior to July 1, 2024.~~
(f) Any communication made by a participant or peer support specialist in a peer support counseling session subject to this section, and any oral or written information conveyed in a peer support counseling session subject to this section, are not admissible in any judicial proceeding,

administrative proceeding, arbitration proceeding or other adjudicatory proceeding. Communications and information made confidential under this section shall not be disclosed by the participants in any judicial proceeding, administrative proceeding, arbitration proceeding or other adjudicatory proceeding. The limitations on disclosure imposed by this subsection include disclosure during any discovery conducted as part of an adjudicatory proceeding.

(g) Nothing in this section limits the discovery or introduction into evidence of knowledge acquired by any law enforcement personnel or emergency services personnel from observation made during the course of employment, or material or information acquired during the course of employment, that is otherwise subject to discovery or introduction into evidence.

(h) This section does not apply to any:

(1) Threat of suicide or criminal act made by a participant in a peer support counseling session, or any information conveyed in a peer support counseling session relating to a threat of suicide or criminal act;

(2) information relating to abuse of spouses, children or the elderly, or other information that is required to be reported by law;

(3) admission of criminal conduct;

(4) disclosure of testimony by a participant who received peer support counseling services and expressly consented to such disclosure; or

(5) disclosure of testimony by the surviving spouse or executor or administrator of the estate of a deceased participant who received peer support counseling services and such surviving spouse or executor or administrator expressly consented to such disclosure.

(i) This section does not prohibit any communications between peer support specialists who conduct peer support counseling sessions, or any communications between peer support specialists and the supervisors or staff of an employee assistance program.

(j) This section does not prohibit communications regarding fitness of an employee for duty between an employee assistance program and an employer.

(k) This section shall be a part of and supplemental to article 4 of chapter 60 of the Kansas Statutes Annotated, and amendments thereto.

The 2019 amendments to this act included national guard members within the set of emergency service providers who may claim this privilege.

Article 5. Limitations of Actions

60-513. Actions limited to two years

In *LCL, LLC v. Falen*, 308 Kan. 573, 422 P.3d 1166 (2018), the supreme court held that the filing and recording of a deed omitting the seller's reservation of a mineral interest, at a minimum, clouds the seller's title and causes an immediate, substantial, actionable injury under K.S.A. 60-513(b). Abrogating *Bi-State Dev. Co., Inc. v. Shafer, Kline & Warren, Inc*., 26 Kan. App. 2d 515, 990 P.2d 159 (1999), the supreme court further held that, in this case, whether the substantial injury was "reasonably ascertainable," per K.S.A. 60-513(b), is a question of fact, which is not resolvable as a matter of law under the constructive notice provision in K.S.A. 58-2222.

In a wrongful death suit, minor child plaintiff argued that enforcing a contractually set 1-year statute of limitations, in lieu of the 2-year clock embodied in K.S.A. 60-513(a)(5), ran contrary to Kansas public policy. The federal district court disagreed and enforced the contractually set 1-year limitations period. *M.F. v. ADT, Inc.,* 357 F. Supp. 3d 1116 (D. Kan. 2018).

60-515. Persons under legal disability

The federal district court held that the minority status of minor plaintiff did not toll one-year contractual limitation on child's wrongful death claim. The court so held because a condition precedent to a claim under the Kansas wrongful death statute is that the decedent "might have maintained the action" had they lived. Because the decedent here could not have maintained any action brought more than one year after her death, and prior to the expiration of that year, her recovery was contractually limited to $247.94, minor standing in these same shoes as the decedent was time barred. *M.F. v. ADT, Inc*., 357 F. Supp. 3d 1116, 1135 (D. Kan. 2018).

60-518. New action, when

Cases

K.S.A. 60-518 is applicable to save a Kansas Judicial Review Act action challenging a university promotion and tenure denial, if the action is refiled within six months of dismissal for lack of prosecution. *Harsay v. Univ. of Kansas*, 308 Kan. 1371, 430 P.3d 30 (2018).

60-724. Exceptions

Cases

Here, the Kansas supreme court provides a useful overview of garnishment doctrine within the insurance context. *Geer v. Eby*, 309 Kan. 182, 432 P.3d 1001 (2019).

60-729. Nature of garnishment; fee

Proposed Legislation. Conference bill passed. As of Apr. 24, 2019

2019 Kansas Senate Bill No. 20, Kansas Eighty-Eighth Legislature 2019 Regular Session, 2019 Kansas Senate Bill No. 20, Kansas Eighty-Eighth Legislature 2019 Regular Session

(a) Garnishment is a procedure whereby the wages, money or intangible property of a person can be seized or attached pursuant to an order of garnishment issued by the court under the conditions set forth in the order.
(b) ~~On and after July 1, 2014,~~ Any party requesting an order of garnishment shall pay a fee in the amount of $7.50 to the clerk of the district court.
(c) A poverty affidavit may be filed in lieu of a fee as established in K.S.A. 60-2001, and amendments thereto.
(d) The fee shall be the only costs assessed in each case for services of the clerk of the district court and the sheriff. The fee shall be disbursed in accordance with K.S.A. 20-362, and amendments thereto.
(e) Except as provided further, the fee established in this section shall be the only fee collected or moneys in the nature of a fee collected for the docket fee. Such fee shall only be established by an act of the legislature and no other authority is established by law or otherwise to collect a fee. ~~On and after July 1, 2017 2019, through June 30, 2019 2021,~~ On and after July 1, 2019, through June 30, 2023, the supreme court may impose an additional charge, not to exceed $12.50 per fee, to fund the costs of non-judicial personnel.
(f) The state of Kansas and all municipalities in this state, as defined in K.S.A. 12-105a, and amendments thereto, shall be exempt from paying such fee.

Cases

Here, the Kansas supreme court provides a useful overview of garnishment doctrine within the insurance context. *Geer v. Eby*, 309 Kan. 182, 432 P.3d 1001 (2019).

60-732. Order of garnishment; when garnishment is to attach intangible property other than earnings; effect; administrative fee

Cases

Here, the Kansas supreme court provides a useful overview of garnishment doctrine within the insurance context. *Geer v. Eby*, 309 Kan. 182, 432 P.3d 1001 (2019).

60-905. Temporary injunction; notice, hearing and bond

Prior to 1988, a bond was always required in every case before a temporary injunction could issue. This statutory requirement was the genesis of the so-called "injunction-bond rule." The 1988 amendments carved out an exception to the bond requirement for the state and state agencies. Furthermore, any party may seek a discretionary waiver from the bond requirement.

The statute continues to provide for attorney fees should it be determined that the temporary injunction was wrongfully issued.

As a matter of first impression, the Court of Appeals held that K.S.A. 60-905(b), coupled with the state's litigation conduct, waived sovereign immunity as to the collection of attorney fees in an injunction suit. *State ex rel. Schmidt v. Nye,* — P.3d —, 2019 WL 1412458 (Kan. Ct. App. Mar. 29, 2019). The state, as plaintiff, sought and obtained an ex parte temporary restraining order, which it then converted into a preliminary injunction. The defendants in this action later moved to vacate the preliminary injunction, which the district court granted reasoning that it should not have ordered the injunction in the first instance. The state then moved to voluntary dismiss the suit. Defendants consented, subject to retaining their right to seek attorney fees. The state contended that sovereign immunity barred the collection of attorney fees. The Court of Appeals held, first, that K.S.A. 60-905(b) specifically envisions the state as a party-plaintiff, and the statute empowers district courts to award attorney fees to defendants when temporary injunctions are wrongfully issued. Second, relying upon *Lapides v. Board of Regents of Univ. System of Ga*., 535 U.S. 613, 624, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002), the appellate court held that the state's litigation conduct can waive sovereign immunity.

The 1988 amendments to K.S.A. 60-905(b) "undercuts the injunction-bond rule." *State ex rel. Schmidt v. Nye,* — P.3d —, 2019 WL 1412458 (Kan. Ct. App. Mar. 29, 2019). As one result of that change, the district may award attorney fees under the statute even when no bond was posted. Id.

An award of attorney fees pursuant to K.S.A. 60-905(b) is limited to those actually and proximately resulting from the effect of the temporary injunction itself, as opposed to litigation expenses independent of the temporary injunction. *State ex rel. Schmidt v. Nye,* — P.3d —, 2019 WL 1412458 (Kan. Ct. App. Mar. 29, 2019).

60-1507. Prisoner in custody under sentence

An untimely motion for new trial that asserts ineffective assistance of counsel may be treated as a collateral attack on a judgment. *State v. Jarmon*, 308 Kan. 241, 419 P.3d 591 (2018).

K.S.A. 60-237 does not permit post-criminal-conviction discovery. *State v. Robinson,* 309 Kan. 159, 432 P.3d 75 (2019).

A trial court's order granting a petitioner a new hearing on his motion to collaterally attack his criminal sentence for ineffective assistance of counsel was not a final, appealable decision in petitioner's habeas corpus proceedings. Notwithstanding the fact that the order fully resolved the question of whether petitioner's counsel for his motion to attack his sentence was ineffective, the trial court order did not dispose of the entirety of the merits of the issue in the proceeding, which was whether petitioner's trial counsel during his criminal case was ineffective. *Allison v. State*, 56 Kan. App. 2d 470, 432 P.3d 87 (2018).

A crime victim's recantation of the testimony that formed the basis for the charge against the defendant qualifies as an unusual event that prevented the defendant from raising the issue

previously. When coupled with a colorable claim of actual innocence, this unusual event excuses the procedural bar of successive habeas petitions under K.S.A. 60-1507(c). *Beauclair v. State*, 308 Kan. 284, 419 P.3d 1180 (2018).

The Kansas supreme court applies *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed. 2d 397 (1986), to habeas petitions seeking to overcome the procedural bar of untimeliness under K.S.A. 60-1507(f) with a claim of actual innocence. *Beauclair v. State*, 308 Kan. 284, 419 P.3d 1180 (2018).

The 2016 amendments to 60-1507(f) do not apply retroactively to 60-1507 motions filed before July 1, 2016. Thus, if an untimely motion was filed under K.S.A. 60-1507 before July 1, 2016, and the movant asserts the court should apply the manifest injustice exception to the one-year limitation period imposed in K.S.A. 60-1507(f), the test set out in *Vontress v. State*, 299 Kan. 607, 325 P.3d 1114 (2014), controls. *White v. State*, 308 Kan. 491, 421 P.3d 718 (2018).

60-1801. Survival of actions; what causes of action survive

As a matter of first impression, the supreme court held that a trust and its beneficiaries who have brought a cause of action for a trustee's breach of trust and breach of fiduciary duty may seek punitive damages under K.S.A. 58a-1002(c) from the estate of the trustee. In so holding, the high court overruled the Kansas Court of Appeals on this question. *Alain Ellis Living Tr. v. Harvey D. Ellis Living Tr.*, 308 Kan. 1040, 427 P.3d 9 (2018).

Here, the wife passed before her counsel submitted a journal entry memorializing the settlement agreement in a separate maintenance action with her husband. The district court granted the wife's adult son's motion to serve as a substitute party in the action. The court of appeals reversed. It ruled that the death of either spouse in a divorce or separate maintenance action, if it occurs before the filing of the journal entry, terminates the action. The death causes the district court to lose jurisdiction and any pending property settlement agreements, agreed to as part of the divorce or separate maintenance action, become void. As such, K.S.A. 60-225(a) does not empower the substitution of a party in such an action, because K.S.A. 60-1801 does not declare that divorce or separation maintenance survives death of a party. *Matter of Marriage of Towle & Legare*, — P.3d —, 2019 WL 1213184 (Kan. Ct. App. Mar. 15, 2019).

60-1901. Cause of action

Cases

Defendants in a wrongful death cause, in which decedent committed suicide to cease on-going pain from a negligently performed medical procedure, appealed a causation jury instruction as contrary to K.S.A. 60-1901. The challenged instruction stated: "The plaintiffs claim that Joel Burnette was injured, sustained damages, and died due to the defendants' fault in one or more of the following respects." The supreme court held that the instruction, when coupled with other instructions delivered, correctly communicated the cause-in-fact requirement under Kansas law. *Burnette v. Eubanks*, 308 Kan. 838, 871, 425 P.3d 343, 364 (2018).

Pursuant to the one-action rule, an heir who settles a wrongful death claim in a federal court lawsuit may not seek categorization of the damages recovered in a separate state court wrongful death action. *Heimerman v. Rose*, 307 Kan. 710, 414 P.3d 745 (2018).

In a wrongful death suit, minor child plaintiff argued that enforcing a contractually set 1-year statute of limitations, in lieu of the 2-year clock embodied in K.S.A. 60-513(a)(5), ran contrary to Kansas public policy. The federal district court disagreed and enforced the contractually set 1-year limitations period. *M.F. v. ADT, Inc.,* 357 F. Supp. 3d 1116 (D. Kan. 2018).

60-1902. Plaintiff

Pursuant to the one-action rule, an heir who settles a wrongful death claim in a federal court lawsuit may not seek categorization of the damages recovered in a separate state court wrongful death action. *Heimerman v. Rose*, 307 Kan. 710, 414 P.3d 745 (2018).

Under K.S.A. 60-1902, an "heir-at-law" refers to one who takes property by intestate succession. Pursuant to the Kansas Parentage Act, an acknowledgement of paternity creates a permanent father and child relationship which can only be ended by court order. Such a father is an heir-at-law as a result. Thus, a father by acknowledgement, who is not the biological father, has standing to bring a wrongful death suit on behalf of his deceased child. *Osborn v. Anderson*, 56 Kan. App. 2d 449, 431 P.3d 875 (2018).

60-1903. Cause of action

Cases

K.S.A. 60-1903(c) requires a verdict to be itemized to reflect noneconomic and economic damages. The jury instruction under appellate review inappropriately identified "loss of a complete family" as economic damages, and the evidence at trial did not support the remaining instruction classifying the "[l]oss of attention [and] care" claim as an economic one. As such, the instruction given was in error, and under the facts of this case reversible error. *Burnette v. Eubanks*, 308 Kan. 838, 871, 425 P.3d 343, 364 (2018).

60-1906. Wrongful life or wrongful birth claims; prohibited

In 2018, the Kansas Court of Appeals upheld 60-1906 against the claim that in passing the statute the Legislature violated Sections 5 and 18 of the Kansas Constitution Bill of Rights, which preserve the rights to a jury trial and legal remedy as these rights existed at common law when Kansas' Constitution was first adopted in 1859. The Court of Appeals reasoned that the *Arche* decision was not an extension of an already existing tort claim for medical malpractice that was recognized in 1859. Rather, the new tort of wrongful birth fashioned in *Arche* was based on public policy that sprang into being with *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973). As such, the tort of wrongful birth is not protected from legislative action under Sections 5 or 18. See *Tillman v. Goodpasture*, 56 Kan. App. 2d 65, 424 P.3d 540 (2018).

60-19a02. Personal injury action defined; limitation established; itemization of verdict; no jury instruction on limitation to be given; wrongful death limitation not affected; limited to actions accruing on or after July 1, 1988

K.S.A. 60-1903(c) requires a verdict to be itemized to reflect noneconomic and economic damages. The jury instruction under appellate review inappropriately identified "loss of a complete family" as economic damages, and the evidence at trial did not support the remaining instruction classifying the "[l]oss of attention [and] care" claim as an economic one. As such, the instruction given was in error, and under the facts of this case reversible error. *Burnette v. Eubanks*, 308 Kan. 838, 871, 425 P.3d 343, 364 (2018).

60-2001. Docket fee; authorized only by legislative enactment; poverty affidavit, court review; additional costs; certain sheriff's charges prohibited

Proposed Legislation. Conference bill passed. As of Apr. 24, 2019

2019 Kansas Senate Bill No. 20, Kansas Eighty-Eighth Legislature 2019 Regular Session, 2019 Kansas Senate Bill No. 20, Kansas Eighty-Eighth Legislature 2019 Regular Session

60-2001.

. (a) Docket fee. Except as otherwise provided by law, no case shall be filed or docketed in the district court, whether original or appealed, without payment of a docket fee in the amount of $173 ~~on and after July 1, 2014,~~ to the clerk of the district court. Except as provided further, the docket fee established in this subsection shall be the only fee collected or moneys in the nature of a fee collected for the docket fee. Such fee shall only be established by an act of the legislature and no other authority is established by law or otherwise to collect a fee. ~~On and after July 1, 2017 2019, through June 30, 2019 2021,~~ On and after July 1, 2019, through June 30, 2023, the supreme court may impose an additional charge, not to exceed $22 per docket fee, to fund the costs of non-judicial personnel.
(b) Poverty affidavit in lieu of docket fee. (1) Effect. In any case where a plaintiff by reason of poverty is unable to pay a docket fee, and an affidavit so stating is filed, no fee will be required. An inmate in the custody of the secretary of corrections may file a poverty affidavit only if the inmate attaches a statement disclosing the average account balance, or the total deposits, whichever is less, in the inmate's trust fund for each month in: (A) The six-month period preceding the filing of the action; or (B) the current period of incarceration, whichever is shorter. Such statement shall be certified by the secretary. On receipt of the affidavit and attached statement, the court shall determine the initial fee to be assessed for filing the action and in no event shall the court require an inmate to pay less than $3. The secretary of corrections is hereby authorized to disburse money from the inmate's account to pay the costs as determined by the court. If the inmate has a zero balance in such inmate's account, the secretary shall debit such account in the amount of $3 per filing fee as established by the court until money is credited to the account to pay such docket fee. Any initial filing fees assessed pursuant to this subsection shall not prevent the court, pursuant to subsection (d), from taxing that individual for the remainder of the amount required under subsection (a) or this subsection.

(2) Form of affidavit. The affidavit provided for in this subsection shall set forth a factual basis upon which the plaintiff alleges by reason of poverty an inability to pay a docket fee, including, but not limited to, the source and amount of the plaintiff's weekly income. Such affidavit shall be signed and sworn to by the plaintiff under oath, before one who has authority to administer the oath, under penalty of perjury, K.S.A. 2018 Supp. 21-5903, and amendments thereto. The form of the affidavit shall be deemed sufficient if in substantial compliance with the form set forth by the judicial council.

(3) Court review; grounds for dismissal; service of process. The court shall review any petition authorized for filing under this subsection. Upon such review, if the court finds that the plaintiff's allegation of poverty is untrue, the court shall direct the plaintiff to pay the docket fee or dismiss the petition without prejudice. Notwithstanding K.S.A. 60-301, and amendments thereto, service of process shall not issue unless the court grants leave following its review.

(c) Disposition of fees. The docket fees and the fees for service of process shall be the only costs assessed in each case for services of the clerk of the district court and the sheriff. For every person to be served by the sheriff, the persons requesting service of process shall provide proper payment to the clerk and the clerk of the district court shall forward the service of process fee to the sheriff in accordance with K.S.A. 28-110, and amendments thereto. The service of process fee, if paid by check or money order, shall be made payable to the sheriff. Such service of process fee shall be submitted by the sheriff at least monthly to the county treasurer for deposit in the county treasury and credited to the county general fund. The docket fee shall be disbursed in accordance with K.S.A. 20-362, and amendments thereto.

(d) Additional court costs. Other fees and expenses to be assessed as additional court costs shall be approved by the court, unless specifically fixed by statute. Other fees shall include, but not be limited to, witness fees, appraiser fees, fees for service of process, fees for depositions, alternative dispute resolution fees, transcripts and publication, attorney fees, court costs from other courts and any other fees and expenses required by statute. All additional court costs shall be taxed and billed against the parties as directed by the court. No sheriff in this state shall charge any mileage for serving any papers or process.

60-2101. Appellate jurisdiction of court of appeals and supreme court; appeal of order of political or taxing subdivision

When an appeal is taken under K.S.A. 60-2101(d), the district court may not substitute its judgment for that of the political or taxing subdivision or agency. The district court's scope of review is limited to deciding whether the board's decision was within the scope of its authority; its decision was substantially supported by the evidence; and it did not act fraudulently, arbitrarily, or capriciously. In this case, the evidence did not support the decision by the board of education, increasing a student's expulsion for making a school-shooting threat to the statutory maximum even though the school superintendent recommended a lesser punishment. Although there was no doubt that the student made a threat against his middle school on social media, other social media posts supported the student's claim that his purported threats were a joke that went too far, that the student accepted responsibility for posting the threat and asked for forgiveness and the opportunity to return to school, that the police investigation concluded that the student could not carry out his threat, and that the board offered no explanation for not following school superintendent's recommendation of a lesser period of expulsion. B.O.A. By &

Through L.O. v. U.S.D. 480 Bd. of Educ., — P.3d —, 2019 WL 1213182 (Kan. Ct. App. Mar. 15, 2019)

60-2102. Appeals to the court of appeals and supreme court

K.S.A. 60-2102(a)(4)'s rule, stating that final decisions may be appealed as a matter of right, applies solely to appeals in civil cases and not criminal cases. As such, the collateral order doctrine, which is as an interpretation of 60-2102(a)(4), also does not apply in a criminal case. *State v. McGaugh*, 56 Kan. App. 2d 286, 427 P.3d 978 (2018).

A trial court's order granting a petitioner a new hearing on his motion to collaterally attack his criminal sentence for ineffective assistance of counsel was not a final, appealable decision in petitioner's habeas corpus proceedings. Notwithstanding the fact that the order fully resolved the question of whether petitioner's counsel for his motion to attack his sentence was ineffective, the trial court order did not dispose of the entirety of the merits of the issue in the proceeding, which was whether petitioner's trial counsel during his criminal case was ineffective. *Allison v. State*, 56 Kan. App. 2d 470, 432 P.3d 87 (2018).

60-2103. Appellate procedure

Defendant was convicted of three counts of theft in 2003. He was also ordered to pay $8,450 in restitution as part of his sentence. In 2017, criminal defendant filed a motion with the district court to release his judgment because it had remained dormant for the statutory period of seven years, which the district court granted. The state appealed. The court of appeals held that the state's notice of appeal, filed 27 days after trial court filed its journal entry of decision to release the restitution judgment, was timely. Although criminal defendant argued that the restitution judgment stemmed from criminal case with a 14-day appeal period, the appellate court held that dormant restitution judgments were governed by civil procedure statutes, and thus were subject to a 30-day appeal period for civil actions. *State v. Dwyer*, — P.3d —, 2019 WL 1213186 (Kan. Ct. App. Mar. 15, 2019).

K.S.A. 60-2103(b) requires that notices of appeal designate the judgment or part thereof being appealed. In *State v. Rocheleau*, 307 Kan. 761, 415 P.3d 422 (2018), the criminal defendant was ordered to be a lifetime registrant under the Kansas Offender Registration Act. The defendant sought to appeal that order by stating that he was appealing "his sentence" in the notice of appeal. At the time the notice of appeal was filed, Kansas case law was split as to whether KORA registration constituted a part of the criminal sentence or not. *See* State v. Marinelli, 307 Kan. —, 347 P.3d 239 (2018) (decided on the same day as *Rocheleau* and holding that KORA registration is not part of the criminal sentence). The *Rocheleau* court held that, because of this split of authority, a liberal construction of 60-2103(b) required it to find the notice of appeal appealing only "his sentence" sufficient in this case even though the registration was not, as a matter of law, a part of his criminal sentence. The court noted, however, that "*Marinelli* now resolves that controversy, so from this date forward warning is afforded to future litigants that KORA appeals should not be shown as only a sentencing challenge." *Rocheleau*, 307 Kan. at 765.

Civil defendant's notice of appeal stated only that it "gives notice of appeal to the Court of Appeals of the State of Kansas of the Permanent Injunction Decision filed with the Clerk of the District Court of Haskell County." The notice of appeal did not include a general "catch-all" category of items to be appealed. In its brief, defendant sought raise additional pre-judgment errors on appeal beyond the scope of the permanent injunction order itself. The plaintiff on appeal did not assert that the failure to list the additional issues prejudiced it. Nevertheless, the court held that because this was a civil case not proceeding pro se, defendant at a minimum needed to include a "catch-all" category in its notice of appeal to preserve review. *Garetson Bros. v. Am. Warrior, Inc.,* 56 Kan.App.2d 623, 435 P.3d 1153 (2019).

The Court of Appeals has jurisdiction to hear a mother's argument that the district court lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to terminate her parental rights, despite the argument that the mother only filed a notice of appeal as to judgment terminating parental rights and not as to a previous judgment that found that a different state had declined jurisdiction. This result follows because a party cannot waive subject matter jurisdiction, meaning the argument may be raised a challenge at any time before any court. Moreover, the matter was properly before the court because parents have a fundamental constitutional right to custody and control of their children, meaning that consideration of the mother's argument for the first time on appeal would be necessary to prevent the denial of a fundamental right. *Interests of K.L.B.,* 56 Kan. App. 2d 429, 431 P.3d 883 (2018).

60-2203a. Notice of pendency of certain actions; liens; release; fees; authorized only by legislative enactment

Proposed Legislation. Conference bill passed. As of Apr 24, 2019

2019 Kansas Senate Bill No. 20, Kansas Eighty-Eighth Legislature 2019 Regular Session, 2019 Kansas Senate Bill No. 20, Kansas Eighty-Eighth Legislature 2019 Regular Session

(a) After the commencement of any action in any district court of this state, or the courts of the United States in the state of Kansas or in any action now pending heretofore commenced in such courts, which does not involve title to real estate, any party to such action may give notice in any other county of the state of the pendency of the action by filing for record with the clerk of the district court of such other county a verified statement setting forth the parties to the action, the nature of the action, the court in which it is pending, and the relief sought, which shall impart notice of the pendency of the action and shall result in the same lien rights as if the action were pending in that county. The lien shall be effective from the time the statement is filed, but not to exceed four months prior to the entry of judgment except as provided in subsection (c). The party filing such notice shall within 30 days after any satisfaction of the judgment entered in such action, or any other final disposition thereof, cause to be filed with such clerk of the district court a notice that all claims in such action are released. If the party filing fails or neglects to do so after reasonable demand by any party in interest, such party shall be liable in damages in the same amounts and manner as is provided by law for failure of a mortgagee to enter satisfaction of a mortgage. Upon the filing of such a notice of the pendency of an action the clerk shall charge a fee of $14 and shall enter and index the action in the same manner as for the filing of an original action. Upon the filing of a notice of release, the notice shall likewise be entered on the

docket. Except as provided further, the fee established in this subsection shall be the only fee collected or moneys in the nature of a fee collected for the court procedure. Such fee shall only be established by an act of the legislature and no other authority is established by law or otherwise to collect a fee. ~~On and after July 1, 2017 2019, through June 30, 2019 2021,~~ On and after July 1, 2019, through June 30, 2023, the supreme court may impose an additional charge, not to exceed $22 per fee, to fund the costs of non-judicial personnel.

(~~(~~b) ~~Any notice of the type provided for in subsection (a) which was filed on or after January 10, 1977, and prior to the effective date of this act shall be deemed to impart notice of the pendency of the action in the same manner as if the provisions of subsection (a) were in force and effect on and after January 10, 1977.~~Notwithstanding the foregoing provisions of this section, the filing of a notice of the pendency of an action pursuant to subsection (a) shall create no lien rights against the property of an employee of the state or a municipality prior to the date judgment is rendered if the pleadings in the pending action allege a negligent or wrongful act or omission of the employee while acting within the scope of such employee's employment, regardless of whether or not it is alleged in the alternative that the employee was acting outside of such employee's employment. A judgment against an employee shall become a lien upon such employee's property in the county where notice is filed pursuant to subsection (a) when the judgment is rendered only if it is found that: (1) The employee's negligent or wrongful act or omission occurred when the employee was acting outside the scope of such employee's employment; or (2) the employee's conduct which gave rise to the judgment was because of actual fraud or actual malice of the employee. In such cases the lien shall not be effective prior to the date judgment was rendered. As used in this subsection (c), "employee" shall have the meaning ascribed to such term in K.S.A. 75-6102, and amendments thereto.

60-2310. Wage garnishment; definitions; restrictions, exceptions; sickness preventing work; assignment of account; prohibition on courts

As a matter of first impression, the Kansas Court of Appeals held that former husband's father was “member of family of debtor,” within meaning of K.S.A. 60-2310(c), for purposes of the former wife's attempt to garnish husband's income to recover past-due spousal maintenance and her share of the husband's military retirement pay, regardless of whether father lived in husband's home. *Matter of Marriage of Gerleman*, 56 Kan. App. 2d 357, 430 P.3d 467 (2018)

60-2403. Judgment, when dormant; release of record; child support judgments after July 1, 2007, never dormant; court costs, fees, fines and restitution judgments after July 1, 2015, never dormant

Prior to 2015, K.S.A. 60-2404, in the now repealed subsection (d), detailed how dormant restitution judgments were to be addressed. The statute provided that when a creditor has not filed a renewal affidavit, or if execution proceedings had not been issued, within 10 years of the journal entry of restitution order, the judgment became dormant and ceased to operate as a lien on the real estate of the judgment debtor. If the judgment remained dormant for an additional period of two years, the district court was required to release the judgment of record upon the defendant's request. Under this now-repealed system, a creditor could revive or renew its intention to collect the debt at any time before the full 12 years had passed in order to keep the judgment alive.

The Legislature amended this statute in 2015 and eliminated subsection (d) regarding the dormancy calculation for restitution judgements. Instead, as to restitution judgments, the statute now states that that they never become dormant. K.S.A. 60-2403(b). The new subsection (b) contains one critical exception for judgments that were void as of the adoption of the 2015 amendments: "If a judgment would have become dormant under the conditions set forth in subsection (a), the judgment shall cease to operate as a lien on the real estate of the judgment debtor as of the date the judgment would have become dormant, but the judgment shall not be released of record pursuant to subsection (a)." The remainder of this treatise's analysis discusses dormancy under subsection (a), which remains mostly unchanged by the 2015 amendments, excepting a definition of "support enforcement proceeding" under subsection (a)(3).

K.S.A. 60-2403(a) applies to judgments in divorce actions. When that judgment is payable in installments, such as monthly percentages of salary, the dormancy period commences as to each installment when it became due and was collectible by execution or other legal process. *Matter of Marriage of Strom*, 56 Kan. App. 2d 655, 435 P.3d 583 (2019).

The period for the state to collect a restitution judgment imposed from a defendant convicted of theft started when the defendant was released from prison, not during his incarceration period, where trial court's journal entry entering judgment did not unambiguously state that judgment would be enforceable during incarceration. The plain and unambiguous language of K.S.A. 2017 Supp. 60-2403 states that all restitution judgments not void as of July 1, 2015, continue to be enforceable forever. *State v. Dwyer*, — P.3d —, 2019 WL 1213186 (Kan. Ct. App. Mar. 15, 2019).

60-2410. Sale of real property under execution

A party seeking to effectuate notice by publication prior to the sale of real property need not have the district court approve the notice prior to publication. The notice is timely so long as it is published after the applicable court order is made and re-published once each week for three consecutive weeks. The fact that a party submitted the notice to the newspaper for formatting and the like, yet not published the noticed, prior to the district court's order does not alter this analysis. *Reverse Mortg. Sols., Inc. v. Goldwyn*, 56 Kan. App. 2d 129, 425 P.3d 617 (2018).

60-2414. Redemption of real property

In a typical reverse mortgage, the borrower takes out a loan, secured by a mortgage that allows the borrower to take draws against the loan over time. See generally 24 C.F.R. § 206.1 *et seq*. (2017) (containing regulations for federally insured reverse mortgages, which are available to homeowners age 62 or older). Repayment is not required during the borrower's lifetime. Because no repayments are made on the loan, the redemption period under K.S.A. 60-2414(m) will be three months, not the longer period available when loan default occurs after one-third of the original indebtedness has been repaid. *Reverse Mortg. Sols., Inc. v. Goldwyn*, 56 Kan. App. 2d 129, 425 P.3d 617 (2018).

60-2415. Sheriff's return of sale

Pursuant to K.S.A. 60-2415(b), the district court may decline to confirm a sheriff's sale where the bid is substantially inadequate. In this case, in which there was no deficiency judgment against the borrower and the sheriff's sale bid was 86% of the total judgment, the district court did not abuse its discretion when it concluded the bid was not substantially inadequate. *Reverse Mortg. Sols., Inc. v. Goldwyn*, 56 Kan. App. 2d 129, 425 P.3d 617 (2018).

ARTICLE 30, LIKELY PUT TRIBAL COURT FULL FAITH AND CREDIT STATUTE HERE. After 60-3008

Conference bill passed. As of Apr. 24, 2019

2019 Kansas Senate Bill No. 20, Kansas Eighty-Eighth Legislature 2019 Regular Session, 2019 Kansas Senate Bill No. 20, Kansas Eighty-Eighth Legislature 2019 Regular Session

Be it enacted by the Legislature of the State of Kansas:

New Section 1. (a) Pursuant to rules adopted by the supreme court, the district courts of this state shall extend full faith and credit to the orders, judgments and other judicial acts of the tribal courts of any federally recognized Indian tribe.

(b) In adopting rules under subsection (a), the supreme court shall only extend recognition to the judgments of tribal courts that grant full faith and credit to judgments of the courts of the state of Kansas.

(c) Nothing in this section shall be construed to be a waiver of the sovereign immunity of the state of Kansas or a waiver of the sovereign immunity of a federally recognized Indian tribe.

60-3701. Punitive and exemplary damages; separate proceeding for determination of amount; considerations; limitations; maximum amount of award; application limited

Cases

As a matter of first impression, the supreme court held that a trust and its beneficiaries who have brought a cause of action for a trustee's breach of trust and breach of fiduciary duty may seek punitive damages under K.S.A. 58a-1002(c) from the estate of the trustee. In so holding, the high court overruled the Kansas Court of Appeals on this question. *Alain Ellis Living Tr. v. Harvey D. Ellis Living Tr.*, 308 Kan. 1040, 427 P.3d 9 (2018).

60-3702. Same; trier of fact determines whether damages allowed; separate proceeding for determination of amount; considerations; limitations; maximum amount of award

Cases

As a matter of first impression, the supreme court held that a trust and its beneficiaries who have brought a cause of action for a trustee's breach of trust and breach of fiduciary duty may seek punitive damages under K.S.A. 58a-1002(c) from the estate of the trustee. In so holding, the high court overruled the Kansas Court of Appeals on this question. *Alain Ellis Living Tr. v. Harvey D. Ellis Living Tr.*, 308 Kan. 1040, 427 P.3d 9 (2018).

60-3703. Filing an amended pleading to claim punitive damages

Cases

As a matter of first impression, the supreme court held that a trust and its beneficiaries who have brought a cause of action for a trustee's breach of trust and breach of fiduciary duty may seek punitive damages under K.S.A. 58a-1002(c) from the estate of the trustee. In so holding, the high court overruled the Kansas Court of Appeals on this question. *Alain Ellis Living Tr. v. Harvey D. Ellis Living Tr.*, 308 Kan. 1040, 427 P.3d 9 (2018).

60-5003. Civil action for victims of human trafficking or commercial sexual exploitation of a child

This section empowers victims of human trafficking to seek civil recovery for damages. (While people escaping human trafficking tend to prefer the label "survivor" over "victim," this text will use the term "victim" so as to map the statutory text.)

The statute states that conduct that would violate K.S.A. 21-5426 or 21-6422 creates civil liability. Under Kansas law, a person who intentionally recruites, harbors, or obtains labor or services through the use of force, fraud, or coercion commits human trafficking. Kansas statutes also provides for other means of committing human trafficking. These state definitions of human trafficking and aggravated human trafficking largely track the federal definition of human trafficking. *Compare* Kan. Stat. Ann. § 21–5426 *with* 18 U.S.C. §§ 1589, 1590. Thus, federal case law, which provides a more robust set of decisions than found in Kansas, interpreting the definition of human trafficking should be persuasive in constructing the Kansas definitions.

As with K.S.A. 60-5002, an underlying conviction of an act of human trafficking under K.S.A. 21-5426 or 21-6422 is not a necessary component for the creation of civil liability under this section. Hence the Legislature's use of the subjunctive tense in subsection (a).

Trafficking victims may proceed on their own behalf, or they may request that the state Attorney General proceed on their behalf, under subsection (d).

Trafficking victims may seek actual damages, punitive damages, injunctions, and other relief to address personal and/or psychological injuries. Subsection (b) creates a statutory minimum award for prevailing plaintiffs at $150,000. Subsection (b) also states that a prevailing plaintiff must be awarded costs and reasonable attorney fees.

Subsection (c) creates a very long statute of limitations. Suits under this section remain viable for 10 years after a victim's release from a trafficking situation or reaching the age of 18, whichever is longer. Presumably, a court could also apply K.S.A. 60-515 to subsection (c) and further elongate the relevant time bar in appropriate cases.

This provision should often be deployed in conjunction with relevant federal law. For example, the Victims of Trafficking and Violence Protection Act, the purpose of which is "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims," can often apply in conjunction with Kansas's act. *See* 18 U.S.C. § 1595 (creating a federal civil cause of action for trafficking victims). Indeed, subsection (f) of the Kansas act specifically notes that seeking relief under this act does not preclude seeking relief from other avenues.

This statute—in concert with meaningful action from the Kansas Attorney General's office, criminal law reforms, and other state actions—appear to be making inroads to offering some relief from the scourge of human trafficking in Kansas. Sadly, in 2009, "Kansas's victim offices served only two survivors of human trafficking, and in 2011, Shared Hope International (a nonprofit working to end sex trafficking) gave Kansas an "F" on its state laws related to stopping and preventing child sex trafficking. By 2016, Kansas had served 463 survivors, and in 2017 was one of only eight states to receive an "A" grade from Shared Hope." Merideth J. Hogan, *A Review of Human Trafficking*, J. KAN. B. ASS'N, June 2018, at 36, 42 (providing an overview of federal and Kansas anti-trafficking law).

Only one court has applied K.S.A. 60-5003 to date. *Ross v. Jenkins*, 325 F. Supp. 3d 1141 (D. Kan. 2018). Here, a former member of a religious group brought action against the religious group leader and his business organizations, alleging various federal and Kansas human trafficking claims. The court awarded more than $8 million in damages and attorney fees in a default judgment procedural posture. Despite this procedural posture, the court provides a detailed finding of facts and statutory analysis that counsel should give careful study before application of this act.

60-5303. Exercise of religion; burden of proof; remedies

Only one court has addressed any provision of the KPRFA since its passage to date. This federal district court held that K.S.A. 60-5003 in the context of land-use regulation provides the same standards as the federal Religious Land Use and Institutionalized Persons Act of 2000 § 2, 42 U.S.C. § 2000cc(a)(1). *See Roman Catholic Archdiocese of Kansas City in Kansas v. City of Mission Woods*, 337 F. Supp. 3d 1122 (D. Kan. 2018) (relying upon *Maum Meditation House of Truth v. Lake Cty., Ill.*, 55 F.Supp.3d 1081, 1088 (N.D. Ill. 2014) (interpreting the Illinois Religious Freedom Restoration Act—which contains practically identical language as the K.S.A. 60-5303—in the same way as RLUIPA's substantial burden provision)).

60-5320. Public speech protection act

K.S.A. 60-5320 is an anti-SLAPP statute. A SLAPP suit, a "strategic lawsuit against

public participation," seeks to quite one's exercise of free speech. Commonly, a SLAPP suit brings libel, defamation, interference with contract or business, antitrust violation, or unfair competition claims. Stereotypically, such a suit is brought against persons who publicly opposed a project or endeavor in an effort to end the public opposition. In short, a SLAPP suit seeks to use the courts to end public discourse. Anti-SLAPP statutes, such as K.S.A. 60-5320, seek to make such First Amendment-chilling conduct costly. See Eric Weslander, T*he First Amendment Slapps Back: An Overview of the Free-Speech Protections of Kansas' New Anti-SLAPP Statute,* J. KAN. B. ASS'N, January 2018, at 30 (providing an overview of Anti-SLAPP statutes generally and Kansas's act).

At its heart, K.S.A. 60-5320(d) allows a defendant to bring an early motion to strike a claim, if the claim is "based on, relates to or is in response to a party's exercise of the right of free speech, right to petition, or right of association," as defined in subsection (c). After making this showing successfully, the burden shifts to the plaintiff to show that it has a likelihood of prevailing with substantial and competent evidence. K.S.A. 60-5320(d). The court must hold a hearing on this motion within 30 days of service. Id. If the plaintiff cannot sustain this burden, the suit must be struck.

Notably, the statute requires the court to award a successful anti-SLAPP movant its costs and attorneys' fees, and to order "such additional relief, including sanctions upon the responding party and its attorneys and law firms, as the court determines necessary to deter repetition of the conduct by others similarly situated." K.S.A. 60-5320(g). By contrast, if the party bringing the claim survives the anti-SLAPP motion, the court may award that party its costs and fees only if the court finds "the motion to strike is frivolous or solely intended to cause delay." Id. As Weslander puts it, "The message to litigants is clear: be very careful before you bring a suit that seeks to punish the exercise of free speech."

In *Caranchini v. Peck*, 355 F. Supp. 3d 1052 (D. Kan. 2018), the court applied K.S.A. 60-5320 extensively. Here, the plaintiff brought suit against defendants who had filed for a temporary restraining order against plaintiff. Plaintiff alleged libel, slander, conspiracy, and harassment. The defendants filed an anti-SLAPP motion to strike under 60-5320. First, the court held, pursuant to an *Erie* analysis, that 60-5320 applies in a diversity action in federal court. Second, the court held that the plaintiff's defamation and conspiracy claims related to defendants' rights of free speech and to petition, for purposes of defendants' 60-5320 motion. Third, the court concluded that the plaintiff failed to establish a likelihood she would prevail on her defamation and conspiracy claims. Fourth, the court held that plaintiff's "harassment and threat of bodily harm" claims and criminal harassment claims did not involve rights to free speech, petition and freedom of association, and thus were not subject to a 60-5320 motion.

US Supreme Court Cases of Note

In *Hamer v. Neighborhood Housing Services of Chicago*, —U.S.—, 138 S.Ct. 13 (2017), the Court held that the U.S. Court of Appeals for the 7th Circuit erred in treating as jurisdictional Fed. Rule of Appellate Procedure 4(a)(5)(C)'s limitation on extensions of time to file a notice of appeal b/c only a statute, not a court made rule, may be jurisdictional.

In *Hall v. Hall*, — U.S.—, 138 S.Ct. 1118 (2018), the U.S. Supreme Court held that when one of several cases consolidated under Federal Rule of Civil Procedure 42(a) is finally decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases remain pending. This interpretation of "finality" for purposes of appeal under federal law should be persuasive under Kansas law.

In *China Agritech Inc. v. Resh*, — U.S. —, 138 S.Ct. 1800 (2018), the U.S. Supreme Court held that equitable tolling of the statute of limitations will not, upon denial of class certification, allow a putative class member to commence a class action anew beyond the time allowed by the applicable statute of limitations. This decision constrains the Court's older equitable tolling precedent in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).

In *Nutraceutical Corp. v. Lambert*, — U.S. —, 139 S.Ct. 710 (2019), the Court held that Rule of Civil Procedure 23(f), which establishes a 14-day deadline to seek permission to appeal an order granting or denying class certification, is not subject to equitable tolling.

In *Republic of Sudan v. Harrison*, — U.S. —, 139 S.Ct. 1048 (2019), the Court held that when civil process is served on a foreign state under the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. §1608(a)(3) requires a mailing to be sent directly to the foreign minister's office in the foreign state.

December 2018 Fed R. Civ Pro Amendments

Rule 5. Serving and Filing Pleadings and Other Papers

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(b) Service: How Made.

* * * * *

(2*) Service in General*. A paper is served under this rule by:

(A) handing it to the person;

* * * * *

(E) sending it to a registered user by filing it with the court's electronic-filing system or sending it by other electronic means ifthat the person consented to in writing—in either of which events service is complete upon ~~transmission~~filing or sending, but is not effective if the ~~serving party~~filer or sender learns that it did not reach the person to be served; or

* * * * *

(3) *Using Court Facilities*. ~~If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).~~ [Abrogated (Apr. ___, 2018, eff. Dec. 1, 2018.)]

* * * * *

(d) Filing.

(1) *Required Filings; Certificate of Service*.

(A) *Papers after the Complaint*. Any paper after the complaint that is required to be served~~—together with a certificate of service—~~must be filed ~~within~~no later than a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

(B) *Certificate of Service*. No certificate of service is required when a paper is served by filing it with the court's electronic-filing system. When a paper that is required to be served is served by other means:

(i) if the paper is filed, a certificate of service must be filed with it or within a reasonable time after service; and

(ii) if the paper is not filed, a certificate of service need not be filed unless filing is required by court order or by local rule.

(2) ***Nonelectronic Filing~~How Filing Is Made—In General~~.*** A paper not filed electronically is filed by delivering it:

(A) to the clerk; or

(B) to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk.

(3*) Electronic Filing, and Signing~~, or Verification~~.* ~~A court may, by local rule, allow papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A local rule may require electronic filing only if reasonable exceptions are allowed.~~

(A) *By a Represented Person—Generally Required; Exceptions*. A person represented by an attorney must file electronically, unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule.

(B) *By an Unrepresented Person—When Allowed or Required*. A person not represented by an attorney:

(i) may file electronically only if allowed by court order or by local rule; and

(ii) may be required to file electronically only by court order, or by a local rule that includes reasonable exceptions.

(C) *Signing.* A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

(D) *Same as a Written Paper.* A paper filed electronically ~~in compliance with a local rule~~ is a written paper for purposes of these rules.

* * * * *

Committee Note

Subdivision (b). Rule 5(b) is amended to revise the provisions for electronic service. Provision for electronic service was first made when electronic communication was not as widespread or as fully reliable as it is now. Consent of the person served to receive service by electronic means was required as a safeguard. Those concerns have substantially diminished, but have not disappeared entirely, particularly as to persons proceeding without an attorney.

The amended rule recognizes electronic service through the court's transmission facilities as to any registered user. A court may choose to allow registration only with the court's permission. But a party who registers will be subject to service through the court's facilities unless the court provides otherwise. With the consent of the person served, electronic service also may be made by means that do not utilize the court's facilities. Consent can be limited to service at a prescribed address or in a specified form, and may be limited by other conditions.

Service is complete when a person files the paper with the court's electronic-filing system for transmission to a registered user, or when one person sends it to another person by other electronic means that the other person has consented to in writing. But service is not effective if the person who filed with the court or the person who sent by other agreed-upon electronic means learns that the paper did not reach the person to be served. The rule does not make the court responsible for notifying a person who filed the paper with the court's electronic-filing system that an attempted transmission by the court's system failed. But a filer who learns that the transmission failed is responsible for making effective service.

Because Rule 5(b)(2)(E) now authorizes service through the court's facilities as a uniform national practice, Rule 5(b)(3) is abrogated. It is no longer necessary to rely on local rules to authorize such service.

Subdivision (d). Rule 5(d)(1) has provided that any paper after the complaint that is required to be served "must be filed within a reasonable time after service." Because "within" might be read as barring filing before the paper is served, "no later than" is substituted to ensure that it is proper to file a paper before it is served.

Under amended Rule 5(d)(1)(B), a certificate of service is not required when a paper is served by filing it with the court's electronic-filing system. When service is not made by filing with the court's electronic-filing system, a certificate of service must be filed with the paper or within a reasonable time after service, and should specify the date as well as the manner of service. For papers that are required to be served but must not be filed until they are used in the proceeding or the court orders filing, the certificate need not be filed until the paper is filed, unless filing is required by local rule or court order.

Amended Rule 5(d)(3) recognizes increased reliance on electronic filing. Most districts have adopted local rules that require electronic filing, and allow reasonable exceptions as required by the former rule. The time has come to seize the advantages of electronic filing by making it generally mandatory in all districts for a person represented by an attorney. But exceptions continue to be available. Nonelectronic filing must be allowed for good cause. And a local rule may allow or require nonelectronic filing for other reasons.

Filings by a person proceeding without an attorney are treated separately. It is not yet possible to rely on an assumption that pro se litigants are generally able to seize the advantages of electronic filing. Encounters with the court's system may prove overwhelming to some. Attempts to work within the system may generate substantial burdens on a pro se party, on other parties, and on the court. Rather than mandate electronic filing, filing by pro se litigants is left for governing by local rules or court order. Efficiently handled electronic filing works to the advantage of all parties and the court. Many courts now allow electronic filing by pro se litigants with the court's permission. Such approaches may expand with growing experience in the courts, along with the greater availability of the systems required for electronic filing and the increasing familiarity of most people with electronic communication. Room is also left for a court to require electronic filing by a pro se litigant by court order or by local rule. Care should be taken to ensure that an order to file electronically does not impede access to the court, and reasonable exceptions must be included in a local rule that requires electronic filing by a pro se litigant. In the beginning, this authority is likely to be exercised only to support special programs, such as one requiring e-filing in collateral proceedings by state prisoners.

A filing made through a person's electronic-filing account and authorized by that person, together with that person's name on a signature block, constitutes the person's signature.

Rule 23. Class Actions

* * * * *

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

* * * * *

(2) ***Notice.***

* * * * *

(B) *For (b)(3) Classes*. For any class certified under Rule 23(b)(3)~~,~~ —or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled,

voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) ***Notice to the Class.***

(A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) ***Approval of the Proposal***. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:~~.~~

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) ***Identifying Agreements***. The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) ***New Opportunity to Be Excluded***. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new

opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) ***Class–Member Objections*****.**

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e)~~; the objection may be withdrawn only with the court's approval~~. The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) Appeals. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1).~~if a petition for permission to appeal is filed~~ A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered, or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

* * * * *

Committee Note

Rule 23 is amended mainly to address issues related to settlement, and also to take account of issues that have emerged since the rule was last amended in 2003.

Subdivision (c)(2). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of class certification and approval of the proposed settlement justifies giving notice. This decision has been called "preliminary approval" of the proposed class certification in Rule 23(b)(3) actions. It is common to send notice to the class simultaneously under both Rule 23(e)(1) and Rule 23(c)(2)(B), including a provision for class members to decide by a certain date whether to opt out. This amendment recognizes the propriety of this combined notice practice.

Subdivision (c)(2) is also amended to recognize contemporary methods of giving notice to class members. Since Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), interpreted the individual notice requirement for class members in Rule 23(b)(3) class actions, many courts have read the rule to require notice by first class mail in every case. But technological change since 1974 has introduced other means of communication that may sometimes provide a reliable additional or alternative method for giving notice. Although first class mail may often be the preferred primary method of giving notice, courts and counsel have begun to employ new technology to make notice more effective. Because there is no reason to expect that technological change will cease, when selecting a method or methods of giving notice courts should consider the capacity and limits of current technology, including class members' likely access to such technology.

Rule 23(c)(2)(B) is amended to take account of these changes. The rule continues to call for giving class members "the best notice that is practicable." It does not specify any particular means as preferred. Although it may sometimes be true that electronic methods of notice, for example email, are the most promising, it is important to keep in mind that a significant portion of class members in certain cases may have limited or no access to email or the Internet.

Instead of preferring any one means of notice, therefore, the amended rule relies on courts and counsel to focus on the means or combination of means most likely to be effective in the case before the court. The court should exercise its discretion to select appropriate means of giving notice. In providing the court with sufficient information to enable it to decide whether to give notice to the class of a proposed class-action settlement under Rule 23(e)(1), it would ordinarily be important to include details about the proposed method of giving notice and to provide the court with a copy of each notice the parties propose to use.

In determining whether the proposed means of giving notice is appropriate, the court should also give careful attention to the content and format of the notice and, if notice is given under both Rule 23(e)(1) and Rule 23(c)(2)(B), any claim form class members must submit to obtain relief.

Counsel should consider which method or methods of giving notice will be most effective; simply assuming that the "traditional" methods are best may disregard contemporary communication realities. The ultimate goal of giving notice is to enable class members to make informed decisions about whether to opt out or, in instances where a proposed settlement is involved, to object or to make claims. Rule 23(c)(2)(B) directs that the notice be "in plain, easily understood language." Means, format, and content that would be appropriate for class members likely to be sophisticated, for example in a securities fraud class action, might not be appropriate for a class having many members likely to be less sophisticated. The court and counsel may wish to consider the use of class notice experts or professional claims administrators.

Attention should focus also on the method of opting out provided in the notice. The proposed method should be as convenient as possible, while protecting against unauthorized opt-out notices.

Subdivision (e). The introductory paragraph of Rule 23(e) is amended to make explicit that its procedural requirements apply in instances in which the court has not certified a class at the time

that a proposed settlement is presented to the court. The notice required under Rule 23(e)(1) then should also satisfy the notice requirements of amended Rule 23(c)(2)(B) for a class to be certified under Rule 23(b)(3), and trigger the class members' time to request exclusion. Information about the opt-out rate could then be available to the court when it considers final approval of the proposed settlement.

Subdivision (e)(1). The decision to give notice of a proposed settlement to the class is an important event. It should be based on a solid record supporting the conclusion that the proposed settlement will likely earn final approval after notice and an opportunity to object. The parties must provide the court with information sufficient to determine whether notice should be sent. At the time they seek notice to the class, the proponents of the settlement should ordinarily provide the court with all available materials they intend to submit to support approval under Rule 23(e)(2) and that they intend to make available to class members. The amended rule also specifies the standard the court should use in deciding whether to send notice—that it likely will be able both to approve the settlement proposal under Rule 23(e)(2) and, if it has not previously certified a class, to certify the class for purposes of judgment on the proposal.

The subjects to be addressed depend on the specifics of the particular class action and proposed settlement. But some general observations can be made.

One key element is class certification. If the court has already certified a class, the only information ordinarily necessary is whether the proposed settlement calls for any change in the class certified, or of the claims, defenses, or issues regarding which certification was granted. But if a class has not been certified, the parties must ensure that the court has a basis for concluding that it likely will be able, after the final hearing, to certify the class. Although the standards for certification differ for settlement and litigation purposes, the court cannot make the decision regarding the prospects for certification without a suitable basis in the record. The ultimate decision to certify the class for purposes of settlement cannot be made until the hearing on final approval of the proposed settlement. If the settlement is not approved, the parties' positions regarding certification for settlement should not be considered if certification is later sought for purposes of litigation.

Regarding the proposed settlement, many types of information might appropriately be provided to the court. A basic focus is the extent and type of benefits that the settlement will confer on the members of the class. Depending on the nature of the proposed relief, that showing may include details of the contemplated claims process and the anticipated rate of claims by class members. Because some funds are frequently left unclaimed, the settlement agreement ordinarily should address the distribution of those funds.

The parties should also supply the court with information about the likely range of litigated outcomes, and about the risks that might attend full litigation. Information about the extent of discovery completed in the litigation or in parallel actions may often be important. In addition, as suggested by Rule 23(b)(3)(B), the parties should provide information about the existence of other pending or anticipated litigation on behalf of class members involving claims that would be released under the proposal.

The proposed handling of an award of attorney's fees under Rule 23(h) ordinarily should be addressed in the parties' submission to the court. In some cases, it will be important to relate the amount of an award of attorney's fees to the expected benefits to the class. One way to address this issue is to defer some or all of the award of attorney's fees until the court is advised of the actual claims rate and results.

Another topic that normally should be considered is any agreement that must be identified under Rule 23(e)(3).

The parties may supply information to the court on any other topic that they regard as pertinent to the determination whether the proposal is fair, reasonable, and adequate. The court may direct the parties to supply further information about the topics they do address, or to supply information on topics they do not address. The court should not direct notice to the class until the parties' submissions show it is likely that the court will be able to approve the proposal after notice to the class and a final approval hearing.

Subdivision (e)(2). The central concern in reviewing a proposed class-action settlement is that it be fair, reasonable, and adequate. Courts have generated lists of factors to shed light on this concern. Overall, these factors focus on comparable considerations, but each circuit has developed its own vocabulary for expressing these concerns. In some circuits, these lists have remained essentially unchanged for thirty or forty years. The goal of this amendment is not to displace any factor, but rather to focus the court and the lawyers on the core concerns of procedure and substance that should guide the decision whether to approve the proposal.

A lengthy list of factors can take on an independent life, potentially distracting attention from the central concerns that inform the settlement-review process. A circuit's list might include a dozen or more separately articulated factors. Some of those factors—perhaps many—may not be relevant to a particular case or settlement proposal. Those that are relevant may be more or less important to the particular case. Yet counsel and courts may feel it necessary to address every factor on a given circuit's list in every case. The sheer number of factors can distract both the court and the parties from the central concerns that bear on review under Rule 23(e)(2).

This amendment therefore directs the parties to present the settlement to the court in terms of a shorter list of core concerns, by focusing on the primary procedural considerations and substantive qualities that should always matter to the decision whether to approve the proposal.

Approval under Rule 23(e)(2) is required only when class members would be bound under Rule 23(c)(3). Accordingly, in addition to evaluating the proposal itself, the court must determine whether it can certify the class under the standards of Rule 23(a) and (b) for purposes of judgment based on the proposal.

Paragraphs (A) and (B). These paragraphs identify matters that might be described as "procedural" concerns, looking to the conduct of the litigation and of the negotiations leading up to the proposed settlement. Attention to these matters is an important foundation for scrutinizing the substance of the proposed settlement. If the court has appointed class counsel or interim class

counsel, it will have made an initial evaluation of counsel's capacities and experience. But the focus at this point is on the actual performance of counsel acting on behalf of the class.

The information submitted under Rule 23(e)(1) may provide a useful starting point in assessing these topics. For example, the nature and amount of discovery in this or other cases, or the actual outcomes of other cases, may indicate whether counsel negotiating on behalf of the class had an adequate information base. The pendency of other litigation about the same general subject on behalf of class members may also be pertinent. The conduct of the negotiations may be important as well. For example, the involvement of a neutral or court-affiliated mediator or facilitator in those negotiations may bear on whether they were conducted in a manner that would protect and further the class interests. Particular attention might focus on the treatment of any award of attorney's fees, with respect to both the manner of negotiating the fee award and its terms.

Paragraphs (C) and (D). These paragraphs focus on what might be called a "substantive" review of the terms of the proposed settlement. The relief that the settlement is expected to provide to class members is a central concern. Measuring the proposed relief may require evaluation of any proposed claims process; directing that the parties report back to the court about actual claims experience may be important. The contents of any agreement identified under Rule 23(e)(3) may also bear on the adequacy of the proposed relief, particularly regarding the equitable treatment of all members of the class.

Another central concern will relate to the cost and risk involved in pursuing a litigated outcome. Often, courts may need to forecast the likely range of possible classwide recoveries and the likelihood of success in obtaining such results. That forecast cannot be done with arithmetic accuracy, but it can provide a benchmark for comparison with the settlement figure.

If the class has not yet been certified for trial, the court may consider whether certification for litigation would be granted were the settlement not approved.

Examination of the attorney-fee provisions may also be valuable in assessing the fairness of the proposed settlement. Ultimately, any award of attorney's fees must be evaluated under Rule 23(h), and no rigid limits exist for such awards. Nonetheless, the relief actually delivered to the class can be a significant factor in determining the appropriate fee award.

Often it will be important for the court to scrutinize the method of claims processing to ensure that it facilitates filing legitimate claims. A claims processing method should deter or defeat unjustified claims, but the court should be alert to whether the claims process is unduly demanding.

Paragraph (D) calls attention to a concern that may apply to some class action settlements—inequitable treatment of some class members vis-a-vis others. Matters of concern could include whether the apportionment of relief among class members takes appropriate account of differences among their claims, and whether the scope of the release may affect class members in different ways that bear on the apportionment of relief.

Subdivisions (e)(3) and (e)(4). Headings are added to subdivisions (e)(3) and (e)(4) in accord with style conventions. These additions are intended to be stylistic only.

Subdivision (e)(5). The submissions required by Rule 23(e)(1) may provide information critical to decisions whether to object or opt out. Objections by class members can provide the court with important information bearing on its determination under Rule 23(e)(2) whether to approve the proposal.

Subdivision (e)(5)(A). The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.

The rule is also amended to clarify that objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them. One feature required of objections is specification whether the objection asserts interests of only the objector, or of some subset of the class, or of all class members. Beyond that, the rule directs that the objection state its grounds "with specificity." Failure to provide needed specificity may be a basis for rejecting an objection. Courts should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.

Subdivision (e)(5)(B). Good–faith objections can assist the court in evaluating a proposal under Rule 23(e)(2). It is legitimate for an objector to seek payment for providing such assistance under Rule 23(h).

But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process. At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.

The court-approval requirement currently in Rule 23(e)(5) partly addresses this concern. Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved. Although such payment is usually made to objectors or their counsel, the rule also requires court approval if a payment in connection with forgoing or withdrawing an objection or appeal is instead to another recipient. The term "consideration" should be broadly interpreted, particularly when the withdrawal includes some arrangements beneficial to objector counsel. If the consideration involves a payment to counsel for an objector, the proper procedure is by motion under Rule 23(h) for an award of fees.

Rule 23(e)(5)(B)(ii) applies to consideration in connection with forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal. Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context. The district court is best positioned to determine whether to approve such arrangements; hence, the rule requires that the motion seeking approval be made to the district court.

Until the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties or on the appellant's motion. See Fed. R. App. P. 42(a). Thereafter, the court of appeals has authority to decide whether to dismiss the appeal. This rule's requirement of district court approval of any consideration in connection with such dismissal by the court of appeals has no effect on the authority of the court of appeals to decide whether to dismiss the appeal. It is, instead, a requirement that applies only to providing consideration in connection with forgoing, dismissing, or abandoning an appeal.

Subdivision (e)(5)(C). Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies. That procedure does not apply after the court of appeals' mandate returns the case to the district court.

Subdivision (f). As amended, Rule 23(e)(1) provides that the court must direct notice to the class regarding a proposed class-action settlement only after determining that the prospect of eventual class certification justifies giving notice. But this decision does not grant or deny class certification, and review under Rule 23(f) would be premature. This amendment makes it clear that an appeal under this rule is not permitted until the district court decides whether to certify the class.

The rule is also amended to extend the time to file a petition for review of a class-action certification order to 45 days whenever a party is the United States, one of its agencies, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. In such a case, the extension applies to a petition for permission to appeal by any party. The extension recognizes—as under Rules 4(i) and 12(a) and Appellate Rules 4(a)(1)(B) and 40(a)(1)—that the United States has a special need for additional time in regard to these matters. It applies whether the officer or employee is sued in an official capacity or an individual capacity. An action against a former officer or employee of the United States is covered by this provision in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time.

Rule 62. Stay of Proceedings to Enforce a Judgment

(a) Automatic Stay~~; Exceptions for Injunctions, Receiverships, and Patent Accountings~~. Except as provided in Rule 62(c) and (d), ~~stated in this rule, no execution may issue~~ on a judgment~~, nor may~~ and proceedings ~~be taken~~to enforce it~~,~~ are stayed for 30 days ~~until 14 days have passed~~ after its entry, unless the court orders otherwise. ~~But unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:~~

~~**(1)** an interlocutory or final judgment in an action for an injunction or a receivership; or~~

~~**(2)** a judgment or order that directs an accounting in an action for patent infringement.~~

~~**(b) Stay Pending the Disposition of a Motion**. On appropriate terms for the opposing party's security, the court may stay the execution of a judgment—or any proceedings to enforce it—pending disposition of any of the following motions:~~

~~(1) under Rule 50, for judgment as a matter of law;~~

~~(2) under Rule 52(b), to amend the findings or for additional findings;~~

~~(3) under Rule 59, for a new trial or to alter or amend a judgment; or~~

~~(4) under Rule 60, for relief from a judgment or order.~~

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) Stay of an Injunction, Receivership, or Patent Accounting Order. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership; or

(2) a judgment or order that directs an accounting in an action for patent infringement.

(d~~e~~) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or ~~denies~~refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights. If the judgment appealed from is rendered by a statutory three-judge district court, the order must be made either:

(1) by that court sitting in open session; or

(2) by the assent of all its judges, as evidenced by their signatures.

~~**(d) Stay with Bond on Appeal**. If an appeal is taken, the appellant may obtain a stay by supersedeas bond, except in an action described in Rule 62(a)(1) or (2). The bond may be given upon or after filing the notice of appeal or after obtaining the order allowing the appeal. The stay takes effect when the court approves the bond.~~

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Committee Note

Subdivisions (a), (b), (c), and (d) of former Rule 62 are reorganized and the provisions for staying a judgment are revised.

The provisions for staying an injunction, receivership, or order for a patent accounting are reorganized by consolidating them in new subdivisions (c) and (d). There is no change in meaning. The language is revised to include all of the words used in 28 U.S.C. § 1292(a)(1) to describe the right to appeal from interlocutory actions with respect to an injunction, but subdivisions (c) and (d) apply both to interlocutory injunction orders and to final judgments that grant, refuse, or otherwise deal with an injunction.

New Rule 62(a) extends the period of the automatic stay to 30 days. Former Rule 62(a) set the period at 14 days, while former Rule 62(b) provided for a court-ordered stay "pending disposition of" motions under Rules 50, 52, 59, and 60. The time for making motions under Rules 50, 52, and 59, however, was later extended to 28 days, leaving an apparent gap between expiration of the automatic stay and any of those motions (or a Rule 60 motion) made more than 14 days after entry of judgment. The revised rule eliminates any need to rely on inherent power to issue a stay during this period. Setting the period at 30 days coincides with the time for filing most appeals in civil actions, providing a would-be appellant the full period of appeal time to arrange a stay by other means. A 30–day automatic stay also suffices in cases governed by a 60–day appeal period.

Amended Rule 62(a) expressly recognizes the court's authority to dissolve the automatic stay or supersede it by a court-ordered stay. One reason for dissolving the automatic stay may be a risk that the judgment debtor's assets will be dissipated. Similarly, it may be important to allow immediate enforcement of a judgment that does not involve a payment of money. The court may address the risks of immediate execution by ordering dissolution of the stay only on condition that security be posted by the judgment creditor. Rather than dissolve the stay, the court may choose to supersede it by ordering a stay that lasts longer or requires security.

Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d). A stay may be obtained under subdivision (b) at any time after judgment is entered. Thus a stay may be obtained before the automatic stay has expired, or after the automatic stay has been lifted by the court. The new rule's text makes explicit the opportunity to post security in a form other than a bond. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or security—a party may find it convenient to arrange a single bond or other security that persists through completion of post-judgment proceedings in the trial court and on through completion of all proceedings on appeal by issuance of the appellate mandate. This provision does not supersede the opportunity for a stay under 28 U.S.C. § 2101(f) pending review by the Supreme Court on certiorari. Finally, subdivision (b) changes the provision in former subdivision (d) that "an appellant" may obtain a stay. Under new subdivision (b), "a party" may obtain a stay. For example, a party may wish to secure a stay pending disposition of post-judgment proceedings after expiration of the automatic stay, not yet knowing whether it will want to appeal.

Rule 65.1. Proceedings Against a ~~Surety~~Security Provider

Whenever these rules (including the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions) require or allow a party to give security, and security is given ~~through a bond or other undertaking~~ with one or more ~~sureties~~security providers, each ~~surety~~provider submits to the court's jurisdiction and irrevocably appoints the court clerk as its agent for receiving service of any papers that affect its liability on the ~~bond or undertaking~~security. The ~~surety's~~security provider's liability may be enforced on motion without an independent action. The motion and any notice that the court orders may be served on the court clerk, who must promptly ~~mail~~send a copy of each to every ~~surety~~security provider whose address is known.

Committee Note

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment "by providing a bond or other security." Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers, including sureties, are brought into Rule 65.1 by these amendments. But the reference to "bond" is retained in Rule 62 because it has a long history.

The word "mail" is changed to "send" to avoid restricting the method of serving security providers.