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MEMORANDUM

To: Special Committee on Civil Asset Forfeiture

From: Office of Revisor of Statutes

Date: December 6, 2023

Subject: Review of Kansas Standard Asset Seizure and Forfeiture Act

The Kansas Standard Asset Seizure and Forfeiture Act (the act) can be found at K.S.A. 60-4101 through 60-4127. K.S.A. 60-4101 names the act and 60-4102 provides definitions to be used throughout the act.

K.S.A. 60-4103 establishes jurisdiction and venue under the act. The district court has jurisdiction over all interests in property for which forfeiture is sought if the property is within the state at the time the action is filed or the interest of an owner or interest holder in the property if the owner or interest holder is subject to personal jurisdiction in the state. A forfeiture proceeding may be brought in the county where any part of the property is found or in the county where a civil or criminal action for the conduct giving rise to forfeiture could be brought against an owner or interest holder. If the action is brought by the attorney general, the action may be brought in any county where venue is otherwise proper or Shawnee county unless a motion to change venue is timely filed.

K.S.A. 60-4104 provides the conduct and offenses that give rise to forfeiture. This conduct can lead to forfeiture regardless of whether there is a prosecution or conviction related to the conduct. The conduct and offenses are:

- Violations involving controlled substances
- Theft
- Criminal discharge of a firearm
- Gambling and commercial gambling
- Counterfeiting
- Unlawful possession or use of a scanning device or recorder
- Medicaid fraud
- Terrorism, illegal use of weapons of mass destruction and furtherance of terrorism or illegal use of weapons of mass destruction

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- Unlawful conduct of dog fighting and unlawful possession of dog fighting paraphernalia
- Unlawful conduct of cockfighting and unlawful possession of cockfighting paraphernalia
- Selling sexual relations, promoting the sale of sexual relations and buying sexual relations
- Human trafficking and aggravated human trafficking
- Violations of the baking code
- Mistreatment of a dependent adult
- Giving a worthless check
- Forgery
- Making false information
- Criminal use of a financial card
- Unlawful acts concerning computers
- Identity theft and identity fraud
- Electronic solicitation
- Felony violations of fleeing or attempting to elude a police officer
- Commercial sexual exploitation of a child
- Violations of the Kansas racketeer influenced and corrupt organization act
- Indecent solicitation of a child and aggravated indecent solicitation of a child
- Sexual exploitation of a child
- Violation of a consumer protection order
- An act or omission occurring outside the state which would be a violation in the place of occurrence and would be described above if the act occurred in Kansas
- An act or omission committed in furtherance of any act or omission described above including any inchoate or preparatory offense
- A solicitation or conspiracy to commit an act or omission described above
- All offenses that statutorily and specifically authorize forfeiture

K.S.A. 60-4105 describes the property that is subject to forfeiture. This includes (1) property that is described in a statute authorizing forfeiture, (2) all property of any kind that is furnished by a person in an exchange that constitutes conduct giving rise to forfeiture or is used in a manner to facilitate conduct giving rise to forfeiture, (3) all proceeds from conduct giving rise to forfeiture, (4) all property derived from or realized through proceeds obtained directly or indirectly from conduct giving rise to forfeiture, (5) all weapons possessed, used or available for use to facilitate conduct giving rise to forfeiture, (6) ownership or interest in real property that is a homestead that was acquired with proceeds from conduct giving rise to forfeiture, (7) contraband, which is seized and forfeited without the procedures outlined in the act, (8) controlled substances and (9) any items bearing a counterfeit mark.

K.S.A. 60-4106 provides a list of circumstances under which property is exempt from forfeiture under the act. Real property or a conveyance cannot be forfeited unless the conduct

giving rise to forfeiture constitutes a felony. A conveyance used by a person as a common carrier in the transaction of business cannot be forfeited unless the owner or other person in charge of the conveyance is a consenting party or privy to a violation of the act. Property is not subject to forfeiture if the owner did not know and could not have reasonably known of the act or omission giving rise to forfeiture or acted reasonably to prevent the conduct giving rise to forfeiture. If an owner acquired the property in good faith for value and was not knowingly taking part in an illegal transaction, the property cannot be forfeited. Property acquired by an attorney as payment for legal services or costs in a matter relating to a violation of this act is also exempt from forfeiture. Property will not be exempt even if the owner or interest holder lacked knowledge of the conduct giving rise to forfeiture if the person whose conduct gave rise to forfeiture had authority to convey the property, the owner is criminally responsible for the conduct giving rise to forfeiture or the owner acquired the property with notice of the seizure for forfeiture. A court is required to limit the scope of the forfeiture if it is grossly disproportionate to the nature of the conduct. In making this determination, the court is to consider (1) the gain received by an owner, (2) the value of the property, (3) the extent to which the property actually facilitated the criminal conduct, (4) the nature and extent of the owner's knowledge and (5) the totality of the circumstances.

K.S.A. 60-4107 outlines the process for seizing property under the act. The court may issue a seizure warrant on an affidavit demonstrating probable cause exists for the forfeiture of the property. Property can be seized without process on probable cause if the law enforcement officer believes the property is subject to forfeiture. The seizing agency is required to make reasonable efforts to provide notice of the seizure to the person from whose possession or control the property is seized. Such notice may be posted at the place of seizure with a description of the property, the date and place of the seizure and information about the seizing agency. When property is seized, the seizing agency shall forward a written request for forfeiture to the county or district attorney who shall accept or deny the request. If denied, the agency may request a state law enforcement agency, including the attorney general, to adopt the forfeiture or engage an attorney to represent the agency in the proceedings. The agency may also request federal adoption of the seizure. Forfeiture claims may be settled between the parties and such settlements shall not be conditioned upon any disposition of criminal charges.

K.S.A. 60-4108 governs management and preservation of seized property. The seizing agency may release property if forfeiture is unnecessary and they may also transfer the property to another agency by discontinuing forfeiture proceedings and allowing the other agency to

initiate new proceedings. An owner of seized property may obtain release of the property by posting a surety bond or cash in an amount equal to the value of the property. If property is seized, the agency may remove the property to an appropriate place designated by the court, place the property under constructive seizure, remove the property to a storage area or deposit it into an interest-bearing special trust account or property for another custodian to take custody of the property. The seizing agency is required to conduct a written inventory and estimate the value of the property. The court may order property sold, leased, rented or operated to satisfy an interest of any interest holder. Such an order may be entered after notice to persons known to have an interest in the property and opportunity for a hearing.

K.S.A. 60-4109 outlines the procedure for commencing forfeiture proceedings. Proceedings are commenced by filing a notice of pending forfeiture or a judicial forfeiture action. If proceedings are not initiated within 90 days, the property must be released on request of the owner or interest holder. A claimant may file a petition for recognition of an exemption. Notice or service shall be by personal service, certified mail or publication in the official county newspaper depending on the circumstances of the property. Notice of a pending forfeiture on real property is not effective until it is recorded. The plaintiff's attorney may file a lien on the property and the statute sets forth the requirements of the lien notice.

K.S.A. 60-4110 provides the framework for recognizing exemptions. An owner or interest holder may file a claim within 60 days after notice of the pending forfeiture, and no such petition can be filed after the court action is commenced by the seizing agency. If one or more owners or interest holders file for recognition of exemption, (1) the plaintiff's attorney shall provide the seizing agency and the petitioning party with a written recognition of exemption and statement of nonexempt interests within 90 days, (2) an owner or interest holder may file a claim within 60 days after the effective date of the notice, (3) the plaintiff's attorney may proceed at any time, and (4) if no claim is properly filed, the plaintiff's attorney shall proceed.

K.S.A. 60-4111 outlines the process of filing a claim. Only an owner or interest holder may file a claim. Such a claim shall be mailed to the seizing agency and the plaintiff's attorney. The claim must include the case information, a return address, the nature and extent of the claimant's interest in the property and a detailed description of when and how the claimant obtained an interest in the property. A claim may include the assertion of the right against self-incrimination. The court may draw an adverse inference from such assertion, but such an inference shall not be the only basis for a judgment against the plaintiff.

K.S.A. 60-4112 covers the general process for judicial proceedings under the act. If property is seized for forfeiture, after following the exemption and claim procedures, the court may issue an order to show cause to the seizing agency for a hearing on whether probable cause for the forfeiture exists. If the court finds no probable cause, the property shall be released. A person charged with a criminal offense may apply, before final judgment, for the release of seized property that is necessary for the defense of the person's criminal charges. The burden of proving an exemption is on the claimant. In any proceeding under the act, the court may receive and consider all evidence admissible in determining probable cause, and the court shall consider the totality of the circumstances in determining if the property of a person is subject to forfeiture. Property declared forfeited under the act vests in the law enforcement agency seeking forfeiture. An acquittal or dismissal in a criminal proceeding does not preclude civil proceedings under this act. The court shall stay discovery against a criminal defendant and the seizing agency during a related criminal proceeding after making provision to prevent loss to any party resulting from the delay. The rules of civil procedure apply to forfeiture proceedings, and actions relating to the same property shall be consolidated on motion of the plaintiff's attorney and may be consolidated on motion of an owner or interest holder.

K.S.A. 60-4113 addresses in rem proceedings. In rem proceedings, which are proceedings brought against property, may be brought in addition to or instead of in personam proceedings, which are proceedings brought against people. Only an owner or interest holder who has timely filed a property claim may file an answer. Such an answer shall include the case information, an address for the claimant, the nature and extent of the claimant's interest in the property and a detailed description of when and how the claimant obtained interest in the property. A claim may include the assertion of the right against self-incrimination. The court may draw an adverse inference from such assertion but such an inference shall not be the only basis for a judgment against the plaintiff. An answer must be filed within 21 days after service of the in rem complaint. The issue shall be determined by the court. The plaintiff's attorney has the burden of proving the interest in the property is subject to forfeiture by a preponderance of the evidence. If the state proves such claim, the claimant has the burden of showing that the claimant has an interest in the property that is not subject to forfeiture by a preponderance of the evidence. If the plaintiff's attorney failed to meet such burden or the claimant proves their claim, the court shall order the interest in the property returned. The court shall order all other property forfeited to the seizing agency and conduct further proceedings.

K.S.A. 60-4114 governs in personam proceedings. On application of the plaintiff's attorney, the court may issue a temporary restraining order without notice or opportunity for hearing if the plaintiff's attorney demonstrates that there is probable cause to believe that the property involved would be subject to forfeiture and the provision of notice would jeopardize the availability of the property. Notice of a temporary restraining order and an opportunity for a hearing shall be given to persons known to have an interest in the property. A hearing shall be held and shall be limited to the issues of (1) whether there is a probability that the seizing agency will prevail on the issue of forfeiture and failure to enter the order could result in the property being unavailable for forfeiture and (2) the need to preserve the availability of the property outweighs the hardship on any owner or interest holder. The court shall enter a judgment of forfeiture on a determination of liability of a person for conduct giving rise to forfeiture. Following entry of such order, the plaintiff's attorney may give notice to owners and interest holders who have not previously been given notice. An owner or interest holder may file a claim if not otherwise precluded. If the seizing agency does not recognize the exemption, the plaintiff's attorney shall file a complaint and the court shall hold a hearing to determine the claim. The court may amend the order of forfeiture based on such court determination.

K.S.A. 60-4115 relates to substituted assets and supplemental remedies. Under certain circumstances, the court may order the forfeiture of other property up to the value of the property subject to forfeiture of an owner or in personam defendant. Those circumstances are when the property (1) cannot be located, (2) has been transferred, conveyed or sold, (3) is beyond the jurisdiction of the court, (4) has been substantially diminished in value, (5) has been commingled with other property that cannot be divided, (6) is subject to any interest of another person that is exempt from forfeiture, or (7) is exempt from forfeiture.

K.S.A. 60-4116 provides for the judicial disposition of the property. After resolution of all claims and exemptions and after a determination that the property is subject to forfeiture, the court shall enter an order that the seizing agency has clear title to the property. If the plaintiff's attorney recognizes that an interest holder has an interest that is exempt from forfeiture, the court may release or convey forfeited personal property to a regulated interest holder under certain conditions. If a claimant fails to prove their interest is exempt, the court shall order the claimant to pay reasonable costs and expenses. If more than one agency is substantially involved in the forfeiture, the court shall equitably distribute the proceeds.

K.S.A. 60-4117 describes how the law enforcement agency may use forfeited property or the proceeds from the sale of forfeited property. The agency may:

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- Retain it for official use or transfer it to another agency
- In the case of illegal or controlled substances or equipment, destroy it or use it for investigative or training purposes
- Sell the property
 - Personal property must be sold at public sale to the highest bidder
 - Real property may be sold at public sale to the highest bidder or the agency may contract with a real estate company to sell the property
 - No employee or public official of an agency involved in the seizure may purchase the property
- Salvage the property

Firearms may be destroyed, used within the agency for official purposes, traded to another agency or given to the KBI for law enforcement, testing, comparison or destruction. The proceeds of a sale shall be distributed in the following order of priority:

- Satisfaction of any court preserved security interest or lien
- Expenses of the forfeiture proceedings
- Reasonable attorney fees
- Repayment of law enforcement funds expended in purchasing contraband or controlled substances
- Credited to the appropriate law enforcement agency's forfeiture account

K.S.A. 60-4118 details the powers of the personnel enforcing the act. A county attorney, district attorney, the attorney general or such attorney's designee may conduct an investigation of alleged conduct in violation of the act. Examination of witnesses shall be done by an attorney and testimony shall be recorded.

K.S.A. 60-4119 authorizes immunity orders. If a person is called to produce evidence under the act, on request of the county or district attorney or the attorney general, the court shall issue an order requiring the person to produce evidence notwithstanding their refusal based on the privilege against self-incrimination. The county or district attorney or attorney general may make this request when the attorney believes the production of the evidence is necessary for public interest and the person has refused or is likely to refuse to produce the evidence. The production of evidence compelled by such an order may not be used against the person in a subsequent criminal case.

K.S.A. 60-4120 is the statute of limitations. All actions under this act shall be brought within five years of the last conduct giving rise to forfeiture. K.S.A. 60-4121 provides that controlled substances that are contraband are summarily forfeited to the state. K.S.A. 60-4122 prohibits a person claiming interest in property subject to forfeiture from commencing or maintaining an action against a seizing agency. K.S.A. 60-4123 provides that the provisions in the act shall be

liberally construed to effectuate its remedial purposes. K.S.A. 60-4124 provides for uniform application of the act. K.S.A. 60-4125 provides for severability of the act if any provision is held invalid. K.S.A. 60-4126 requires the act to be codified in the code of civil procedure and applies the rules of evidence.

K.S.A. 60-4127 creates the Kansas asset seizure for forfeiture repository and requires reporting by law enforcement agencies. The Kansas bureau of investigation is required to set up the repository and gather information on each seizure and forfeiture made under the act. The repository is required to be on the bureau's website. Each agency is required to report information concerning each seizure for forfeiture to the repository. The prosecuting attorney shall submit information on each forfeiture action to the seizing agency for submission to the database. Each law enforcement agency is required to submit a forfeiture fund report to the repository. The bureau is required to determine whether each agency's financial report matches the agency's seizing report and notify the agency of any errors for correction.