# ISSUES CONFRONTING THE 1998 GENERAL ASSEMBLY

**Informational Bulletin No. 198**

Legislative Research Commission

Frankfort, Kentucky

# ISSUES CONFRONTING
# THE 1998 GENERAL ASSEMBLY

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# FOREWORD

This collection of issue briefs, prepared by members of the Legislative Research Commission staff, attempts to bring into sharper focus some of the major issues which have received considerable legislative attention to date during the interim. The report by no means exhausts the list of important issues facing the 1998 Legislature. Nor are the alternatives in the discussion of each issue necessarily exhaustive.

Effort has been made to present these issues objectively and in as concise a form as the complexity of the subject matter allows. They are grouped for the convenience of the reader into the various committee jurisdictions and no particular meaning is placed upon the order in which they are presented. Because of continuing activity by the legislative committees, a supplement to this publication will be prepared in December.

Staff members who prepared the reports were selected on the basis of their knowledge of the subject matter and their work with the issues during the 1996-97 interim.

Don Cetrulo
Director

Frankfort, Kentucky
September, 1997

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# AGRICULTURE AND NATURAL RESOURCES

## INDUSTRIAL HEMP

Prepared by Biff Baker

### Issue

**Should the General Assembly authorize research of industrial hemp?**

### Background

The history of industrial hemp in Kentucky can be traced back to the mid-1700's. Initially used by early settlers to produce rope, clothing, and other personal articles, hemp was eventually shipped in bulk to New Orleans for export. Hemp production flourished until the end of the Civil War. The unavailability of (slave) labor and the increasing importation of competing fibers contributed to the industry's decline.

Industrial hemp saw a resurgence in Kentucky during World War II, but because of intensive labor requirements and government intervention, production once again fell off soon after the war ended. In 1970, the Controlled Substance Act was passed, aimed at eliminating the use of marijuana, except for authorized experimental purposes. This was significant since marijuana and low THC industrial hemp are both members of the cannabis sativa family and possession of any cannabis sativa plant was made illegal.

During the last few years there has been a renewed interest nationwide in researching viable agricultural uses for industrial hemp. Several states have introduced legislation that would allow industrial hemp to be grown for research purposes, but none have succeeded yet in getting their proposals enacted into law.

Data gathered from hemp grown in research plots could answer a number of agronomic questions relating to hemp's potential for production in Kentucky. Agronomic data could show potential for seed production, optimum seeding rates, soil and moisture requirements, fertilizer requirements, row width, planting and harvesting dates, yields, weed control, insect and disease problems, crop rotation, and storage capability.

This information would be useful for comparing industrial hemp to other fiber crops, such as flax and kenaf. In addition to the agronomic comparison to other fibers, economic and marketing data for hemp could be developed. Equipment requirements for harvesting and processing hemp and the quality of hemp products could be researched. Currently, the main product uses for such fibers are fabric, seed and oil, building materials, and pulp and paper.

## Discussion

The Interim Joint Committee on Agriculture and Natural Resources heard testimony on the issue of allowing research of industrial hemp to determine its feasibility as a possible cash crop for Kentucky farmers. If Kentucky does succeed in passing legislation that would authorize raising industrial hemp for research purposes, a number of events would have to take place before any research could actually be done.

Federal law considers all cannabis sativa plants, including industrial hemp, as marijuana. Marijuana is a Schedule 1 controlled substance. In order to raise hemp for research purposes, a federal permit from the US Drug Enforcement Agency (DEA) would be required. The DEA would require the state to fill out an application requesting a manufacturer's permit. The state would be inspected by the DEA to verify that it could meet strict security requirements for the hemp plots, possibly including security fencing, alarm systems, controlled access to the site, and around-the-clock armed guards. If these strict criteria were met, a permit could be issued. It is important to note, however, that the DEA has never issued a permit allowing research of industrial hemp.

Advocates of allowing the research of hemp point out that industrial hemp is legal in much of the world and is used in a variety of ways to produce a number of products. It is touted as a hardy crop that is environmentally friendly, in that it requires little, if any, weed control and is naturally pest resistant. Proponents also argue that for reliable data to be compiled to determine the potential for industrial hemp in Kentucky, research would need to be done.

One legislator has proposed legislation that would allow the agricultural experiment station at the University of Kentucky to raise industrial hemp, in order to conduct research relating to the production of commercial products, study the economic feasibility of developing an industrial hemp market in the Commonwealth, develop a report that would determine the estimated value-added benefit that Kentucky businesses would reap, study the research being conducted worldwide relating to industrial hemp, and develop a method to assign an industrial hemp poundage allotment to Kentucky farms. The bill also limits the maximum amount of tetrahydrocannabinol (THC) that any part of the plant could contain to one-half of one percent. THC is the product in the plant that produces the "high" created when marijuana is smoked or ingested.

Opponents counter that under existing state and federal law, there is no distinction between low-THC industrial hemp and marijuana. They are both cannabis sativa plants. The plants are virtually indistinguishable to the naked eye, thus making law enforcement nearly impossible if the growing of industrial hemp were legalized. Opponents also fear that pro-marijuana supporters are using the legalization of research of industrial hemp as a stepping stone to the legalization of marijuana. Finally, those against authorizing the growing of industrial hemp for research purposes state that even if Kentucky allows it, it will still be against federal law.

# UNTREATED SEWAGE DISCHARGES

Prepared by Daniel J. Risch

## Issue

**Should the General Assembly consider new approaches to prevent discharges of untreated sewage piped straight from homes to streams?**

## Background

Historically Kentucky has been challenged to meet basic water quality standards because of untreated or inadequately treated sewage discharged to the waters of the state. The following discussion will be limited to one specific source of untreated sewage: discharges from homes directly to the state's waters. This has become known as the problem of "straight pipe discharges."

Straight pipe discharges of untreated sewage contain high levels of fecal coliform bacteria. The state tests water for fecal coliform because the bacteria can indicate the presence of other disease-causing organisms. Common illnesses that can arise when unsafe levels of fecal coliform are present in water include gastroenteritis and ear and skin infections. Hepatitis Type A can also be contracted from sewage contaminated water.

Every summer since 1990 Kentucky citizens and visitors to the state have been warned against swimming in the north fork of the Kentucky River because of the health threat from high counts of fecal coliform. Recent studies confirmed a long held suspicion that much of the contamination spews from over 1000 straight pipes carrying the waste directly from homes to the upper reaches of the Kentucky River and its tributaries.

In urban areas, the state's Division of Water routinely issues warnings against swimming or any body contact with the rivers and streams flowing through these population centers. Again, the threat comes from untreated or poorly treated sewage. The contamination sources are varied, but straight pipe discharges are found even in these developed areas. For example, in northern Kentucky twelve homes were discovered to have straight pipe discharges, even though the homeowners could have connected to a sewage system serving the area where the homes are located.

Straight pipe sewage discharges occur when homeowners build a house or set up a mobile home without either connecting to an available sewer system or constructing an approved on-site sewage system. A homeowner might choose a straight pipe discharge to avoid the cost of installing an on-site system or the cost of hooking up to a sewer system and incurring the ongoing service fees. Fear that annexation may follow sewer line extensions may also lead homeowners to avoid proper sewage treatment.

The cost of a conventional on-site system to serve a three-bedroom home can run between $2000 and $2500 in rural counties and around $4000 in urban counties. A typical cost to connect to a sewer system is around $400 and yearly service fees can average $180 to $300.

In addition, rural homeowners, who are more likely to need an on-site sewage system, often find that conditions related to their land cause the costs of a conventional system to rise or force the use of a non-conventional system that would be more costly to build. Also, a non-conventional system can cost up to three times more than a conventional system and require greater maintenance.

Presently, the key control for the state to prevent straight pipes is for local health departments to review a homeowner's construction plans and, where sewer service is unavailable, to issue a permit to build an on-site system.

**Discussion**

There are a number of approaches that have been proposed for dealing with the problem of straight pipe discharges.

One approach to shoring up the state's control appeared most recently in a legislative proposal put before the 1994 General Assembly.

The legislature considered restricting the start of any home construction until the homeowner obtained an on-site septic system permit. To accomplish this, the homeowner would have been required to request a site evaluation and obtain an on-site system permit before electrical service could be supplied to the property. Because the proposal was introduced very late in the session, the bill received little attention.

However, fifteen counties have enacted ordinances which largely mirror the 1994 legislative proposal. Additionally, a bill has been prefiled for consideration during the 1998 regular session to try again to apply the requirement statewide.

Another approach attacks the homeowner's financial concerns head-on. A special project underway in eastern Kentucky and centered in Letcher County is pooling resources from local, state, and federal governments in a concentrated effort to prevent and eliminate straight pipe discharges. One aspect of the project involves giving grants to homeowners willing to install on-site septic systems to replace their home's straight pipes.

This grant program serves two goals. Homeowners who find that their land is unsuitable for conventional systems are financially supported and encouraged to try non-conventional systems. This has the added benefit of testing systems that have not been extensively tried in the state but which show potential in helping to solve problems posed by property sites unsuitable for conventional systems.

The second goal accomplished by the homeowner grant program is that through advertising the program and the availability of financial assistance the public's attention is drawn to the problems and solutions surrounding straight pipe sewage discharges.

And that leads to a third approach to preventing straight pipe sewage discharges: public education. A significant proportion of the special effort in eastern Kentucky is devoted to informing the public of the problems caused by the pipes. To accomplish this the Governor's Office, the Secretary of the Natural Resources and Environmental Protection Cabinet, and the 5th District Congressional Office have used the high profiles of their offices to gain the attention of the public.

Beyond stressing the health improvements that could be made from using proper sewage treatment, the case is also being made that clean water helps encourage economic development.

The General Assembly may be asked in the upcoming session to fund continuation of the homeowner's grant program and the public education effort now underway in east Kentucky or to fund and extend similar programs to the rest of the state.

# CONCENTRATED LIVESTOCK OPERATIONS

Prepared by Christine Baker

## Issue

**Should the General Assembly consider stricter laws and administrative regulations to address the increasingly industrialized nature of animal production farms?**

## Background

Farming has undergone sweeping changes in the past 200 years. In the early years of our country, farming was a way of life for most people and families raised livestock and crops for their own consumption. Later, industrialization resulted in fewer, more specialized farms in which a smaller number of independent farmers produced food for larger segments of society. This trend has dominated most of the 20th century.

Gradually, the average *size* of farms has increased while the *number* of farms has decreased. According to the 1992 Census of Agriculture, the total farm count dwindled from 2.7 million in 1969 to 1.9 million in 1992, while the number of large farms -- those with $100,000 in sales or more -- has jumped from 51,995 in 1969 to 333,865 in 1992.

In the livestock industry, the system of marketing that has prevailed during most of this period is known as open production. In this type of system, a food product firm purchases commodities (chickens, hogs) from farmers at market prices determined at the time of purchase.

However, as a result of changing demographics and lifestyles, more discriminating consumers, and new technological developments, a revolution has been taking place within the poultry, pork, and beef industries. The open market system is being replaced.

The trend in these industries today is toward large-scale farms that are closely connected to or controlled by food product firms. The two systems dominating this trend are known as contract production and vertical integration.

Contract production occurs when a firm commits to purchasing hogs, chickens, or cattle from a producer at a price established in advance. A vertically integrated system is one in which a single firm controls the flow of a commodity across two or more stages of production (from chicks to chickens to eggs, for example). In both types of systems, firms have some kind of control over the production process. This control may be comprehensive -- in which a firm details exactly how the animals will be housed, raised, medically cared for and fed -- or it may be in the form of a certain expectation of weight and quality specified in a contract between the firm and the producer.

Food product firms have moved to these systems because consumers are demanding safer, more consistent, and uniform products. Because of the availability of new technology, food product firms are able to contract with or build larger, highly systematized farms. By controlling all or some of the animal production process, firms are able to ensure that their products will have a uniform appearance, taste, consistency and weight. By developing large-scale operations, the firms also benefit from economies of scale.

The size of these new hybrid farms, however, has caused concern here in Kentucky and in other states. The large concentration of animals in one place creates challenges of waste storage and disposal, which call up environmental and health concerns.

**Discussion**

Kentucky has laws to deal with agricultural polluters, the most basic being KRS 224.70-110, which states that "No person shall...cause or contribute to the pollution of the waters of the Commonwealth."

Farmers that are found to be polluting water sources are given a chance to take corrective measures to solve the problem, and financial and technical assistance is available to help bring them into compliance with the law. Individuals who continue to pollute or disregard the warnings can be fined or jailed.

Aside from measures taken after pollution has already occurred, there are also regulations that instruct farmers on how to deal with animal waste and carcasses.

Farmers handling liquid waste (swine and dairy operations) must apply to the Division of Water for construction and operating permits for waste lagoons. The lagoons must conform to design standards set up by the U.S. Department of Agriculture's Natural Resource Conservation Service, and the Division must approve the site, construction of the facility, and confirm that the lagoon is operating properly.

In addition, the Agriculture Water Quality Act, adopted in 1994, sets up a system in which farmers are given specific guidelines to follow with regard to pollution control. Currently farmers are simply encouraged to operate their farms based on Best Management Practices and to adopt individual water quality plans. However, the Agricultural Water Quality Authority is charged with developing a state Water Quality Plan, and farmers will be required by the year 2001 to adopt a plan in compliance with the state plan.

Despite these measures, opponents of the large-scale livestock operations say that Kentucky's livestock regulations were written with smaller farms in mind and that they aren't designed to effectively limit pollution from large-scale, commercial farms. They point to the fact that the two large hog producers that have recently announced their intentions to build large-scale facilities in Western Kentucky would roughly double the hog population in Kentucky, bringing it to 1.2 million hogs.

The announcement by the two hog producers has alarmed local citizens, who fear that large or improperly managed hog waste lagoons could pollute streams, lakes, rivers, and other water sources, and spread disease. There are also concerns that property values could fall in areas located near large hog farms or that the smell would be a nuisance to homeowners and a threat to tourism.

Critics also point to states such as North Carolina and Missouri, which experienced environmental mishaps, such as spills of hog waste into rivers, resulting in fish kills. Both of these states responded by adopting new animal waste laws. These laws cover a variety of issues -- such as tougher construction and monitoring standards, distance requirements between animal waste and water sources, mandatory training for farm workers and managers, and annual inspections.

On the other hand, supporters of the large hog operations say that if the facilities are properly constructed and managed, large lagoons and carcass waste should not cause problems.

They cite the economic benefits such industries can bring to an area, such as new jobs, capital investment and spin-off industries, like feed mills and slaughterhouses. Supporters also point out that a large farm can be a boon to smaller, local farmers who grow corn used as hog feed.

# APPROPRIATIONS AND REVENUE

# MOTOR VEHICLE USAGE TAX

Prepared by Terry K. Jones

## Issue

**Should the method used for the levy of the motor vehicle usage tax on the sale of used motor vehicles be changed?**

## Background

Kentucky first taxed the sale of motor vehicles under the sales tax law enacted in 1934. Upon repeal of the sales tax in 1936, a special three percent sales or usage tax on motor vehicles was enacted. The tax was levied only upon the transactions involving the registration of motor vehicles not previously registered in this state. The tax was based upon the value of the vehicle the first time it was licensed in Kentucky. Used motor vehicles taxes were based on the values listed in an automotive reference manual prescribed by the Revenue Cabinet.

In 1960, with the enactment of the general sales and use tax law, the receipts from the sale of used motor vehicles previously registered in this state were subject to tax. A trade-in deduction was allowed in determining the receipts subject to tax and the tax was remitted and reported by the dealer on the monthly sales tax return.

In 1968, the taxation of used motor vehicles previously registered in this state was transferred from the sales and use tax law to the motor vehicle usage tax law. The taxation of first time licensed used motor vehicles and used motor vehicles previously registered in this state were combined under one statute and retained some features of both laws. The tax was based on the value assigned the used motor vehicle by an automotive reference manual prescribed by the Revenue Cabinet, and a trade-in deduction was allowed.

The Revenue Cabinet currently uses the average value compiled and published monthly by the National Automotive Dealers Association (NADA) to determine retail price. For vehicles more than seven years old, the NADA average trade-in value is used to determine retail price.

## Discussion

Legislators, county clerks, and Revenue Cabinet officials hear frequent complaints that the current method of taxing used motor vehicles is unfair, because it results in the imposition of a tax on a value higher than that actually paid by purchasers of used motor vehicles.

In response to these concerns, legislation has been introduced during the last several sessions of the General Assembly proposing to use either "cash consideration" or "average trade-in value" as the method for taxing used motor vehicles. However, none of the legislative proposals have been enacted, primarily because of the lack of credible data relating to the actual selling price of used motor vehicles in the Kentucky market. The lack of credible data left proponents of the legislative proposals unable to substantiate the validity of these concerns. In addition, the lack of data has made it very difficult to accurately analyze the fiscal implications of adoption of any legislative changes. As a result, the Legislative Research Commission approved a request that LRC staff and the Revenue Cabinet jointly conduct a study of the current method of taxing used motor vehicles. The results of the study were published in September 1994, in Research Memorandum No. 468.

The results of the study found that on average, sellers reported receiving 88.2 percent of the average NADA value for vehicles they sold, while buyers reported paying 87.6 percent of the average NADA value for vehicles they purchased. This data would seem to substantiate the proponents' claims that the use of the NADA's average retail price is not reflective of the actual selling price of used motor vehicles in the Kentucky market.

It is estimated that the use of **cash consideration** would result in a $11.4 million revenue loss for those vehicles which are currently taxed at the NADA average retail price. The study did not analyze any vehicle transactions for vehicles more than seven years old, which are currently taxed at the NADA average trade-in value. The Revenue Cabinet estimates that the use of cash consideration for these vehicles would result in a $12.8 million revenue gain. The net revenue change would be a $1.4 million revenue gain.

On the vehicle transactions in which there was a response from both the seller and buyer, 45.9 percent reported the same cash price being received or paid. Of the remaining 54.1 percent of the responses, 24.6 percent of the sellers reported receiving a cash price higher than the buyer reported paying and 29.5 percent of the sellers reported receiving a cash price lower than the buyer reported paying. With 54.1 percent of the responses reporting different amounts received and paid for the vehicle, and with over 550,000 used vehicle transactions a year, verifying the actual cash consideration received and paid for a vehicle from the seller and the buyer is a compliance concern of the Revenue Cabinet.

The use of the **average trade-in value** as the method of taxing all used motor vehicles, not just those over seven years old, would be approximately a 20 percent reduction from the current method and would result in a $15.6 million revenue loss.

## INTANGIBLE PERSONAL PROPERTY TAX

Prepared by Susan Gilliland

### Issue

**Should the remaining intangible property taxes be repealed?**

### Background

During the last several years, there has been a flurry of judicial activity regarding the intangible property tax. The Kentucky Supreme Court held in *St. Ledger v. Commonwealth of Kentucky* that the 25 cents per $100 tax on out-of-state bank deposits and the statutes imposing the tax on corporate stock while exempting stock of in-state corporations to be unconstitutional. The court held that the bank deposits tax statute violated the Commerce Clause of the U.S. Constitution by creating a lower tax rate on in-state deposits than out-of-state deposits. At the time, in-state deposits were subject to a 1/10 cent rate. In 1996, the General Assembly extended the 1/10 tax rate to all bank deposits. The Court held that the exemption for in-state stock violated the Commerce Clause of the U.S. Constitution. Due to these court decisions, the taxing scheme used by the state of Kentucky to tax bank deposits and stocks was invalidated. This resulted in an approximate loss of $35 million in annual general fund revenues.

In addition to the judicial activity, there have also been numerous attempts during the last several regular sessions of the General Assembly to afford favorable treatment to the remaining classes of intangible property.[1] These bills have proposed constitutional amendments to exempt intangible personal property from taxation or to permit the General Assembly to exempt any or all classes of intangible property from taxation. Bills have also been filed that would reduce the rate of taxation on intangible personal property.

### Discussion

Section 170 of the Kentucky Constitution requires that all property be subject to tax unless specifically exempted by the Constitution. Generally, intangible personal property is assessed at fair cash value as of January 1 of each year. The tax still applies to such intangible assets as bonds, patents, trademarks, account receivables, note receivables, and mortgage receivables and generates about $45 million per year.

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[1]Intangible personal property still subject to taxation includes annuities, capital stock of bank for cooperatives, brokers accounts receivable, domestic life insurance, production credit associations, profit sharing plans, retirement plans, savings and loan associations, bonds, patents, trademarks, receivables, royalties, and tobacco base allotments.

There are tax some levies that are classified at intangible taxes that are paid by businesses in lieu of other taxes. If the intangibles tax is addressed as an entire class in proposed legislation, the taxes paid by certain businesses would be drastically reduced:

**(1) Savings and loan associations' capital stock.** Savings and loan associations currently pay $0.10 on each $100 of taxable value of their capital stock. The tax is paid by the bank or trust company on behalf of the shareholder and the shareholder is not required to list the shares for taxation. Savings and loan associations are also exempt from the corporate income and license tax. Revenues from this tax for FY 1992-93 were approximately $6.3 million.

**(2) Insurance companies' taxable capital.** Domestic life insurance companies currently pay $0.70 on each $100 of taxable capital. Domestic life insurance companies are exempt from the insurance premiums tax, and the corporate income and license tax because they pay this tax in lieu of those taxes. Revenues from this tax for FY 1992-93 were approximately $4 million.

**(3) Public service companies' property tax assessments.** Property taxes are assessed against the operating property, non-operating tangible property, and non-operating intangible property of public service companies. Public service companies include utility companies, such as electric, gas, water, telephone, and cable television, and transportation companies, such as railroads, air carriers, pipelines, and water transportation. The 1992-93 fiscal year revenue attributable to non-operating intangible property was approximately $0.58 million. Public service companies are exempt from the corporation license tax; however, they do pay a significant amount of corporate income tax.

While there is general agreement on repealing the tax imposed on at least some classes of intangible property, there is not a consensus on how the repeal should be achieved. One solution is to propose a Constitutional amendment to exempt all intangible personal property from taxation. Proponents of this solution maintain that it will result in immediate relief for Kentucky's taxpayers. Opponents of this solution argue that this method would tie the hands of the legislature. It would also leave certain businesses with virtually no tax liability.

Another possible option is to allow the General Assembly to exempt all or any class of intangible personal property from taxation. Proponents argue that this solution will allow the General Assembly to retain more control over what classes of intangible property are subject to tax and at what rate. Opponents suggest that this solution provides no direct and immediate relief to taxpayers, since it only permits the General Assembly to reduce or exempt classes of intangible property from taxation.

A third solution is to reduce the tax imposed against intangible personal property to the lowest amount permitted by the Kentucky Constitution and case law. There are no court decisions that specifically address the issue of what constitutes a permissible tax rate. The case of *Gillis v. Yount* is often cited as holding that a tax rate of $.001 per $100 of value is unconstitutional. However, the decision of the Kentucky Supreme Court in *Gillis v. Yount* was based upon the holding of the court that the separate classification of unmined minerals was arbitrary. Thus, the court did not specifically address the issue of whether the rate was unconstitutionally low.[2] In a subsequent decision, the Court of Appeals held that the classification of distilled spirits separate from other tangible personal property violated the Kentucky Constitution as an arbitrary classification. Like unmined minerals, distilled spirits were taxed at a rate of $.001 per $100 in value.[3] Although both decisions were based upon an arbitrary classification, both opinions contain dicta indicating that absent the classification issue, the rate of $.001 per $100 in value would probably be low enough to constitute a de facto exemption, which would violate Section 172 of the Constitution. These two cases represent the only guidance at all regarding constitutionally permissible tax rates. It is therefore difficult to determine with any degree of certainty what the lowest "constitutionally permissible" rate would be.

If the rate imposed against all intangible personal property was reduced, there would seem to be little danger that the court would find the classification arbitrary. Thus, any court challenge would probably be based on the sufficiency of the rate imposed.

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2 In failing to address the issue of the constitutionality of the rate, the Court stated: "Having decided that KRS 132.020(5) is an arbitrary classification in violation of Section 171 of the Kentucky Constitution, as quoted above, the Court has elected not to consider whether the $.001 ad valorem levy upon unmined coal is an unconstitutional rate."

3 *Yount et al. v. Revenue Cabinet et al.*; Ky. Ct. App. Nos. 90-CA-454-MR and 90-CA-1398-MR

# UNMINED MINERALS

Prepared by Pam Lester

## Issue

**Should the General Assembly propose an amendment to the Kentucky Constitution to exempt unmined minerals from the property tax?**

## Background

Sections 170 through 182 of the Kentucky Constitution address issues relating to revenue and taxation. In addressing most types of taxes, the Constitution is very vague, granting the General Assembly broad authority. However, the Constitution includes a great deal of detail regarding the imposition of and exemption from the property tax. Three sections of the Kentucky Constitution combine to establish the authority of the General Assembly to impose property taxes and to create exemptions from the property tax. Section 171 of the Kentucky Constitution requires that taxes "shall be uniform upon all property of the same class". Section 172 requires that "all property, not exempted from taxation by this Constitution shall be assessed...", and Section 174 requires that "all property ... shall be taxed in proportion to its value, unless exempted by this Constitution; and ... shall pay the same rate of taxation." Further, Section 170 of the Constitution, which specifies the exemptions from taxation, states that "all laws exempting or omitting property from taxation other than the property above mentioned shall be void." Thus, the exemption of unmined minerals from the property tax would require a Constitutional amendment.

The taxation of unmined minerals generally, and coal specifically, has a long and varied history in Kentucky. From 1792, when Kentucky's first property taxes were levied, until the late 1970's, unmined minerals were not classified separately from other forms of real property for the purpose of taxation. Initially, the value of unmined minerals was included in the overall value of the surface property. However, in the latter part of the 19th century, landowners began to sell mineral rights while retaining the surface estate, thus severing the ownership of underlying minerals from the surface estate. The severance of the mineral rights from the surface estate complicated matters, because the surface estate and underlying minerals were often owned by different individuals. Thus, separate assessment and collection efforts had to be made for both categories of ownership.[4] Initial collection efforts against mineral owners resulted in the realization of little or no tax revenues, as owners of the mineral estate were often difficult to locate. Efforts were made in Eastern Kentucky in the 1950's to develop a uniform system of valuation and assessment; however, those attempts were largely unsuccessful. This haphazard and somewhat disorganized locally-based system continued through the early 1970's.

[4]Kentucky law has long recognized that separate mineral interests constitute real property.

In 1976, the Kentucky General Assembly created a classification for coal that separated it from other real property for tax purposes and exempted it from local taxation. In addition, the General Assembly assigned the responsibility of valuing unmined coal to the Revenue Cabinet, leaving the valuation of the surface estate to the local PVA. The creation of a separate classification and separate valuation clearly established the intent of the General Assembly to treat unmined coal as a separate classification for property tax purposes. Between 1976 and 1978, the Revenue Cabinet valued and assessed unmined coal, generating revenues in excess of $1.5 million. In 1978, the General Assembly lowered the tax rate imposed against unmined coal from 31.5 cents per hundred to one cent per thousand (one mil).(Other unmined minerals were not affected, and continued to be taxed at the same rate as other real property.) The General Assembly also returned to the local PVA the responsibility for valuing and assessing unmined coal. The practical effect of the reduction in rate and transfer of responsibility was that unmined coal was no longer assessed or taxed in any meaningful way.

In 1985, two lawsuits were filed challenging the separate classification and taxation of unmined coal. The two suits were consolidated, and in 1988, the Kentucky Supreme Court issued its opinion in *Gillis v. Yount*,[5] holding that the separate classification of unmined coal by the General Assembly was arbitrary, and therefore unconstitutional under Section 171 of the Kentucky Constitution.

**Discussion**

Since the Kentucky Supreme Court decision in *Gillis v. Yount*, unmined coal has been classified, assessed, and taxed in the same manner as other real property, including other unmined minerals and natural resources. A lawsuit filed by Kentuckians for the Commonwealth shortly after the decision in *Gillis v. Yount* challenged the assessment of unmined minerals by local PVAs. The Franklin Circuit Court entered a temporary injunction, which directed the Revenue Cabinet to commence centralized assessment of unmined minerals. In 1994, the General Assembly officially placed the responsibility of valuing and assessing unmined minerals with the Kentucky Revenue Cabinet. The Kentucky Revenue Cabinet has experienced a great deal of difficulty in determining and implementing appropriate valuation methods for unmined minerals generally, and coal in particular. There are currently pending three lawsuits that challenge valuation methods used by the Revenue Cabinet. One case is awaiting a decision by the Kentucky Supreme Court . Until that opinion is issued, the Kentucky Revenue Cabinet is operating the unmined coal program with a great deal of uncertainty about the acceptability and validity of its valuation methodology.

Valuation issues that have been raised include how to value minerals that cannot practically be mined, how to value minerals under farmland that the owner has no intention of mining, how to incorporate the provisions of the broad form deed laws into the valuation of coal, how to account for minerals that must remain in the ground to prevent the mine from caving in, and how to make a valid distinction between property that is being actively mined and property that is not. The annual operating budget for the unmined coal program is approximately $1

[5]Ky., 748 S.W.2d 357 (1988).

million.  The state assessment billed for collection in 1996 is estimated to be $1.8 million; the local assessment is estimated at $9.2 million.

Repeal of the ad valorem tax on unmined minerals would require a Constitutional amendment.  The Constitutional amendment could be structured to allow the General Assembly to enact legislation to exempt unmined minerals from taxation, or it could establish the exemption outright in the Constitution.

# BANKING AND INSURANCE

## DEPARTMENT OF INSURANCE REGULATORY TRUST FUND

Prepared by Greg Freedman

### Issue

**Should moneys from fees charged by the Department of Insurance and deposited in its agency trust fund be restricted to departmental use or should part be transferred to the General Fund?**

### Background

The Department of Insurance proposed in 1997 to amend a regulation that sets certain fees payable by insurance companies and agents. The increased revenue resulting from these changes was to be used to fund new programs in the Department of Insurance, which receives no General Fund dollars. It has an insurance regulatory trust fund in the State Treasury, in which it deposits moneys received from fees. The Department pays its expenses from the fund. KRS 304.2-400(2) provides that at the end of each fiscal year any amount in the fund in excess of $2 million lapses to the General Fund. The Department's current budget is $11,372,000. Historically, the Department has a surplus at the end of the fiscal year of four to five million dollars. Since the Department must transfer amounts in excess of $2 million, it has been transferring to the General Fund two to three million dollars each fiscal year.

### Discussion

Although the Commissioner of Insurance appeared before the Interim Joint Committee on Banking and Insurance and withdrew the regulation, there remains the issue of how fees deposited in the agency trust fund are used. Some legislators question whether increased fees that are deposited in the agency trust fund and later transferred to the General Fund are nothing more than tax increases, since the money is used for purposes other than to meet the expenses of the collecting agency in fulfilling its statutory duties. The department maintained that the additional money from the proposed fee increase would be used to fund new programs in the Department of Insurance and thus would not lapse. KRS 304.2-400 creates the Department of Insurance trust fund. It provides that the moneys deposited in the agency fund "shall be appropriated for use only by the department to defray the expenses of the department in discharge of its administrative and regulatory powers and duties as prescribed by law..." That restrictive language clearly limits the use of the agency funds. However, the statute goes on to subject such expenditures "to the applicable laws relating to the appropriation of state funds and to the deposit and expenditure of state moneys." Furthermore, the statute then directs that funds in excess of $2 million shall lapse to the General Fund.

If it chooses to address this issue, the General Assembly has several options. The language of KRS 304.2-400 could be amended to clarify seemingly conflicting provisions regarding the legal use of moneys deposited in the agency trust fund. KRS 304.2-400 could also be amended to either raise the $2 million amount to make more funds available to the Department or eliminate the amount so that all funds are available to the Department of Insurance.

# ESCHEAT AUDITS AND UNCLAIMED PROPERTY

Prepared by Judy L. Fritz

## Issue

**Should the General Assembly enact legislation to clarify escheat audit procedures?**

## Background

KRS Chapter 393 was enacted for the purpose of returning unclaimed property, tangible and intangible, to the rightful owners or legal heirs and to avail to the Commonwealth property that remains unclaimed after a specified period of time. The administration of the Unclaimed Property Program lies with the Department of the Treasury.

Past methods that the Department of the Treasury followed have been questioned by the present Treasurer. The major issue is in regards to escheat audits. Escheat audits determine whether property has been abandoned. There is disagreement between the Kentucky Bankers' Association and the Department as to how such determination is made. The pivotal questions are, when the last contact was made by the customer with the property, and whether that contact was sufficient to conform with Chapter 393.

## Discussion

If the General Assembly chooses to address this issue, it could consider enactment of the Uniform Unclaimed Property Act of 1995. The Act sets out with specificity what constitutes positive owner contact. The Act or portions of it could be adopted to make clear what notice procedures to follow and also to give structure to the present audit practice.

# ECONOMIC DEVELOPMENT & TOURISM

## TAX CREDITS FOR SKILL UPGRADE TRAINING

Prepared by Mary C. Yaeger

### Issue

**Should the General Assembly establish a tax credit for skill and occupational upgrade training as a means to advance the education and training of the current workforce?**

### Background

The General Assembly has been concerned with the relationship between education and training and well-paying employment opportunities for Kentuckians. In part, Kentucky's Education Reform Act of 1990 was enacted as a response to this concern, as was the creation of the Cabinet for Workforce Development in 1990. More recently, review of public adult education and training efforts culminated in the 1997 Special Session passage of the Kentucky Postsecondary Education Improvement Act of 1997. One concern that received attention during these hearings was the effectiveness of educational institutions in preparing citizens to compete in the globally competitive marketplace and in providing occupational and career paths that offer economic relief from the low-paying jobs that are associated with a lack of skills and education.

The General Assembly has supported private-employer-initiated training to workers. In 1984, it created the Bluegrass State Skills Corporation (BSSC), which provides grants to selected companies and requires a cash match of 50% for skills training and education. In Fiscal Year 1995-96, two million dollars was disbursed in grants-in-aid to 212 companies.

In 1994, legislation was enacted to allow workforce training as a priority expenditure category for the use of coal severance tax dollars in grants under the Local Government Economic Assistance Program and industrial development projects in the Local Government Economic Development Program.

The Kentucky Cabinet for Economic Development has proposed another way to encourage training of adult populations in the workforce -- provide tax credit to those existing non-retail industries that provide their full-time employees skill upgrade training or occupational upgrade training leading to promotional opportunities.

The concept of providing business incentives for training of employees is common today. According to a recent study on state incentives by the Council of State Governments, all but two states provide some sort of job training programs to businesses. Most of these state programs are grants to companies to cover part of the cost of training employees. Programs vary by what public policy states want to encourage. Programs may target new, existing or displaced workers. Programs may limit training to entry-level skills, adult basic skills, customized training, or upgrade training for existing workers only. Kentucky's BSSC program allows training of employees for all these types of training needs.

## Discussion

Discussions of the effectiveness of tax credits address two major issues: First, are tax credits, or any tax incentives, sufficient impetus to encourage a company or business to change its behavior? In this case, does giving a tax credit motivate a company to provide training where it would otherwise not do so? If a company would provide the training to its workers anyway, then the state has lost revenues it would have otherwise collected. Second, what public policy do legislators want to encourage that the business sector is not now practicing?

It is difficult to gauge whether training tax credits would cause companies to offer training they would not otherwise provide. Corporations already provide a tremendous amount of training, much of which is on-the-job training. The fact that 48 states have some type of job training grant program, but only a few offer tax credits may indicate states' uncertainty regarding their benefits.

However, those states that do offer training tax credits have narrowly defined the public policies they want to encourage. Georgia and Mississippi have a credit for basic skills training of employees. Georgia offers a $150 corporate income tax credit for each employee successfully completing an approved basic skills program and Mississippi offers a credit equal to 25% of training expenses for similar training. In this case, the policy makers may feel that basic skills training raises employment value for life.

Kansas rewards high-performance businesses that pay above average wages in a county if they invest 2% of their payroll in training or participate in one of Kansas' workforce training programs. By limiting this incentive to high-quality firms, Kansas hopes to attract, retain and develop more of these companies. This worker training and education credit is part of a larger incentive program which gives these companies priority consideration for other business assistance programs as well.

Connecticut offers a 5% tax credit on the first year, with a maximum 25% credit beginning in 1998. However, for a company to qualify, job training spending must exceed the amount expended in the previous year. In this way Connecticut appears to have dealt with the issue of motivating companies to provide more training -- if not more than they otherwise would have provided, at least more than they did the year before.

Also Connecticut offers a $300 per student credit to corporations that employ high school students enrolled in a program called Cooperative Work Education Diversified Occupation. This is another example of targeted public policy.

The Kentucky Cabinet for Economic Development tax credit proposal is targeted to existing non-retail businesses and their full-time employees. The skills upgrade training definition includes those skills typically associated with essential workplace skills, such as interpersonal skills, computer skills, communication, problem solving, reading, writing and math skills, but also includes all training that "is designed to provide the employee with new skills necessary to enhance productivity, improve performance, or retain employment." The tax credit also applies to occupational upgrade training, which is defined as training that qualifies an employee for a promotional opportunity.

The General Assembly may have an opportunity in the 1998 Regular Session to determine whether providing tax credits for skills training will strongly encourage companies to provide the type of training and education needed by the Kentucky workforce.

## HIGHWAY BILLBOARDS

Prepared by John Buckner

### Issue

**Should the General Assembly explore ways to allow an increased number of billboards alongside federal interstate highways?**

### Background

The Federal Aid Highway Act (P.L. 85-381, April 15, 1958), which is commonly referred to as the "Bonus Act," set forth initial standards regulating directional, informational, and advertising signs that were located adjacent to highways financed by the federal government. As it pertained to outdoor advertising (a.k.a. billboards), the Act provided for states that voluntarily agreed to control billboards located adjacent to federal highways by following the standards set forth in the Act to receive a bonus of 0.5% of the highway's construction cost. Kentucky entered into this agreement on June 12, 1961, after this action was authorized by the General Assembly in 1960, thus making Kentucky a "bonus state." To date, Kentucky has received a total of $2.58 million pursuant to the Act and is eligible for an additional $4 million if Congress appropriates the approximately $10 million necessary to pay bonus states what is owed. According to testimony from various federal Department of Transportation officials, however, this is unlikely to happen.

States were allowed to adopt two amendments to the Bonus Act. The first, known as the "Kerr amendment," allowed states to exclude any segment of the federal interstate system that went through commercial or industrial zones which were within the boundaries of incorporated municipalities or other areas that were established by state law as industrial or commercial zones. Kentucky adopted the Kerr amendment.

The second amendment to the Bonus Act is known as the "Cotton amendment." This amendment allowed states to permit outdoor advertising signs to be erected in areas adjacent to federal interstate highways if any part of the land on which the federal highway was built was acquired as a right-of-way prior to 1956. Kentucky did not adopt the Cotton amendment.

Finally, the Highway Beautification Act of 1965 mandated state compliance with federal standards for outdoor advertising for billboards located adjacent to federal interstate highways. Thus, if a state did not adopt the Cotton amendment prior to the passage of this Act, the only Cotton area signs that would be allowed would be those in areas that are also in commercial or industrial areas or used in a manner that falls within the state's unzoned commercial area definition. According to state highway officials, the primary difference between the Highway Beautification Act and the Bonus Act is that the Bonus Act required any billboards erected in rural areas to be in zoned commercially- or industrially-developed areas, while the Highway Beautification Act allowed billboards to be erected in rural unzoned commercial or industrial areas. A state was allowed to continue participating in the Bonus Act if it agreed to comply with both Acts. If a conflict between the two existed, compliance with the more stringent provision was required.

**Discussion**

Since Kentucky's adoption of the Bonus Act in 1961, controversy surrounding billboards adjacent to federal interstate highways has been the source of debate and disagreement. Opponents of existing state laws and regulations governing outdoor advertising, chief among them being persons involved in tourism-related businesses, contend that the restrictions on billboards preclude them from reaching the millions of visitors who pass though Kentucky on the interstate highway system. Since many of Kentucky's tourist attractions are located in rural areas, which are subject to the most stringent and restrictive billboard regulations, opponents argue that most travelers pass by their businesses without even knowing that they are there. They argue that outdoor advertising is the most cost-efficient way to reach potential visitors and that the lack of signage places them at a competitive disadvantage with businesses in surrounding states that place fewer restrictions on highway billboards.

Supporters of existing state laws and regulations counter by arguing that many polls show that travelers dislike a plethora of billboards adjacent to interstate highways. They argue that in states that permit outdoor advertising, the majority of billboards are used by businesses that are not tourism-related. Furthermore, they contend that if Kentucky were to relax outdoor advertising regulations, the state could face a 10% reduction in federal-aid highway revenues based upon provisions in the Highway Beautification Act of 1965.

In conclusion, the question remains should the General Assembly explore legislation that would be supportive of either of these positions or seek a middle ground between these positions -- legislation that would allow limited outdoor advertising and not face the potential of a cut in federal highway aid yet not threatening the scenic beauty of Kentucky's interstate highway system?

# EDUCATION

# THE TASK FORCE ON PUBLIC EDUCATION

Prepared by Bonnie Brinly

## Issue

**Should the General Assembly enact the recommendations of the Task Force on Public Education in order to further improve public education?**

## Background

In 1989, the Kentucky Supreme Court found the state's entire system of public schools unconstitutional. The Court ruled that the General Assembly is solely responsible for providing an efficient system of schools and for monitoring the system on a continuing basis to assure that every child in the Commonwealth has access to an adequate education.

In response to the ruling, the General Assembly, with the passage of the Kentucky Education Reform Act of 1990, created a new system of schools. In addition to providing significant new dollars for all school districts, the law called for high standards for all Kentucky students and a strong accountability component to assure that schools make progress toward meeting the standards. It provided a number of new initiatives to help support teaching and learning, including a more equitable funding formula for school districts, increased emphasis on professional development, early childhood education programs, the primary program, family resource and youth service centers, extended time for learning for students falling behind in school, and a significant investment in technology. A number of changes were made to promote strong governance of the system and to reduce mismanagement and political influence, including confirmation of state board members, an appointed chief state school officer, creation of the Office of Education Accountability, anti-nepotism provisions, and school-based decision making.

## Discussion

With the 1990 legislation close to being fully implemented, the 1996 General Assembly created the Task Force on Public Education, to review the implementation of the education reform initiatives and the status of public education in Kentucky. The task force is composed of eighteen members: six senators appointed by the President of the Senate, six representatives appointed by the Speaker of the House of Representatives, and six members of the Executive Branch appointed by the Governor. The task force has divided its work into three phases: gathering information, establishing issue groups, and developing final recommendations.

The information gathering efforts included public hearings, school visits, a telephone opinion survey, and a review of the research. The co-chairs appointed three teams of task force members, each team assigned to hold public hearings and visit school districts in two

Congressional districts. The teams held a total of 18 public hearings, with 298 speakers and 856 people signing attendance sheets. The teams also visited a total of 29 schools in 12 school districts.

During the public hearings, the teams heard divided opinion about the reform initiatives in general; several speakers cited positive changes in teaching and learning, while others voiced concern that the changes are lowering standards. All three teams heard general agreement from those testifying that extended school services, the family resource and youth service centers, and the preschool initiatives are working well. The area of curriculum standards, assessment, and accountability generated more comment than any other, with a wide variety of opinion reflected. Several issues relating to the funding formula and additional funding needs were also mentioned.

Based on public opinion and the research findings, the co-chairs identified three issue groups and appointed members of the Task Force and lay citizens, including parents, educators, and community members, to further study problem areas. The three groups are Assessment and Accountability, Teaching and Learning, and Finance and Management. The groups have been meeting since March, 1997, and will bring their recommendations back to the full Task Force for its consideration in the fall.

# RETIREMENT CALCULATIONS FOR LOCAL SCHOOL DISTRICT CLASSIFIED EMPLOYEES

Prepared by Audrey Carr

## Issue

**Should the General Assembly provide additional retirement benefits to classified employees of local school districts?**

## Background

Local district classified employees, such as school bus drivers, secretaries, aides, and maintenance personnel, receive retirement benefits under the County Employees Retirement System (CERS). In 1996, an amendment was made to KRS 78.615 that has resulted in considerable inquiry to General Assembly members. The legislation was considered to be clean-up legislation that would not negatively impact employees. The changes were proposed by CERS officials as a result of the lack of clarity and inconsistent applications of the previous statute that were discovered when the CERS officials conducted site audits. Some individuals were reported to be eligible for more service credit than they should have received. In some cases, this was not discovered until persons were applying for retirement, and corrections had to be made at the time of their retirement.

The previous statute was silent on the issue of rounding procedures in the calculation of service and CERS did not require that standard rounding procedures be used. For example, a bus driver, who is considered a regular employee of the district, and who had a contract for four hours a day for 9 1/4 months under the old language would have earned nine months service credit as long as the driver averaged eighty hours per month and if standard rounding procedures were being used. However, many districts were awarding ten months credit, as the employee worked part of a tenth month.

The new language clarifies that rounding shall be to the nearest whole month, so it is likely that some employees will now receive one less month than past practice would have given them.

Prior to the 1996 amendment, some employees who were working 9 1/4 months, but a full work day five days a week, had been awarded twelve months service credit, because their districts were dividing the total hours worked by twelve and if the employees averaged 80 hours or more a month, they were awarding twelve months service credit. Those particular districts were ignoring the contract year and CERS was permitting the practice. However, the practice was not consistent across districts. The revised statute prohibits that practice.

The 1996 amendment also sought to ensure that the calculation of service credit would be consistent among all the state's districts.

**Discussion**

Many classified employees in local districts have asserted that they should be under the same rules as teachers. Teachers receive twelve months credit if they work the full school term. CERS contends that making classified school district employees eligible for twelve months credit would have serious fiscal implications that would need additional study.

Classified school district employees are currently being treated the same as other classified public employees with two exceptions. All earn retirement service credit on a-month-to-month basis. Employees not employed in local districts must work one hundred hours minimum per month rather than the eighty hours required of local district classified employees. In addition, local board classified staff or their employer may purchase service credit for the months that they do not work. This purchase option is not available to other classified employees in other agencies. Some critics therefore charge that the local board classified employees have unfair advantages over other local classified employees in public agencies.

The General Assembly could consider amending KRS 78.615 to grant a full year's credit to any local district classified employee who is employed and works a full school term. This change would provide that all employees in a school district eligible for retirement benefits earn service credit on an equal basis. This would also make it more likely that classified employees in a school district would earn full retirement benefits. However, this option would create an inequity with other public employees in similar positions who are not employees of a school district. There would also be an increased cost liability to the state.

Another option is for the General Assembly to amend KRS 78.625 to restore the previous language. As a result, the employees would not lose service credit due to standard rounding procedures and employees in some districts would receive a full year's service credit based on total number of hours worked rather than months worked in the contract. However, the possibility of improper application of the rules would be the same as before the 1996 amendment, and inconsistency of implementing the retirement benefits would likely be a problem.

# FUNDING AND GOVERNANCE OF SECONDARY VOCATIONAL EDUCATION PROGRAMS

Prepared by Audrey Carr

## Issue

**Should the General Assembly enact legislation to restructure the governance and financing of secondary vocational education programs?**

## Background

### *Governance*

Historically, the operation of secondary vocational education programs has been shared between local school districts and the state. From the mid-40's until the early 80's, area vocational education centers were, with the exception of a few, operated by the Kentucky Department of Education and the State Board of Education, even though the area center buildings were each owned by a local district. In addition, almost all comprehensive high schools offered vocational courses.

Currently, secondary vocational education programs are provided in:

- Comprehensive high schools in local school districts;
- Vocational education departments or centers, sometimes referred to as technology centers, in twenty-three local districts; and
- Fifty-four area vocational or technology centers, operated by the Cabinet for Workforce Development. Of the fifty-four centers, forty-two serve students from two or more districts. Thirty-two centers enroll postsecondary students in programs with high school students, nine have at least one full-time postsecondary program offered either during the regular school day or after school hours, and thirteen serve only secondary students.

Circumstances have arisen that suggest there is a need to reconsider the governance and funding of secondary vocational education, and in particular, the operation of the area vocational education centers, or as they are now commonly called, area technology centers.

During the eighties, the Kentucky Department of Education and State Board of Education reached contractual arrangements with some of the local districts to begin operation of their own schools. Eventually the number of districts operating local vocational schools reached twenty-three. Not all districts had contracts, since their centers had always been operated locally. Jefferson County, which had six vocational centers, was the largest of these districts.

A major change in the vocational school system occurred in 1990, when the General Assembly created the Workforce Development Cabinet and moved the total state-operated system of vocational schools (KY Tech) to the cabinet, under a new governing board, the State Board for Adult and Technical Education. This move included the postsecondary as well as the secondary institutions. At the same time, the 1990 Kentucky Education Reform Act was passed, but it did not specifically address expectations for the state-operated area centers relative to secondary education.

Since passage of the 1990 Reform Act, some education leaders have expressed concern about the lack of a clear connection of the state-operated area technology schools to the elementary and secondary education system's goals and expectations. They cite the lack of coordination, program planning and improvement activities between the state-operated schools' faculties and the local high schools, and suggest that in some cases, there is a lack of respect for vocational programs--a result of their being outside the local school district administration and accountability system. These leaders have suggested that the more appropriate governance is under local boards of education and argue that the potential success of secondary students would be enhanced by a more cohesive, responsive, and accountable program of vocational education. They also suggest that operational costs could be lowered if existing resources of the local system are realigned.

Another major change occurred with the 1997 passage of the Postsecondary Education Improvement Act, which moved the postsecondary KY Tech schools to a new structure, known as the Kentucky Community and Technical College System (KCTCS). While there was much support for this action, there were concerns expressed by some that the area centers should not be separated from the other KY Tech schools, as this would result in fragmentation of services.

### *Funding*

***State-operated centers***. State-operated centers are funded with agency receipts, the general fund, Support Education Excellence in Kentucky (SEEK) funds, and federal funds. SEEK funds, earmarked for vocational education in state-operated centers, are appropriated to the Department of Education. The value of each full-time equivalent (FTE) student is calculated, based on the October 1 enrollment, by dividing the total FTE students into the total statewide line item value ($17.9 million in 1996-97). The SEEK funds pay for approximately 50-55% of the operating and instructional costs for the secondary students. The funds generated by FTE enrollment in each school are distributed as follows:

1. Funds generated by student enrollment in state-owned facilities-100% transferred to the Cabinet for Workforce Development, Department for Technical Education, and

2. Funds generated by student enrollment in local board facilities-20% to the local board of education for bond payments, insurance, and maintenance, and 80% transferred to the Cabinet for Workforce Development, Department for Technical Education.

***Locally-operated centers***. Between 1980 and 1989, eleven school districts assumed operation of the state area centers. The schools that were transferred by agreement with the state receive the SEEK funds their students generate and a contracted amount from the Department of Education. Until 1993-94, they also received an amount from the Workforce Development Cabinet for equipment.

Eleven additional school districts operate their own schools or centers, funded with SEEK, federal funds and other local funds. In the 1990-92 budget, these schools also began to receive a state supplement for administrative costs.

Some local administrators contend there is inequity in funding between the support given to the state-operated schools and the locally-operated centers, even with the state supplement. There is a difference between what it costs a school district that operates its own school versus a district that sends its students to a state-operated area vocational school. The latter provide vocational education programming for their students without using local funds. The district's average daily attendance is reduced by .3 for the time students spend at the vocational school, as opposed to the student not being counted while the student is at the vocational school. Districts transporting their students to other locations receive vocational transportation reimbursement as well.

**Discussion**

The General Assembly may opt to leave the area centers in the Cabinet for Workforce Development, which already has procedures in place, including a personnel system, and process for program approval. However, this would require maintaining a bureaucratic structure, including a state board, that would not be necessary if the area centers were moved to another existing structure. It also raises the question whether the Cabinet for Workforce Development is best poised to assist area schools in meeting the goals of public education. It also maintains the schools under the purchasing, funding limitations, and personnel cap that are a part of state government that often restrict a school's ability to respond to students' needs.

A second option is to transfer the schools to the Kentucky Department of Education, the agency that is responsible for implementing the state's system of preschool through secondary education, including Tech Prep, School to Work, and High Schools That Work initiatives. This option would also require amending the statutes, under KRS Chapter 151B, to change the governing board to the Kentucky Board of Education. Moving the schools to the Kentucky Department of Education would not alter the issues of flexibility and responsiveness, unless there are changes made in other statutes relating to the purchasing, funding limitations, and personnel cap as a part of state government as mentioned previously. This move would not necessarily decrease the staff or administrative costs.

A third option is to transfer the centers to local school district operation. This option could provide the linkages necessary to link the goals of public education to the programming needed to help students succeed, as the district would be determining programming, hiring of staff, and daily operations. Vocational teachers would have the same accountability and status as other teachers in the district. This option could eliminate some bureaucracy at the state level and eliminate one state board, if the Department for Adult Education and Literacy were moved to another agency. Local district operation could potentially streamline operating costs, as existing resources might be realigned and more efficiently and effectively utilized. However, there may be some resistance from local districts, as some of the districts that took over the operation of their schools in the eighties believe they have evidence that they are receiving unequal funding compared to the state-operated schools, and are thus carrying an extra financial burden. Some teachers have expressed fear they would be treated with less concern and maintain less status than they currently have as an employee in a state-operated school. They are also concerned with salaries and benefits. Teachers and administrators are also uncertain about what happens with centers that serve multiple school districts.

A fourth option would be to transfer schools to the Kentucky Community and Technical College System. This option would keep the current structure together, but place it under the board of regents. It could promote the continued interrelationships that exist between the postsecondary institutions and the area centers that serve adult students with continuing education and business and industry customized training. This option could also eliminate the State Board for Adult and Technical Education as discussed above. Some express concern that this move would be a burden to the KCTCS, as the new structure is intended to increase the rigor, accessibility, and connectivity of postsecondary systems, while the mission of the area centers has been primarily to serve secondary students, even though they may serve adults. The missions could become more blurred for staff. Splitting attention between postsecondary and secondary needs could perpetuate some of the same problems that exist now within the system, as the design of high school programs by nature inhibits the full development of postsecondary environments. Moving the area centers under KCTCS could also widen the gap that appears to exist between local centers and high schools. This move would not enhance the secondary centers' role in enabling high school students to meet public education goals.

Alternative funding options would need to be designed to adequately fund the governance structure that is selected.

# EDUCATING CHILDREN WHO ARE IN THE CUSTODY OF THE STATE

Prepared by Susan Lewis Warfield and Bonnie Brinly

## Issue

**Should the General Assembly make funding changes to support local school districts' educating children who are in the custody of the state?**

## Background

Over 12,000 Kentucky children are placed in the custody of the state during the course of a year because they have been mistreated, need services the caretaker cannot provide, or they have engaged in criminal or delinquent behavior. A number of children who are placed in state custody continue to live in their homes with their natural parents or relatives. However, when state officials determine the best place for a child to live is somewhere other than home, alternative living arrangements must be found. Options include public or private foster homes, emergency shelters, detention facilities, residential treatment facilities, group homes, and psychiatric residential treatment facilities or hospitals.

In most cases, the legal obligation to provide a free appropriate public education rests with the local school district where the child resides. A survey of facilities conducted in December 1996 by the Legislative Task Force on Children in Placement looked at the extent to which children are placed in geographic proximity to their home community. The study revealed that 61% of the children in private child care facilities were placed outside of the Department for Social Services (DSS) district in which their home was located. Over 90% of the youth in state-operated juvenile justice facilities were placed outside their home district. The survey findings indicated that local school districts in 40 counties were serving the educational needs of children from 114 counties. A financial burden is thus placed on those districts providing services to a disproportionate number of children from outside the district, especially when those children have severe handicapping conditions.

State funding for educational services for these students is primarily generated from the fund to Support Education Excellence in Kentucky (SEEK). Funding is based on the number of students in average daily attendance during the previous year adjusted, by the number of at-risk students (based on the number of students whose families qualify for the federal free lunch program), transportation costs, and the number of students with disabilities who attended school in the district on December 1 of the previous year. The prior year's average daily attendance is adjusted for any increases in the student population during the first two months of the current school year. School districts serving children in the custody of the state and placed in certain types of facilities receive additional financial assistance from the State Agency Children Fund (SACF), established by KRS 158.135 and administered by the Kentucky Educational Collaborative for State Agency Children (KECSAC). These funds are provided for children in day treatment programs and in residential programs operated or contracted by either the Department for Juvenile Justice (DJJ) or DSS, or other facilities which are financed with state or federal funds. For FY 98, the fund provides $2844 per child in a residential setting, and $2330 per child in a day treatment program.

When new treatment facilities open or existing programs are expanded, the SEEK formula does not provide the local school districts additional funding for the first year of the operation. If students with disabilities are served in programs opening after December 1 or there is an increase in the enrollment of children with disabilities in existing programs after December 1, the districts do not receive additional special education funds for two fiscal years. Also, there is no additional funding for students with disabilities or high needs who are in placements such as foster care or juvenile detention, which are not eligible for reimbursement from the State Agency Children Fund.

**Discussion**

Should the General Assembly choose to consider alternatives to the current funding mechanism, several approaches are available. One course of action would be to decrease the number of children placed outside of their home community. This could be accomplished by increasing the placement options within each county, so children could continue to be served where they reside, but the complex and diverse needs of the students would require a significant array of services. Some counties commit so few children to the custody of the state that this duplication of programs would be an inefficient use of scarce resources. A more realistic variation of this alternative would be to make the array of services available throughout each geographic region, with shared funding and programmatic responsibility. Analysis of the distribution of programs and number of children accessing the programs may determine which regions have the most pressing need for development of placement options.

Another cost effective alternative is to fund additional non-residential day treatment programs which are designed to address both treatment and educational needs. Children attending such programs live in the home of their parents, relatives, or foster parents and are not required to be in the custody of the state. These programs serve a wider population of students and often avoid the need for placement in a more costly residential setting. Currently, there are 25 day treatment programs (serving 948 students), which are operated by 24 school districts but serve 58 school districts in 23 counties. Two additional day treatment programs serving multiple school districts with 30 students each are nearly operational and are expected to begin offering services soon.

An alternative approach is to provide more flexibility in the education funding mechanisms, to assure that districts receive additional funding more quickly to better serve these students. Some strategies could include providing additional assistance for school districts that are serving students who need significantly more resources than the current funding formula supports. A separate pool of funding from the SACF could be available to school districts serving students with disabilities whose required services cost more than a predetermined percentage above what the current federal, state, and local funding provides. Similarly, extra funding from the SACF could be available to offset the costs incurred when facilities increase the number of children to be served or locate a new program in the local school district. Another strategy would be to provide funding from the SACF for students with disabilities who are placed by the state in foster care, detention, and other placements that do not presently qualify for these funds. Adjusting the child count for students with disabilities who enroll in the district after the December 1 count would resolve the problem of delayed special education funding.

# ENERGY

## DEREGULATION IN THE ELECTRIC INDUSTRY

Prepared by Linda Kubala

### Issue

**How should the General Assembly respond to the growing competition in electric markets?**

### Background

The electric utility industry in the United States is undergoing a profound change. Since the 1930's, electric service has been provided, for the most part, through vertically-integrated, highly regulated, private or public entities that are monopolies within a specified territory. Today, the circumstances which supported that structure are eroding, and the industry is moving towards functional separation, greater competition, and partial deregulation. Federal actions now have opened wholesale markets to effective competition, allowing some small municipal or rural cooperative utilities to shop for bulk power for the first time. Numerous states are considering whether and how to extend competition to retail customers as well, and eight states have enacted laws to create competitive retail markets.

The pressure to open up electric markets has come mainly from customers who pay unusually high electric rates. Electricity is a generic good, so it is not surprising that customers clamor for change when the cost of a kilowatt-hour differs greatly from place to place. In fact, the oil and gas shortages of the 1970s, costly nuclear plants, and overbuilding by some utilities, among other things, have created large differences in the rates charged by different utilities. In 1996, a residential customer of Long Island Lighting paid, on average, 16.84 cents for a kilowatt-hour of electricity, while a customer of Kentucky Utilities Company paid 4.64 cents. Average prices by state ranged, in 1995, from a low of 4.1 cents to a high of 11.7 cents. These differences from one company or from one region to the next have been a powerful incentive for customers, especially large industrial customers in the service territories of high-cost utilities, to push for access to cheaper power sources.

industry changes. Kentucky is a source of the cheaper power that is supposed to flow into high-cost areas as competition replaces monopolies. Kentuckians enjoy, on average, the cheapest electric rates in the Eastern United States. One purpose of competition is to even out the differences in electric prices and service that have helped Kentucky recruit and retain industry in the past. Electric industry changes will affect the coal industry; 80% of Kentucky coal is burned to make electricity. In short, the state has a lot to gain - or lose - from electric competition, and an extraordinary interest in directing the way competition develops in the industry.

***Wholesale Competition*.** Federal actions have opened wholesale markets to effective competition, allowing many small municipal or rural cooperative utilities to shop for bulk power for the first time. The 1978 Public Utilities Regulatory Policies Act required utilities to open transmission facilities in some limited cases. The 1992 Energy Policy Act (EPACT) greatly expanded these early reforms, both by creating a new and largely unregulated class of power producers (exempt wholesale generators, or EWGs), and by giving the Federal Energy Regulatory Commission the authority to make utilities provide access on their transmission systems. Most recently, in 1996, the Federal Energy Regulatory Commission issued its orders 888 and 889, which removed additional barriers to the wholesale choice of supplier. In essence, these orders require the utilities that own transmission lines to move power for other utilities, power generators, and local distribution companies under the same conditions they impose on themselves, and to provide simultaneous market information.

The development of actual wholesale electric markets already has had dramatic consequences for the industry. In time it is expected to increase the utilization of efficient, low-cost plants, retire some expensive generators, lessen rate disparities from place to place, and lower costs overall. Implementing the existing federal rules requires utilities to separate their businesses into three distinct functional entities, and requires states to oversee these functions in new ways. Generation increasingly will be regulated by the market; transmission facilities are being separated from direct utility operation and likely will be operated by regional "Independent System Operators," while federal actions leave distribution mainly under state control. The General Assembly faces decisions about adjusting state regulation and taxing of utilities to respond to these federally-imposed changes that already have taken place. These decisions are very important as Kentucky moves to provide a smooth transition to its utilities and protect their customers.

***Retail Competition*.** The General Assembly also may face legislation to extend competition to electric distribution. This is called retail electric competition. Several states are acting to do this, but it is not presently mandated by the federal government.

Retail competition allows end-use customers to choose their supplier. The utility still would control the wires and other infrastructure that connect local customers to the transmission grid, but would operate as a common carrier transportation system, open to anyone who pays the rates and follows the rules of business. Customers could contract with someone other than the utility for electric power and related services, rather than taking the whole package from the local utility. Whether a customer chooses the utility or a competitor, the customer pays the local utility a transportation charge.

Several states are acting to establish retail competition, and a lot more are watching the issue closely. Two years ago, early pilot programs began in a few areas to test the concept of retail choice. As of July 1997, eight states already had passed deregulation bills: California, New Hampshire, Rhode Island, Maine, Pennsylvania, Nevada, Oklahoma, and Montana. Bills were introduced in many more states, and a recent survey found that thirty states have created study committees or task forces to study the complex issues in depth and make recommendations to a future legislature or to the regulatory commission.

While the details differ, most of the enacted states' plans share two or three major provisions. They include a three- to five-year transition period that allows the utilities to restructure to prepare for losing their monopolies. They usually allow utilities to recover substantially all of their so-called stranded costs - unprofitable investments in nuclear plants, long-term power contracts, or other uncompetitive investments. Customers will pay for this through an extra fee on all electricity that passes through utility distribution lines, regardless of the source. Several recent enactment's are allowing utilities to issue state-backed bonds, i.e., to "securitize" their stranded costs.

One reason why states may be moving on this issue now is the threat of federal legislation. Several bills have been introduced in Congress that would impose national rules and mandate that customers may choose their electric supplier by the year 2000 or 2002. None of these bills is expected to pass this year, but another wave of congressional deregulation, this time usurping traditional state authority over retail electric service, is possible. States may hope to preempt federal legislation by acting before Congress and by designing their own programs. The theory is that there will be some degree of grandfathering in any major deregulation bill.

**Discussion**

Because Kentucky now enjoys very low rates and dependable service, it is hard to justify dramatic change except as a necessary action to control and direct the inevitable changes to the state's advantage. Proponents of retail competition promise lower overall rates, but also argue that competition is inevitable, and that timely state action will give the utilities a head start, give the state a temporary economic development advantage, and influence the eventual federal standards. Opponents fear that the price of electricity in Kentucky will rise, rather than drop, as prices level out nationwide. They also argue that allowing competition into retail markets will endanger the many social aspects of electricity pricing under regulation. A company competing for customers on price is unlikely to provide weatherization services or invest in cutting-edge technologies, they argue. Competing companies might target only the most profitable customers, leaving rural customers or residential customers without choice.

The debate about reforming the electric industry is complex. The warnings that problems could result from restructuring and the promises of tremendous savings from restructuring both are evidence that legislatures should consider the reforms to the electric industry with care. Many of the arguments against competition actually highlight issues which could be addressed in the design of legislation. Several groups have compiled lists of issues or topics that have to be considered in any move by a state to restructure its industry. The list of issues which follows was adapted from one that was prepared in early 1997 by the Kentucky Public Service Commission.

- ***Maintaining Kentucky's Low Cost Advantage*** - Rate payers in Kentucky enjoy some of the lowest utility rates in the United States, due to: 1) a close proximity to coal-producing areas; 2) a state ban on nuclear generating units; 3) good corporate management and operations by utility companies; and 4) fair and reasonable regulation and oversight by state authorities. This advantage needs to be protected as much as possible.

- ***System Reliability*** - Decisions regarding system maintenance and operation that are based solely on competitive or market-based considerations could result in a deterioration of service quality and reliability. The reliability of electric supplies in hard-to-serve and less lucrative regions could be compromised. Restructuring must assure an acceptable level of reliability.

- ***Consumer Protection*** - Customers must be protected against discrimination, poor service, unfair billing and disconnection practices, deceptive market practices, and disreputable energy marketers or suppliers.

- ***Universal Service*** - Electric service has become a basic human need. Customers should be entitled to non-discriminatory access to reasonably priced power. An electric market that is driven strictly by competitive and economic considerations will not necessarily protect the interests of small consumers, particularly low-income customers. The health and safety of all Kentucky customers should be preserved in any restructured electric industry.

- ***Shared Benefits*** - Electric industry restructuring should be done in a way that benefits all customer classes fairly and does not disadvantage any customer class.

- ***Environment*** - Under the present regulatory framework, utilities are encouraged, and occasionally required, to pursue environmentally responsible expansion plans. A marketplace driven strictly by competitive and economic considerations would be very limited in its ability to promote environmentally sound resource allocation strategies, so environmental standards or processes should be incorporated in legislation.

- ***Stranded Costs*** - Individual states must have the authority to consider utility claims to recover net, verifiable and non-mitigatable retail stranded costs and to develop fair and equitable verification and recovery methods that consider the interests of utility shareholders and rate payers.

- ***Allocation of costs*** - If utilities unbundle services and certain aspects of utility operations become unregulated or federally regulated, the PSC could have some difficulty protecting Kentucky consumers against the misallocation of costs between regulated and unregulated activities. Legislation must truly separate, or allow regulators to separate, the financing of regulated and competitive functions that are now co-mingled inside organizations.

- ***Roles of Various Energy Providers*** - In a restructured electric industry, many types of electricity providers and purchasers will be interacting and competing: investor-owned utility companies, rural electric cooperatives, municipalities, power marketers, power brokers, aggregators, self-generators, and non-utility generators. The objectives and motives of each of these entities will differ, perhaps significantly. Designing rules that protect customers from unscrupulous agents and transactions will be very important.

## 9-1-1 EMERGENCY TELEPHONE SERVICE

Prepared by Linda Kubala

### Issue

**Should the General Assembly enact standards or create new funding mechanisms for 9-1-1 emergency number systems?**

### Background

States differ markedly in how they establish, coordinate and oversee 9-1-1 service. In some states, all local 9-1-1 emergency number systems are approved or operated by a central state coordinating agency, and must conform to a myriad of organizational and operational standards. In Kentucky, 9-1-1 service is locally controlled. The only statewide standards for 9-1-1 dispatch are contained in KRS 65.750 - 65.760. These statutes require approval by the governing body of the city or county to establish 9-1-1 emergency service, and allow local governments to establish a joint service through an interlocal cooperation agreement. They require that any 9-1-1 service in some way connect to law enforcement, fire fighting, and emergency medical/ambulance services, and operate 24 hours a day. Finally, KRS 65.760 allows local governments to put a charge on local exchange telephone subscribers, collected by the telephone company, to fund 9-1-1 service.

Since Kentucky's emergency services were created by local initiatives, the location, organization, and funding basis for these services differs markedly from place to place. There is no service at all in 20 counties. Most services, but not all, are operated by local law enforcement personnel. Neighboring 9-1-1 systems may or may not coordinate their services. State Police posts handle most of the calls from cellular telephones. The State Police also perform an informal coordinating function, but cannot set standards for local systems or require coordination.

New technologies, the prospect of competition between local telephone services, and the expansion of Enhanced 9-1-1 service, which automatically shows dispatchers the location of callers, have changed the demands on local 9-1-1 systems. Statewide standards have been discussed as solutions to several emerging problems.

Maintaining complete and accurate location data is one problem. Today, 54 counties use Enhanced 9-1-1 systems, and 27 additional counties propose to upgrade their existing systems. Enhanced systems give the dispatcher immediate access to address, location and other information when a call is received, so they don't depend on the caller's being able to give this information. Enhanced 9-1-1 systems demand an accurate and current data base that links telephone numbers to locations. Generally, this data base is maintained by the local telephone company. Some are concerned that in an era of local telephone competition, a single company no longer will be able or willing to maintain this accurate data base of all telephone locations. They advocate legislation or regulation to require this service.

Private switchboards also can be a problem for Enhanced 9-1-1 systems, and equipment standards have been proposed. A single switchboard may serve a whole college campus, office park, or several convenience store locations. Legislation enacted in some states allows only those private switchboards (PBX's) to be used that locate each line connected to them, so that an enhanced 9-1-1 system can dispatch to the right location.

The spectacular growth of the cellular telephone industry raises both technical and funding issues for 9-1-1 service. Cellular telephones are mobile, and up to now have not transmitted their location. The State Police rather than local agencies have handled most cellular 9-1-1 calls in Kentucky. The Federal Communications Commission is phasing in requirements for locator signals from new cellular and other wireless phones. Emergency 9-1-1 answering centers must purchase new equipment and receive training to utilize the new location signals.

Wireless phone users do not currently pay a surcharge to help support 9-1-1 systems. The surcharge authorized in KRS 65. 760 applies only to local exchange telephone subscribers. At least 10 states reportedly have enacted wireless E9-1-1 statutes, which impose a monthly surcharge on wireless customers to fund services.

**Discussion**

Kentucky imposes almost no statewide requirements on local 9-1-1 services. While this has worked well in the past, dealing with today's more sophisticated technologies has raised issues which some wish to solve through legislation. There also is interest in levying a fee on cellular telephone users to support 9-1-1 systems, which currently can collect only from wired telephone subscribers.

Any attempt to impose performance standards or coordination requirements on 9-1-1 systems statewide would need to address the differences between existing systems, which stem from the tradition of local control. One approach would be to focus on performance requirements and not try to create uniform organizations.

If cellular and Personal Communications Services (PCS) users are assessed a line fee for 9-1-1, some mechanism would have to be developed for collection and administration that takes into consideration the fact that cellular phones are mobile by their very nature and may not be used near the residence of the subscriber. If statewide collection and administration is considered, some coordinating entity must be chosen to handle these funds and some mechanism for distribution back to local answering and dispatch services would be needed.

Statewide regulation would be a significant change from the way 9-1-1 services have been operated in the state.

## TAX INCENTIVES TO STIMULATE KENTUCKY'S COAL PRODUCTION

Prepared by Tanya Monsanto

### Issue

**Should the General Assembly create incentives to increase coal production in Kentucky?**

### Background

Kentucky's coal production continues to fall, despite the fact that overall demand for US coal has increased. Based on data from the Energy Information Agency, total coal production declined by more than 3% in Eastern Kentucky and by more than 15% in Western Kentucky between 1992 and 1996. US coal production increased by 2.3 % during the same period, reducing Kentucky's share of national production from 16% to 14%.

One reason Kentucky's share of national production is falling is the growing demand for cleaner burning coal with lower sulfur and ash content. In fact, many utilities, in anticipation of the implementation of Phase II of the Clean Air Act, are switching to low sulfur coal or to alternate fuels. Switching to cleaner burning fuels allows the utility to bank part of its pollution budget today to offset future compliance costs. This trend has affected Kentucky's market in several ways.

First, prices and sales of high sulfur coal have declined. This coal dominates in the West Kentucky coal fields. Second, Western states like Wyoming, with low cost, low sulfur coal have made dramatic advances into Kentucky's overall market share for low sulfur coal. Finally, competition between Kentucky and its border states for local markets has intensified. According to data from the Kentucky Coal Marketing and Export Council, Kentucky's exports to border states decreased by 25% between 1994 and 1996, while imports from border states increased by 30%. West Virginia made considerable gains into Kentucky's intrastate market share, accounting for 62% of the increase in Kentucky's net imports from border states during the same period. By 1994, West Virginia displaced Kentucky as the number two coal producer in the nation.

Proponents believe that Kentucky should provide tax or production incentives to the coal industry to help Kentucky producers compete both with neighbors and with cheap Western producers. They also argue that Kentucky must match incentives passed by border states if it wants to protect its current markets. Both Virginia and West Virginia recently passed a coal severance credit on coal mined from "thin" coal seams. Virginia discounts severance taxes by $.60 per ton of coal from seams less than 33 inches and $.50 per ton of coal from seams at or above 33 inches. West Virginia uses a similar sliding scale for conferring tax credits. West Virginia reduces severance from 5% to 2% per ton of coal mined from seams at or above 47 inches and to 1% per ton of coal from seams at or below 37 inches.

In Ohio and in Kentucky, discussion has centered on the benefits of a re-mining credit against severance taxes for coal mined from abandoned mines. Proponents in both states claim that the re-mining credit could increase the number of new mines, and improve the reclamation rate of abandoned mine lands without using the Abandoned Mine Lands (AML) Fund.

**Discussion**

There are a number of important issues regarding the use of incentives for coal producers. First, will all coal producers benefit equally from a tax credit, and second, how will the tax credit affect the competitiveness of Kentucky's coal? Finally, how will the use of a tax credit affect local revenues?

Both thin seam and re-mining credits can have an uneven impact on coal producers in different regions of the state. If one uses a restrictive definition for "thin seam", the credit may not benefit Western Kentucky coal producers, where seams typically are thicker then in Eastern Kentucky. Even if a thin seam credit lowers the price of Kentucky's high sulfur coal, the demand for Western Kentucky coal may remain unchanged. Current demand for high sulfur coal tends to be less responsive to changes in price.

However, a thin seam credit may position Kentucky's low sulfur coal producers more competitively, because Eastern Kentucky's thin seams are predominantly composed of low sulfur coal. This may be particularly important, since some experts anticipate that deregulation of electric utilities will increase the utilization of coal fired generating plants and make coal a more attractive source of energy for utilities.

Western Kentucky may benefit disproportionally from a re-mining credit, since approximately 70% of Kentucky's acreage listed as "abandoned mine land" is located there. Large operators will benefit more than their smaller counterparts, because large operators tend to be capitalized better and can absorb the high up-front costs of acquiring permits.

Under the aegis of the Office of Surface Mines, Kentucky recently formed a task force on re-mining. This task force is investigating potential sites for re-mining. The task force will make recommendations to the Office of Surface Mines concerning new incentives to encourage re-mining. Currently, the Office of Abandoned Mine Lands is negotiating with different coal producers to re-mine specific abandoned mine sites in Kentucky.

Finally, both the thin seam and the re-mining credit could reduce the state's coal severance tax receipts and the amount of tax revenue returned to local governments through the Local Government Economic Development and Local Government Economic Assistance funds. In FY '97, 31% of Kentucky's coal severance tax was returned to local governments through these two funds. The funds were used for local economic development projects and to cover administrative expenses for the operation of local governments. The fact that reductions in coal severance tax could reduce the source of these two funds raises important policy concerns about the degree of state and local burden sharing for the cost of granting either a thin seam or re-mining tax credit.

# HEALTH AND WELFARE

## STRATEGIES FOR WELFARE TO WORK PROGRAMS

Prepared by Catherine Iannello

### Issue

**Should the state take a Work First approach to welfare reform, moving recipients quickly into the workforce, or a Human Capital approach, investing in education and training for recipients?**

### Background

The Personal Responsibility and Job Opportunity Reconciliation Act of 1996, P.L. 104-193, passed in August of 1996. Kentucky began implementation and came under the provisions of federal law on October 18, 1996. Significant changes to federal welfare law shift the focus of welfare programs and give states the responsibility and flexibility to design an assistance program to move recipients to self-sufficiency by entering the labor market. Data from the Cabinet for Families and Children show county unemployment rates in Kentucky ranging at the county level from a low of 2.3% to a high of 15.9%, with the percentage of persons living below the poverty level ranging from 6.3% to 45.5%, and a statewide average of 18.9%.

As of January 1997, there were approximately 49,000 adults receiving cash assistance under the Kentucky Transitional Assistance Program (K-TAP), formerly known as Aid to Families with Dependent Children (AFDC). Under the new federal welfare reform requirements, by July 1, 1997 states were to have at least 25% of single parent cases participating in work activities and 50% of two-parent cases doing so. These numbers gradually increase to 50% single parent and 90% two-parent in the year 2002.

While states have the flexibility to design work programs and define work participation however they choose, federal law sets new limits on educational and training programs for adult recipients that can be counted toward meeting the mandated work participation rate. Because failure to meet these federal work participation rates will result in financial sanctions to states, and because recipients now have a lifetime limit of five years on receiving benefits, it is important that the state utilize an approach which balances the economic interests of poor Kentuckians with federal mandates.

### Discussion

There are two basic approaches to work programs, the "Work First" approach, which seeks to move people quickly into the workforce by assisting clients with job search and placement, and the "Human Capital" approach, which invests in training and education to prepare clients for higher wage jobs.

Proponents of Work First programs stress that they are inexpensive, with a range of costs from about  $200 for one recipient in Arkansas to $1,200 per recipient in California, and reduce welfare rolls rapidly, showing a taxpayer savings quickly.  Research in California, Arkansas, and Virginia showed that Work First programs helped people to find jobs faster than they would have otherwise; however, job loss and recidivism was high, and earnings did not increase much over what they were receiving on welfare.  Noting that states have a stake in moving recipients into a countable work activity quickly, the Work First approach has been successful at moving people into jobs.  Proponents maintain that work experience, not education, helps people to move into better jobs, and that with the current federal time limits, clients are better served by moving them into employment as quickly as possible and keeping them off of the system.

Opponents of this approach note that, moving people into low paying jobs is not solving the long-term problems associated with poverty, and purport that the goal of welfare reform should be to increase earnings of recipients, at which Work First programs have not been successful.  In addition, Work First programs have shown little success with the more difficult recipients, who have very low educational attainment and have little or no employment experience.

Proponents of the Human Capital approach maintain that investing in education and skill building will help recipients find employment that is more stable and higher paying, thus keeping people off of public assistance longer.  Research by the Urban Institute and several independent economists has shown a strong correlation between education and success in the labor market. Research of welfare-to-work programs in California, Maryland, and Florida offering education and training to recipients showed that the programs had a greater impact on the most difficult clients, those persons who were most disadvantaged, and had longer term effects on increasing recipient earnings.  Supporters of this approach note that there has been no long-term research on Human Capitol programs, and that success cannot be accurately measured for the short-term. While spending may increase at the front end, proponents believe that an investment in education and training will show an overall decrease in spending by reducing long-term poverty.

Opponents of the Human Capital approach note that education and training programs cost more per recipient to operate, from about $1,300 in Florida to $4,400 in California, and initially keep people on the rolls longer.  In addition, research findings have not been consistent across programs and have not consistently reduced welfare spending or saved tax dollars.  Opponents note that this approach helped persons who would have gotten jobs anyway get better jobs, and that an approach which works best for both the easiest to serve and the most difficult to serve is a costly proposition for all recipients, including those who don't seem to benefit from it.

Research to date shows that each model has both strengths and limitations.  Currently, the Cabinet for Families and Children is receiving assistance from the Manpower Demonstration Research Corporation to implement a Work First approach.  Determining which approach will work best in Kentucky should take into account the goals of the program, such as saving money, reducing welfare receipt, improving participants' immediate and long-term financial well-being, or decreasing overall poverty.  Should the General Assembly decide to enact policies and appropriate funds to make other work programs available to Kentuckians, the following options could be considered:

1. Enacting legislation to implement a mixed welfare-to-work program. Possible strategies include: using different program models for different client populations; modifying the length of time allowed in educational components; or varying the types of education and training available.

2. Appropriating funds to implement a Human Capital pilot program to offer education and training for selected recipients of K-TAP benefits, and requiring a research component to evaluate the success of the program in comparison to clients' participating in the Work First model.

3. Appropriating funds to enable selected recipients to participate in education and training programs that do not count toward the state work participation rate and using state dollars for K-TAP benefits to these participants, which do not fall under federal time-limit and work participation mandates.

## CERTIFICATE OF NEED

Prepared by Laura Hendrix

### Issue

**Should the General Assembly restructure the Certificate of Need program to address changing health care markets with respect to acute care?**

### Background

In 1972, the General Assembly enacted the Certificate of Need or "CON" program, and amended it in response to the Federal National Health Planning and Resources Development Act of 1974, which mandated that states have in place health planning laws. The General Assembly, in enacting the CON laws, found that the CON program was necessary to: (1) Ensure safe, adequate and efficient medical care; (2) Prevent the proliferation of unnecessary health care services and facilities, which results in costly duplication and underuse of facilities, services, and equipment; (3) Prevent proliferation from increasing the cost of quality health care within the Commonwealth; and (4) Improve quality and increase access to health care facilities, services, and providers, creating a cost-effective delivery system for the citizens of the Commonwealth. KRS 216B.010. CON applications must meet statutory criteria and must not be inconsistent with the State Health Plan, which is written every 3 years and updated annually. The General Assembly has provided exceptions to the CON laws for certain facilities, services, and ownership categories since the inception of the program, and court cases have provided numerous other exceptions.

### Discussion

Nationally, CON processes have been maintained, modified, or repealed in different states, for acute care services and facilities. Currently, 29 states and the District of Columbia have CON laws which regulate the establishment of health services and facilities. Twenty-one states either dropped CON when the federal mandate was repealed in 1986, have recently repealed the CON requirements, or are phasing out CON over a period of time for acute care services and facilities. All states have some kind of CON process or moratorium on long-term care facilities and services.

States which have retained CON for acute care services and facilities have cited controlling costs, limiting proliferation of services, fostering statewide health planning, preserving small or "traditional" providers, and mitigating the low impact of managed care on controlling health care costs as reasons for preserving CON. Additionally, states have considered the impact on their Medicaid budgets.

States repealing or phasing out CON have noted increased competition in the health care market, need for flexibility, local health planning, quality control and the high impact of managed care in their decisions to eliminate CON. Many of these states also have managed care systems in place for Medicaid.

States generally have not kept track of costs associated with the CON program, and it is difficult to track or break down medical care costs attributed to doing away with or maintaining CON provisions.

Supporters of CON in Kentucky have cited the same reasons for retaining CON as those states which have kept CON. They contend that additional facilities and services will increase costs of health care generally, decrease quality of services, negatively impact rural and locally-based providers, drive up costs to Medicaid, decrease the level of indigent care due to increases in non-hospital-based care, and decrease access to care due to traditional providers being acquired and consolidated by larger provider groups. Additionally, since managed care penetration in Kentucky is relatively low, managed care's ability to hold down costs may not be as great as in other states. Supporters of CON argue that the health care marketplace is different because health care providers do not truly compete on the basis of quality and cost, and regulation is needed to control proliferation of services and facilities.

Opponents of CON cite the fact that many states have recently eliminated CON. They believe that the continuation of CON discourages innovative service delivery, limits access to care by limiting providers and facilities in the overall health care system, encourages monopolies of established businesses, creates market inequalities, provides for extended litigation, and discourages free competition. Opponents argue that changes in the reimbursement structure and the introduction of managed care for the Medicaid population would help stem the tide of costs in that program, and that future managed care penetration would also prevent cost increases for the privately-insured population.

Should the General Assembly decide to deregulate the CON program for acute care, the following are some questions that may need to be considered:

1. Are existing acute care services and facilities adequately distributed throughout Kentucky, and is CON currently helping to meet those needs? If CON is not meeting those needs, then what should be done to address access?

2. Have changes been made to the CON process throughout the years that have led to inequalities in the healthcare marketplace?

3. How much is Kentucky currently spending on healthcare in the public and private sectors and what would be the expected impact of restructuring or repealing CON?

4. What changes would have to be made in the Medicaid reimbursement and delivery structure to prevent increased Medicaid costs if CON were to be restructured or repealed?

5. Would quality of care be impacted by restructuring or repealing CON and should alternatives to CON be put in place to ensure quality of care?

6. Should state health planning continue to be performed at the state level or is more local planning needed?

7. How would changing the CON process impact on indigent care, rural healthcare, smaller providers, and the communities and their labor forces?

# NON-PROFIT HEALTH CARE ENTITY CONVERSIONS

Prepared by Laura H. Hendrix

## Issue

**Should the General Assembly adopt a non-profit health care entity conversion bill?**

## Background

Over the past five years, the health care marketplace has seen tremendous growth in mergers, acquisitions, and restructuring of operations of health care facilities and services. In particular, non-profit entities, such as hospitals, have been acquired in increasing numbers by for-profit companies. For example, across the U.S. in 1992, 15 non-profit hospitals were purchased by for-profit companies, while in 1995, 347 such transactions took place. Additionally, many non-profit insurance plans, such as traditional Blue Cross/Blue Shield plans of non-profit HMOs, have converted to for-profit status. Non-profit and for-profit health care entities have fundamental differences.

Non-profit entities hold their assets in "charitable trust", which holds money or assets used for charitable purposes. While for-profit corporations may distribute surplus revenues as dividends or spend the revenues at the direction of the board of directors, the surplus revenues and other assets of non-profit corporations belong to the public or to the charitable beneficiaries the trust was organized to serve. When a non-profit entity is acquired by or merged with a for-profit, the assets are required to be used for charitable health care purposes, pursuant to federal and state laws. Many transactions are incredibly complex and may take a number of different forms.

## Discussion

There have been growing concerns regarding these conversions. Supporters of increased scrutiny of conversions argue that there is little or no public disclosure of the terms of such conversions, and public policymakers have little input into the processes. While state Attorneys General may have broad powers to look at legal questions relating to conversions arising from common law or charitable trust provisions, specific questions relating to the provision of health care in the community often may not be addressed without particular legislation. Unless a particular Attorney General is interested in health care conversions, the conversion might not be held to public scrutiny. Communities are particularly concerned about the level of charity care and the overall quality of care. Additionally, proper valuation of the non-profit's assets is of concern to advocates for conversion laws, because undervaluation can result in a loss of charitable contributions to the community or beneficiaries.

However, for-profit companies state that the health care market is volatile, managed care has put great pressure on organizations to control their bottom line, and the ability of health care organizations to react quickly to new opportunities is crucial. They state that for-profit organizations can operate more efficiently, thus ensuring that a greater amount of actual health care is given to the community. A recent study conducted by the Kaiser Family Foundation and funded by the Federation of American Hospital Systems concluded that hospitals that converted were in poor financial shape before the conversion, improved their finances after conversion, and maintained levels of uncompensated care. Additionally, the opponents of conversion laws state that increased governmental intervention would drive up the costs of running such facilities and services, thus reducing the amounts spent on care for the community.

Eleven states, in response to these concerns, have passed specific legislation which governs these conversions. This legislation may provide for any of the following: notice to the state Attorney General, Department of Health, Department of Insurance, Secretary of State, or general public; public review of documentation prior to the transaction; financial disclosure of compensation and terms of the transaction; specific criteria for review for safeguarding assets and access to health care; approval of use of charitable assets and assessment of fair market value for assets; public hearing; and reporting of post-transaction activities.

A bill has been prefiled for the 1998 regular session, BR 332, which would provide standards for review and approval of non-profit conversions. This bill pertains to any hospital or other licensed health facility under KRS Chapter 216B, requires persons seeking to acquire nonprofit health care facilities to notify the Attorney General and the Cabinet for Health Services at least 30 days prior to an acquisition. The notice consists of the seller's name, the purchaser's name, the terms of the proposed agreement, sale price, a copy of the agreement, an independently-prepared financial and economic analysis and report on the effect of the acquisition, a community health services plan which considers the amount of indigent care and care to the uninsured for at least 5 years after the acquisition, the level of health services to be maintained by the facility for at least 5 years after the acquisition, and any of the efforts the facility will undertake to promote improved health care in the affected community. The bill requires the Attorney General to hold a public hearing within 30 days of the receipt of the notice, and the Cabinet for Health Services to render a decision on the acquisition within 60 days of the hearing. In considering whether to approve the conversion, the Cabinet would be required to assess whether it is in the public interest by determining whether appropriate steps have been taken to safeguard charitable assets, ensuring that proceeds would be used for appropriate health care purposes, and considering the availability of health care in the community. The Cabinet would look at compliance with the statutes governing nonprofit entities, whether the nonprofit health facility exercised due diligence in the decision to sell, whether expert assistance was used, at conflicts of interest, fair value, risk to charitable funds, options or rights of first refusal retained, use of sale proceeds for charitable health care purposes, whether the entity created to hold the proceeds would be broadly based in the community, filing of a community health services plan, whether providers would be offered an interest in the facility, and whether conflict of interest provisions were in place.

## MINIMUM AGE FOR MARRIAGE

Prepared by Catherine Iannello

### Issue

**Should the General Assembly enact legislation to establish a minimum age to marry?**

### Background

KRS 402.020 requires persons under 18 years of age seeking to marry to have the consent of their parents or a District Court Judge, in the case of pregnancy. There is currently no minimum age for marriage in the state of Kentucky. Forty-eight states and the District of Colombia have set minimum age requirements, with almost all states setting forth provisions for exceptions in some circumstances, including cases of pregnancy.

Legislation was proposed in the 1996 Regular Session which would have required the consent of the child's parents, as well as the Circuit Court Judge, for children below the age of 16, and permitted judicial consent without parental consent in cases of pregnancy. This proposal would have required judges to consider the child's bests interests, maturity level, and monetary resources, before granting consent. Legislation has been prefiled for the 1998 Regular Session to prohibit persons under age 16 to marry and permitting applicants below this age to request permission from a District Court Judge in cases of pregnancy.

### Discussion

Opponents of establishing a minimum age on marriage contend that marriage is a highly personal issue and note that historically, women have often married at a young age. They also maintain that states should not have the right to supersede parental authority, and that in cases of pregnancy or family violence, marriage may be in the best interests of the child.

In contrast, supporters of minimum age requirements point out that laws may be constructed to permit exemptions based upon special circumstances and pending judicial approval. Additionally, proponents argue that parents do not always act in the best interest of the child, that some children are too emotionally and physically immature to sustain a marital relationship, which requires financial security, added responsibility, and may result in early childbearing. Medical research shows a correlation between the age of the mother and high risk factors for both infant and child, including higher rates of anemia, premature birth and low birth weight, associated with a predisposition for brain damage and mental retardation. There is an even greater risk for mothers under 15 years, who give birth before attaining physical maturity themselves. Proponents point out that many teen pregnancies in which marriage is sought are the result of adult/child relationships which may be considered rape, sodomy, or sexual abuse, as defined under KRS 510.040-130. Marriage to a minor could provide a means of avoiding prosecution under statutory rape laws. Furthermore, KRS Chapter 510 provides that a person is incapable of providing consent to engage in sexual activity when he or she is under the age of 16.

The Kentucky Annual Vital Statistics Reports cited that in 1995 there were 2,272 brides ages 17 and under, 116 of whom were ages 14 and under, including three 12-year-old brides. In the same year, there were 403 grooms ages 17 and under, only 2 of whom were 14 years of age. For each year through 1990 to 1995, the youngest bride in Kentucky was reported to be 12 years of age. For males, this figure was slightly higher, at 13 years in 1993 and age 14 for all other years.

Should Kentucky decide to enact legislation establishing a minimum age to marry, the following alternatives could be considered:

1. Require both parental and judicial consent for marriages below a certain age.

2. Permit exemptions for special circumstances, such as pregnancy, with or without judicial consent.

3. Set a minimum age with no exemptions.

4. Set a minimum age for marriage, with authorization for counties to provide premarital counseling as a requisite to the issuance of a license.

5. Require judicial consent and set forth specific criteria to be met.

## CASELOAD STATISTICS REPORT

Prepared by Jare L. Schneider

### Issue

**Should the General Assembly revise KRS 199.461 to improve the information contained in the DSS caseload statistics report?**

### Background

In response to growing concerns about the state's ability to protect and serve a growing population of families and children in need of intervention, housing and therapeutic services, the General Assembly enacted KRS 199.461 in 1992. The legislation imposed a caseload standard of 25 cases per Family Service Worker (FSW) and required a report of caseloads to the Governor and the General Assembly. The statute:

- Defines "family service worker" as a social worker who provides direct casework services in foster care, child protection, juvenile services, or adult protection.
- Identifies that an "active case" includes the total number of cases for which the family service worker has responsibility.
- Establishes a standard monthly statewide caseload average for family service workers in the area of foster care, child protection, juvenile services, or adult protection, and mandates they shall not exceed twenty-five active cases.
- Requires a report to the Governor and to the Legislative Research Commission if the monthly statewide caseload average for FSWs exceeds twenty-five active cases for ninety consecutive days. Included in the report is:
    - data by county and district
    - family service worker caseload averages
    - the number of established family service worker positions
    - the number of vacant family service worker positions.
    - a description of the factors contributing to the caseloads
    - recommendations related thereto.

The statute is silent on how the cabinet is to collect this array of data and in what format it is required to report such information. No administrative regulations were promulgated to establish how this statute would be implemented.

**Discussion**

In response to the requirements of KRS 199.461, the Cabinet developed a time and case reporting system to aggregate all FSWs' time allocated to delivering services to clients, including not only investigations and intake, but also all direct and indirect services. Actual cases are assigned a status of active, investigative or ongoing, and some are weighted. The resulting calculation is defined as a "worker's distribution" of labor. The Cabinet divides the number of cases by the worker distribution to arrive at an average caseload for each county, each DSS District, and the state as a whole. The DSS District produces this average statewide caseload on a monthly basis. The report required by KRS 199.461 is produced only when the average "statewide" caseload goes above 25 in any 90-day period.

The statutory 90-day time frame for reporting caseload statistics allows for capturing blocks of cases, staff numbers, and services delivered, in an attempt to balance high intensity activity with low case activity during certain periods of the year.

The information in the report may have limited utility. An average statewide number does little to illustrate the problems in individual counties, such as a large county, where caseloads vary between 30-60 in any given period, the high caseloads in a small county when one worker quits. Additionally, the information produced may not always be up to date.

Since 1992, county populations have increased throughout Kentucky, as have those populations of individuals 18 years and younger. Also, those populations to whom the Cabinet for Families and Children provides services have demanded more varied and complex sets of services to not only children and youth, but also to the families of those children.

Unlike other programs of public assistance which are limited eligibility-based state services, the Department for Social Services is mandated to serve **all** children and families who are reported to the cabinet. The DSS must serve all in strict time frames.

If information collection and reporting is flawed, it impacts the Cabinet's ability to appropriately dedicate staff or to project service needs. Should the General Assembly revise the caseload statistics report, they could include the following stipulations:

- Carefully define and distinguish the terms "caseload" and "workload" and how these are calculated
- Develop a standard case weighting system for all types of cases for use in determining caseload and workload calculations
- Require that DSS Districts report their caseload averages by county, in order to produce an accurate picture of the county FSWs' caseload
- Require that DSS Districts report all staff positions and vacancies by county
- Mandate that the report be produced every quarter, and not just when a certain threshold is met over a set period of time
- Require an action and a report of such, to be taken by the Cabinet to remedy caseloads in counties which exceed 25 cases per FSW.

The downside to changing the calculation formula used in providing caseload statistics is that additional personnel may be needed to meet the current caseload standard.

# POVERTY

Prepared by C. Gilmore Dutton

## Issue

**Is there any legislative action that can be taken to break the cycle of poverty in Kentucky?**

## Background

During the decade from 1980 to 1990, the number of Kentuckians living in poverty increased, both in absolute terms and as a percentage of the state's population. The latest update from the 1990 Decennial Census reflects a continuation of this trend, with Kentucky's poverty rate measured at 19.6 percent in 1993, up from 19.0 percent in 1989. The national poverty rate was poised at 15.1 percent in 1993.

Children and minorities continue to suffer at a disproportionate rate. More than one-fourth of the state's youth lives in poverty, and one in every three African Americans in Kentucky lives in poverty. And, contrary to popular belief, a substantial number of the 747,919 Kentuckians in poverty, 38.7 percent (289,613), live in the state's metropolitan areas.

The period from 1989 to 1993 produced mixed signals from Kentucky's economic data base. The poverty rate declined in 66 of the state's 120 counties; counties with household incomes higher than the national median grew from 4 to 13; and the median household income increased from 75.0 percent of the national median to 80.7 percent. Meanwhile, the number of counties with a lower poverty rate than the United States as a whole doubled from 9 to 18; Kentucky's median household income declined to 48th among the 50 states and the District of Columbia; and the state's poverty rate raised Kentucky's standing to the seventh highest among the 50 states and the District of Columbia.

The state's disparate economic data leads to the conclusion that the poor are getting poorer, and the gap between the poor and non-poor is widening. This appears to be occurring even though Kentucky ranks nineteenth among the states in the number of institutions of higher education, has been cited as having one of the most attractive economic development programs in the nation, and ranks fifth among the states in state and local expenditures for public welfare per $1,000 of personal income.

## Discussion

The 1996 Session of the General Assembly, recognizing that the "overwhelming complexity and durability of the poverty phenomenon demand the constant vigilance of citizens and policymakers," reconstituted the Commission on Poverty for the 1996-97 interim. The current charge to the eleven legislative and eleven at-large members is to "...evaluate the ability of existing poverty and development programs...to mitigate the causes of poverty in various areas of the state and among various categories of the poor...and recommend improvements in these programs." A number of the recommendations embodied in the Commission's March, 1996, report to the Legislative Research Commission were adopted over the course of the next year in the Executive's Welfare Reform Plan for Kentucky and in the General Assembly's post-secondary education reform act, adopted in Special Session.

The Commission has focused during the present interim on housing for the poor, education programs designed to keep high school students in school, and programs which would alleviate barriers in making the transition from welfare to work. The Commission also has devoted significant time to monitoring the progress of Kentucky's response to the federal welfare reform act, K-TAP (Kentucky Transitional Assistance Program), with particular attention to the role that local communities will be playing in helping recipients' move from welfare to work.

One of the major challenges to Kentucky policymakers is to break the cycle of poverty in the Commonwealth. While the number of people on the state's welfare rolls is declining, the number of people in poverty is increasing, a reflection, to a great extent, of the levels of employment that former recipients are able to obtain. A concomitant danger in the rush to move recipients into the job market is the potential for displacing the currently employed. Tracking the history of the newly unemployed to insure that welfare recipients are not displacing currently employed workers will be a recommendation of the Commission in its upcoming report. Other recommendations which will likely be forthcoming from the Commission will include:

(a) Extending Medicaid coverage to two years for newly employed welfare recipients who do not receive health insurance as an employment benefit;

(b) Extending the period of eligibility for child care and establishing a realistic sliding scale for co-payment;

(c) Recognizing that work skills and life skills are necessary ingredients for gaining and obtaining employment, and insuring that all recipients have access to this training;

(d) Requiring the Department of Education to review dropout prevention programs in the school districts with the highest one-third dropout rates, with recommendations for corrective action;

(e) Encouraging school districts to adopt alternative programs or alternative schools to assist students at risk of dropping out;

(f) Recommending permanent sources of funding for the Affordable Housing Trust Fund, administered by the Kentucky Housing Corporation;

(g) Commissioning a study to determine the impact of the expiration of Section 8 Program rental assistance contracts in Kentucky; and

(h) Enacting Commission-sponsored legislation to provide statewide guidelines for landlords and tenants, and to create a Kentucky Child Care Matching Grant Program.

While it has become evident to the Commission on Poverty that there is no "quick fix" or "cure-all" to poverty, it has become equally evident that there are a number of actions that can be taken by the state to forever sever the bonds of poverty for a large number of Kentuckians. Prioritizing recommendations for apportionment of limited resources among not-so-limited needs will be the Commission's biggest challenge.

# CHILDREN'S HEALTH CARE COVERAGE

Prepared by Laura H. Hendrix

## Issue

**Should the General Assembly adopt provisions for children's health care coverage?**

## Background

Children's health care coverage has steadily eroded in the United States during the last five years. The U.S. General Accounting Office (GAO) reported that the percentage of children without health insurance coverage reached its highest level in 8 years, 14.2%, in 1994. Additionally, the percentage of children insured by private insurance reached an 8-year low in 1994, at 65.6%, down from 73.6% in 1987. The decrease in children's private health coverage is in contrast to an overall increase in private health insurance coverage for persons aged 18 to 64, and an increase in the number of parents working full-time. In 1994, nearly 25% of children with a parent working full-time did not have private health insurance. Employers' financial support for family health insurance costs has decreased, leaving families to pick up the tab. According to the Southern Institute on Children and Families, Kentucky had about 125,000 uninsured children in 1993, or about 12% of all the state's children.

Children's decreasing health insurance coverage has been shown to directly impact access to care and the quality of care received. A June 1997 study by the Families USA Foundation demonstrated that uninsured children are considerably less likely to receive needed health care, particularly preventive well-child care and inpatient hospital care. Children without health insurance have much poorer overall health than children with health insurance. In 1995, about 25% of children were uninsured for at least 1 month during the first 3 years of life. According to the Journal of the American Medical Association, children who have these "gaps" in their health insurance are at great risk of receiving "fragmented care", which may have a detrimental impact on children's' health. Children are more vulnerable to these lapses in care than are adults, due to their rapid growth and development. Children who do not have a usual source of health care are at greater risk for developing preventable or easily treatable conditions which can impact them over a lifetime.

Many children who are not insured are actually eligible for Medicaid. An April, 1997 study by the Center on Budget and Policy Priorities states that as many as 1/5 of the children under 11 who are eligible for Medicaid in the U.S. are not enrolled in that program, and between 29,000 and 96,000 Kentucky children under age 11 who are Medicaid-eligible are not enrolled. The GAO reported that in 1994, 62% of children on Medicaid did not have a working parent, and more than 50% of the children on Medicaid did not receive Aid to Families with Dependent Children (AFDC, now Temporary Assistance to Needy Families, or TANF) or other public assistance.

## Discussion

Many states and the federal government have sought to address the decline in children's health coverage. State responses include expansions of Medicaid coverage for children through waivers or existing programs, subsidizing family health insurance coverage, subsidizing employers' health insurance premiums, and tax incentive or voucher programs for individuals who purchase health care. These programs encompass strictly governmental activities, public/private partnerships, and private foundations specifically established to provide health care to children. For example, Kentucky has expanded its Medicaid coverage to 185% of the federal poverty level (FPL) for pregnant women and infants (0-1), 133% of FPL for children 1 to 6, and 100% of FPL for children 6 to 18. Additionally, a bill, BR 29, has been prefiled for the 1998 regular session regarding children's health insurance coverage. This bill would require one of the five standard health benefit plans to be a children's preventive health services benefit plan, establish a Kentucky Healthy Children's Program and Foundation, use savings from the Section 1115 Medicaid waiver (the Managed Care Partnership Program), make health benefit plan premium payments under the children's preventive health services benefit plan for children with incomes below 250% of FPL, and modify the Section 1115 waiver to extended Medicaid coverage for children in families with incomes below 250% of FPL.

The U. S. Congress recently passed a budget reconciliation bill, the Balanced Budget Act of 1997, or H.R. 2015, which was signed by the President on August 5, 1997, and includes provisions for children's health insurance. The program is called the State Children's Health Insurance Program, or SCHIP. According to estimates, which may be subject to revision, Kentucky is slated to receive $50 million for each of the years 1998-2000, $53 million in 2001, and $41 million in 2002, for a total of $246 million over 5 years. The legislation provides for states to receive these allotments through block granted funds, and states are eligible to receive enhanced matching funds equal to their existing federal Medicaid match plus 30% of the state share. For example, it is estimated by the GAO that Kentucky would have to provide $13 million in matching state dollars in order to receive the 1998 estimated allotment of $50 million. The state must submit a plan to the Secretary of Health and Human Services describing the use of the funds before federal payments can be made, and may begin receiving allocated funds on October 1, 1997, if the plan is approved. A state may use up to 10% of its total costs for administrative expenses, outreach activities, and direct purchase of services from providers.

States must use these payments to cover uninsured, low-income children, using any or a combination of the following: provision of Medicaid benefits, purchase of private coverage; direct purchase of services; or other methods as approved by the U.S. Department of Health and Human Services. Low-income children are children under 19 years of age with a family income below 200% of the FPL. Targeted low-income children are those who are: determined eligible for assistance under the program; are not eligible for Medicaid or covered under a group plan or other private insurance; or were covered under a state child health insurance program in operation before July 2, 1997, which received no federal funds.

The SCHIP will be funded with a tobacco tax increase of 20 cents per pack. The Act gives a range of options to states to provide for uninsured children, and states must include the actuarial equivalent of a "benchmark" package, which is either the Blue Cross/Blue Shield PPO plan offered to federal employees, a coverage plan offered and generally available as a state employee health benefit plan, or the health insurance coverage plan offered by the HMO plan with the largest non-Medicaid enrollment in the state. Services covered must include inpatient and outpatient hospital, physician, lab, X-ray, and well-baby care, including immunizations. There are maintenance of effort requirements which provide that states may not adopt Medicaid eligibility requirements which are more restrictive than those in place as of June 1, 1997.

Kentucky's General Assembly will have several options in terms of financing children's health care under the new federal provisions. Should the General Assembly wish to finance additional child health insurance using federal funds provided in the budget bill, Kentucky will have to comply with the federal budget terms. However, it is clear that Kentucky will have flexibility to tailor its program of financing children's health care coverage to the specific needs of the state's children, should it choose to do so.

## MANAGED CARE PLANS AND PATIENT PROTECTION

Prepared by Greg Freedman and Laura H. Hendrix

### Issue

**Should the General Assembly adopt a managed care patient protection law?**

### Background

Managed care is growing quickly throughout the country. Approximately 58 million Americans are enrolled in health maintenance organizations (HMOs) and another 81 million are covered under other types of managed care. According to a survey by Deloitte & Touche LLP and VHA Inc., national HMO enrollment was almost 26% in 1995, up from 21% in 1994.

While the spread of managed care plans has had a positive effect on health care costs, it has also brought complaints from consumers about denied services, as well as concerns from health care providers who suffer loss of autonomy and income. Pressure on health insurance plans to increase profits has accelerated in recent years, as much of the savings from managed care has been "squeezed out." As managed care plans have sought to reduce these costs, questions have arisen regarding managed care policies, such as "gag clauses" in provider contracts, which attempt to limit provider communication to patients about procedures which are not covered under their plans, undisclosed financial incentives or disincentives, limitations on access to specialty care, and unclear and lengthy appeals processes, any of which may affect a patient's ability to receive needed medical care. There have been highly publicized accounts of managed care enrollees who have had care limited or denied by managed care plans and who have died or have been seriously injured as a result.

In contrast, health insurer groups, such as the American Association of Health Plans, contend that health insurers should be able to manage the care of their enrollees free from governmental interference, and that these associations will develop internal policing mechanisms that protect consumers. They maintain that managed care plans support quality of care for their patients, and that they are in the best position to determine whether a particular procedure is necessary. Since health plans may operate in many different states, they do not want to be subject to varying state law requirements. Additionally, they contend that mandated benefits, appeals procedures, and governmental intervention lead to additional and unnecessary administrative costs for the health care plans, thus taking away premium dollars which could be used for additional health care for enrollees.

In some cases, HMOs, consumers, and providers have come together and agreed on certain actions without the need for legislation and have modified plan provisions. Some HMOs now allow primary care physicians to refer patients to specialists without prior approval, except for the most costly treatments. Blue Shield of California will allow HMO enrollees to self-refer to specialists with a co-payment of $30. Additionally, some health plan member organizations have adopted statements of principle that would provide for patient protections. For example, the American Association of Health Plans has adopted a "Putting Patients First" statement, which requires member health plans to adopt patient protection provisions in their health care plans regarding appeals, emergency care, patient/provider communications, and information about the health plan.

In response to these concerns, states and the federal government have increasingly focused upon constraining managed care plans' ability to limit services. In 1996, more than 1000 bills pertaining to HMOs were introduced in state legislatures and in the first six months of the year, 33 states passed legislation. This legislation has included prohibitions on "gag clauses", "any willing provider" provisions, direct access to care, continuity of care, utilization review standards, disclosure of health plan structure, reimbursement, and procedures, additional appeal rights, and prudent layperson standards for access to emergency care. Also, many states have enacted laws focused on specific conditions, for example, mandating minimum 48-hour and 96-hour minimum maternity stays, and specific treatments, such as bone marrow transplants for breast cancer. Additionally, many states have passed women's direct access acts, which provide for direct access to obstetrician/gynecologists or other women's health specialists.

However, since states cannot regulate plans which are covered under the federal Employee Retirement Income Security Act (ERISA), states are limited in the kinds of plans they may regulate. As a result, the U.S. Congress is considering several different pieces of legislation which encompass the same types of state concerns about managed care on a national level. These proposals range from bans on gag clauses to grants to states to establish health plan certification. Additionally, President Clinton recently appointed an Advisory Commission on Consumer Protection and Quality in the Health Care Industry, which is a 32-member panel charged with developing a national consumer bill of rights.

**Discussion**

The legislative initiatives across the country are only one indication that managed care plans have created serious concerns among consumers and health care providers. Lawsuits have been filed naming HMOs as defendants, medical savings accounts have received federal approval, and physician-run HMOs are emerging. The issues surrounding managed care plans include: restrictions on autonomy of providers, choice of providers, access to care, quality of care, complaint and appeals procedures, disclosure of meaningful data, and profit incentives.

The Kentucky General Assembly has already passed some patient protection laws, but has not passed an overall "patient protection" bill. For example, Kentucky has a broad "any willing provider" provision, which is codified at KRS 304.17A-110(3), which states that "health care benefit plans shall not discriminate against any provider who is located within the geographic coverage area of the health benefit plan and is willing to meet the terms and conditions for participation established by the health benefit plan." (1994 HB 250.) 1996 HB 504 provided that group and individual insurers providing for treatment of breast cancer by chemotherapy shall also provide coverage for autologous bone marrow transplantation and high-dose chemotherapy, and the legislation declares that this treatment is not to be considered experimental. 1996 HB 186 provided that health benefit plans issued or renewed after July 15, 1996 which provide maternity coverage shall also provide coverage for inpatient care for a mother and her newborn for a minimum of 48 hours for vaginal delivery and a minimum of 96 hours after cesarean section delivery. However, the health benefit plan may provide for a postpartum home health visit for the collection of necessary hereditary and metabolic tests, if the mother and attending physician agree, and the mother and newborn meet the criteria for medical stability. Another piece of legislation, 1996 HB 782, provides for direct access to chiropractors without a referral, and extends the "any willing provider" law to chiropractors. Additionally, 1996 SB 49 provides that health insurance companies must give a notice of appeal rights to a person whose insurance claim is denied, and direct them to the Cabinet for Health Services' appeal system.

The Attorney General has proposed a "Patient's Right to Know Act"; however, this bill has not been prefiled. The proposed bill would require plans to disclose plan coverage, choice of providers, requirements of appeal, revenues and expenses, and summary of complaints to consumers and providers, require access to covered health plan services, including emergency services within a certain time period, and prohibit insurers from interfering in provider-patient communications or retaliating against a provider for such a communication.

In considering whether to enact additional patient protection laws, the General Assembly may want to consider the following issues:

1. Do current Kentucky laws adequately protect consumers of managed health care?

2. Would a managed care law inhibit competition in the state and would this have a negative effect on managed care plans' ability to compete?

3. What experiences have consumers had in other states with or without patient protection laws, and have laws been effective in ensuring access and the quality of managed care?

4. Which patient protection provisions will be most effective in allowing patients and their providers to decide which care is needed?

**MAXIMIZING FEDERAL DOLLARS FOR HEALTH CARE THROUGH THE STATE MEDICAID PROGRAM**

Prepared by Jare L. Schneider

## Issue

**Should the General Assembly mandate the movement of certain targeted populations into Medicaid Managed Care?**

## Background

States are finding new and innovative ways to increase access to health services for selected populations, while maximizing federal Medicaid dollars available under the Social Security Act administered by the Health Care Financing Administration (HCFA). Many populations find themselves unable to afford access health care insurance for reasons of uninsurability due to high risk conditions, unaffordable premiums for the policies for which they qualify, lack of benefits available from employers, or eligibility for an income-based public assistance program. There is a growing concern that many citizens are falling through the ever-widening cracks in the states' health care systems. States are looking for more ways to gain flexibility in how health care services are purchased, financed, and delivered.

The current federal administration has strongly advocated, with support from Congressional members and advocacy groups, the inclusion of the more vulnerable and at-risk populations in the Medicaid program, among them HIV/AIDS populations, low-income children, and elderly and disabled populations. Other targeted groups for inclusion under a Medicaid waiver are those retired or disabled individuals who are too young to access Medicare (aged 55-64), but who cannot afford health insurance working parents who cannot afford the high cost of dependent coverage under employer plans, or groups whose employer plans offer no other dependent coverage.

There are also components of the 1997 federal Balanced Budget Act which allow states more flexibility in administering their share of Medicaid funding:

- Provide up to $1.5 billion over 5 years in a block grant to states to provide premium assistance to beneficiaries with incomes between 120%-150% of the federal poverty guidelines
- Allow states to continue providing Medicaid benefits to children who would have been eligible for benefits but for the enactment of P.L. 104-193, welfare reform, and their subsequent loss of SSI
- Allow states to provide 12 months continuous coverage for children
- Permit states to allow disabled SSI beneficiaries with income up to 250% of the FPL to buy into Medicaid by paying a premium

- Permit states to expand eligibility to include uninsured women under age 65 who have been diagnosed with breast cancer through the CDC breast cancer screening program, who satisfy CDC eligibility and who are not otherwise eligible for Medicaid benefits
- Eliminate copayments on children in families with incomes below 150% of FPL
- Allow limiting Medicare cost-sharing to Medicaid payment rates
- Allow states the option of providing Medicaid services through managed care without a waiver
- Allow states the option to expand Medicaid coverage under the newly created Children's Health Insurance Assistance Program (new Title XXI of the Social Security Act)

**Discussion**

The Kentucky Department of Medicaid Services has one of the largest budgets in state government, some $2.7 billion a year, which covers the cost of the state agency's administration and operation of a health care delivery system for the indigent citizens of the Commonwealth. The average monthly eligibles for FY 97 currently projected by the Cabinet for Health Services are 578,075. Over time, different states have targeted populations of high cost users, such as those with costly pharmaceutical expenses or conditions which require specialists' attention, and folded these groups into the population of covered recipients. Additionally, individuals with significant health care needs who cannot access health care insurance in the absence of employer-offered insurance or because of unaffordable premium rates have also been moved into Medicaid managed care via waivers that are approved through the federal Health Care Financing Administration (HCFA).

Currently Kentucky has the following active and operating waivers in the Department for Medicaid Services:

| Name of Waiver | Section of Social Security Act 42 U.S.C 1396p | Targeted Groups Covered |
|---|---|---|
| Kentucky Patient Access and Care System (KENPAC) | Section 1915(b) | • **all Medicaid-eligible individuals**<br>• allows states to place recipients in primary care case management systems, run on a fee-for-service or capitated basis<br>• mandates recipient freedom of choice, comparability of services and statewideness of program application |

| Name of Waiver | Section of Social Security Act 42 U.S.C 1396p | Targeted Groups Covered |
|---|---|---|
| Home and Community Based Waiver for the Aged and Disabled | Section 1915(c) | · **elderly and disabled; mentally retarded, mentally ill, and individuals with a specific illness or condition**<br>• allows states the flexibility to develop and implement creative alternatives to the institutionalization of Medicaid-eligible persons<br>• mandates certain sets of services to be included<br>• allows states the flexibility to select the mix, range and geographic area to best meet the needs of the populations they wish to serve |
| Model I Waiver Ventilator-Assisted Individuals 24-hrs/day Coverage | Section 1915(c) | · **a Medicaid-eligible individual who requires ventilator assistance** |
| | | |
| Model II Waiver Ventilator-Assisted Individuals Limited to 16-hrs/day | Section 1915(c) | · **a Medicaid-eligible individual who requires ventilator assistance** |

**Source:** Compilation by LRC staff of information collected from an array of reports provided by the Cabinet for Health Services and a UNISYS Ad Hoc Report # 411 (11/96)

Other groups which the General Assembly may want to consider mandating moving into Medicaid Managed Care are:

- Those high cost HIV/AIDS individuals whose income meets the 200% of the federal poverty guideline as a targeted group to provide access to appropriate care based both on medical and social models.
- Older adults and persons with disabilities with incomes equal to or less than 100% of the federal poverty level. This increase in persons eligible for home and community-based care

through Medicaid would provide a more stable base of support for agencies delivering these services in communities across the state. Elderly and disabled individuals who are eligible for the Supplemental Security Income program (SSI) are automatically eligible for Medicaid. The SSI income limits are approximately 70% of the federal poverty guidelines. Individuals with incomes above that amount have to spend down the excess income to the medically needy income limit, approximately 40% of the federal poverty guidelines.

- Children of a working parent(s) at 200% of the poverty level whose parent(s) cannot afford health insurance coverage for their dependents
- Retired or disabled persons with incomes at 200% of the federal poverty level who are not yet of age to be covered by the Medicare program

There are a variety of options Kentucky could explore for developing benefit levels or special services for these groups. Approaches include 1) using pilot projects to develop new strategies to deliver health care services already mandated and currently provided by the state network of Medicaid providers; and 2) creating alternative financing options through contractual arrangements or partnerships with private enterprises.

The responsibility for health care financing, regulation and purchase is spread across many state agencies, divisions and departments in Kentucky. The General Assembly could consider requiring the Cabinet for Health Services, the Department of Education, the Department of Juvenile Justice and the Cabinet for Families and Children to report on an annual basis their coordinated efforts in developing proposed waivers.

The advantage to providing expanded coverage to these groups is the degree to which preventive services can be provided to keep individuals healthy, reducing future costs. Additionally, the use of primary care case management through a managed care organization may effect more cost savings over time, which would make it possible to expand coverage to other populations in need of health care services.

Given the recent changes in federal legislation under P.L. 104-193, The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PROWRA),and P.L. 104-191, The Health Insurance Portability and Accountability Act of 1996 (HIPAA), there are populations of individuals who will be significantly impacted, to the extent that coverage under state Medical Assistance Programs is reduced, restricted or removed. Finding alternative methods to include some of these affected groups would also enhance the state's efforts at moving welfare recipients into a work environment.

Traditionally, to "expand" coverage to certain other groups would require some matching funds from the state, and the anticipated savings expected from implementation of some waiver requests are questionable. The lack of supportable documentation on the costs associated with implementation hampers lawmakers' ability to make informed decisions about allocating funds. State agency and legislative oversight and review of not only the development of waivers, but the subsequent contractual obligations which ensue, are essential in managing the states' financial resources dedicated to health care delivery systems.

# JUDICIARY

## ALTERNATIVE SENTENCING

Prepared by Louis J. Pierce

### Issue

**Should Kentucky implement alternative sentencing for nonviolent felony offenders in order to ease prison overcrowding and the burden on the criminal justice system?**

### Background

Currently, nonviolent felony offenders, like violent offenders, are generally sentenced either to prison or to probation. However, because of perceived problems in the criminal justice system, some jurisdictions have begun to experiment with alternative sentencing.

Alternative sentencing can mean either or both of two things. First, it can be sentencing that is imposed outside of the traditional criminal justice system. In one Vermont city, for example, sentences are imposed by groups of volunteer citizens rather than by judges. In cities in Pennsylvania and Texas, the families of juvenile offenders meet with the offenders' victims and negotiate sanctions. Second, alternative sentencing can simply be sentencing that differs from the traditional options of probation and parole. Such sentences can include restitution to the victim, community service, or drug and alcohol treatment.

Although most experiments in alternative sentencing have occurred at the municipal level, the state can act by creating a separate nonviolent felony offense and mandating alternative sentences for such offenses.

### Discussion

Many people see problems in the current criminal justice system. First, they claim that the cost of keeping people in prison is excessive. In Kentucky, the cost is anywhere from $13,000 to $20,000 per inmate per year. And because the prisons are becoming overcrowded, the state could incur additional costs in building new, or expanding old, prison facilities. Meanwhile, prison overcrowding itself contributes to additional costs in the form of disturbances and prisoner lawsuits.

Second, many claim that the criminal justice system is overburdened. Whether they go to prison or not, offenders must still go to court, and sometimes undergo supervision by probation officers. This means higher costs, victims waiting longer to see justice done in their cases, and violent offenders often being able to plea bargain for reduced sentences because the courts are pressured to dispose of their cases quickly. Finally, they claim that the current sentencing system neither rehabilitates offenders nor fairly compensates victims or communities for offenders' crimes.

Proponents of alternative sentencing claim that alternative sentences would reduce prison costs and overcrowding. They also say that such sentences can better rehabilitate offenders. In Vermont, for example, a man "who drove 105 mph down a residential street was sentenced to work with brain-injured adults, some of them survivors of high-speed crashes." This, they allege, was more rehabilitative than sentencing the man to probation.

Proponents also claim that alternative sentences are fairer to victims and the community. They point to the victim restitution, the victim and community involvement in sentencing, and the community service which are often parts of alternative sentences. Additionally, they say that by removing many nonviolent cases from the criminal justice system, alternative sentencing would allow the system to concentrate on locking up and monitoring violent offenders.

Opponents of alternative sentencing make the following claims: that such sentences are not tough enough on offenders; that they would result in grossly unequal penalties for similar violations; that it would still be expensive to implement the treatment programs or to monitor offenders' compliance with their sentences; and that some ways of imposing the alternative sentences, such as by citizen judges, would either be unconstitutional or unethical.

# VIOLENT OFFENSE SENTENCES

Prepared by Norman Lawson, Jr.

## Issue

**Should sentences for offenders be lengthened?**

## Background

As public concern over crime increases there are calls for stiffer penalties for violent criminal offenders and for repeat offenders. In recent years the Kentucky General Assembly has passed truth-in sentencing legislation, to permit juries in the penalty phase of a trial to know the defendant's prior record, bifurcated trials to permit introduction of the evidence about the defendant's past record, lengthened the time to parole for violent offenders, increased sentences, created new crimes and prohibitions against probation of violent offenders, sex offenders, persons using firearms in the commission of crimes and various other types of offenses, and created a sentence of life without parole for 25 years as an alternative to the death penalty (which, while still on the books, has not resulted in an execution since 1962).

Proposals have been made to lengthen sentences through statutes setting life without parole as the penalty for various offenses, requiring life without parole for second or third violent offenses, and setting statewide standards for pretrial diversion programs for felony offenders. (Pretrial diversion means that a defendant undergoes counseling, agrees to do community service, or pays restitution, without admitting guilt and without going to trial.) Georgia voters just approved "two strikes and you're out" legislation, while various other states and the federal government (through various funding programs in the 1994 Crime Bill) favor requiring "three strikes and you're out" (imprisoned for life without possibility of parole) for repeat violent offenders.

## Discussion

Proponents cite the reduction of crime which has occurred in states which have lengthened sentences for violent offenders. They feel that the offense of murder needs a new penalty (life imprisonment without parole), rather than the life with parole in 12 years or 25 years, as now permitted in Kentucky, that repeat violent offenders are better kept in prison for the protection of the public, and that "three strikes and you're out" and sentence lengthening will protect the public from these criminals. Similarly, proponents feel that pretrial diversion and alternatives to trial programs should not be available to violent offenders, and that, since there are no statewide standards for these programs, set statutory standards might prevent abuses of these programs.

Opponents of such programs cite the often criticized federal sentencing guidelines and the federal elimination of parole as a model not to follow. They cite the tremendous costs of prison construction and of keeping offenders in prison (a typical 20-year-old prisoner sentenced to life without parole will live to be 70 years of age and cost $1 million or more to keep in prison--not counting prison construction costs), the increasing costs of caring for geriatric prisoners, and the success of some rehabilitation and retraining programs. They feel that the new attitude is retribution and that it creates a situation where, in the absence of the use of the death penalty, a person sentenced to life without parole may be less manageable in prison and more prone to escape, since they know that the most they can get is the sentence they already have.

# PARENTAL LIABILITY FOR JUVENILE CRIME

Prepared by Norman W. Lawson, Jr.

## Issue

**Should parents be held liable for juvenile crime?**

## Background

Many experts cite the breakdown of the family as a source of juvenile crime; thus as juvenile crime has increased, demands for more controls over parental involvement with juveniles has increased. Traditionally a parent who sat by and did nothing to protect a child was liable for permitting the child to become neglected, needy, or dependent. Kentucky many years ago decided to hold parents liable for juvenile vandalism and for shoplifting. However, in recent years there has been a call for holding parents liable for more offensive acts committed by their children, even if they didn't participate in or know of the act. Following the lead of Florida, Montana, and other states, Kentucky will now hold parents liable if a juvenile obtains a handgun and commits a crime with it, even if the parents were merely negligent in storing the firearm. The 1994 General Assembly was presented with legislation which would have held parents liable if a juvenile violated a municipal curfew ordinance. The curfew legislation did not pass. Questions arise as to what parents may and may not legitimately do to control delinquent children, particularly those who are continually delinquent and cannot be controlled, even by the court system.

## Discussion

Proponents of such legislation feel that parents are lax in the control of their children and that parental control can be encouraged by holding the parents liable for the child's acts. A typical proposal made at the 1994 session of the General Assembly would have set a curfew for children and made the parents liable for each offense of violation, but no action would have been taken directly against the child until the third offense.

Opponents offer the proposition that many children who get into trouble are in conflict with their parents and would use any opportunity to get the parent in trouble, either alone or along with them. Some parents feel that they are limited in their ability to discipline or control their children because of the threat of being labeled as child abusers. A bill introduced in 1996 would have defined parental rights in the control of their children.

One possible compromise involves the use of the "one free bite" theory for some offenses where the parent had no prior knowledge that the child was committing an offense; parents would be held liable after the first offense. Another compromise involves not holding a parent liable when the parent has first turned the child over to the juvenile court as beyond parental control, or when the parent has reported the offense himself.

## CAPITAL PUNISHMENT

Prepared by Louis J. Pierce

### Issue

**Should the method of execution in Kentucky be changed from electrocution to lethal injection?**

### Background

Of the 38 states that have capital punishment statutes, 32 provide for lethal injection either as a sole or alternative method of execution. Eleven states authorize electrocution. Kentucky is one of only six states that employ electrocution as the sole method of execution.

The trend in other states appears to be to move away from electrocution and toward lethal injection. In 1995, for example, both South Carolina and Virginia amended their laws to authorize lethal injection as an alternative to electrocution, while Connecticut substituted lethal injection for electrocution as the sole means of execution.

### Discussion

Proponents of lethal injection usually cite humanitarian reasons for their position. They claim that electrocution is excessively painful and gruesome. Some have pointed to an allegedly "botched" electrocution in Florida, where flames and smoke were seen emanating from the prisoner's headpiece. They claim that lethal injection is a more humane and civilized way to execute convicted murderers.

Additionally, and partly as a result of the Florida incident, some have claimed that electrocution might be unconstitutional, based on the eighth amendment's prohibition of cruel and unusual punishment. The lawyers for Harold McQueen, the most recent prisoner executed in Kentucky, pressed, but lost, such a claim in state and federal courts in Kentucky in 1997,

On the other hand, there are those who claim that electrocution is not painful or gruesome. A Florida court recently determined, after reviewing a significant amount of medical evidence, that electrocution was not painful at all, because it causes unconsciousness and an inability of the brain to feel pain in "milliseconds". *Jones v. Butterworth*, No. 81-4593-CF (Fla. 4th Cir. Ct., 1997). The court also determined that the execution referred to above was not botched, and that the flames and smoke came from a burning sponge used in the headpiece, not from burning flesh.

Several courts recently have considered whether electrocution is unconstitutional. The *Jones* court held that it was not. Another court held that "in light of overwhelming precedent...

there is no merit in [the] claim that death by electrocution constitutes cruel and unusual punishment...." *Felker v. Turpin*, 101 F.3d 95, 97 (11th Cir. 1996). The Sixth Circuit Court of Appeals also found no merit in the claim, based on "well-settled principles." *See McQueen v. Patton*, 118 F.3d 460, 464-65 (6th Cir. 1997). The Supreme Court of Kentucky has also upheld the constitutionality of electrocution. *McQueen v. Parker*, No. 97-SC-517-MR (Ky., June 30, 1997).

Moreover, some claim that adopting lethal injection will not change the debate over capital punishment. They note that lethal injection has been criticized on the same grounds as electrocution. Some doctors claim that prisoners could "strangle or suffer excruciating pain" during the chemical injections but may be "prevented by the paralytic agent from communicating their distress." Jonathan I. Groner, MD, *Murder By Medicine*, The Free Press (July/August 1995). There have been claims of "botched" injections, such as one in which a chemical tube allegedly broke during the injection. *E.g.*, Bill Estep, *Lethal Injection or Electrocution: State Ponders Which to Use*, Lexington Herald Leader, June 15, 1997. And it has been claimed that lethal injection is unconstitutional as cruel and unusual punishment. *See Gomez v. District Court*, 503 U.S. 653 (1992).

In Kentucky, one bill on this issue has been prefiled for the 1998 regular legislative session. BR 245 would authorize lethal injection. It would allow prisoners sentenced to death before the effective date of the act to choose between lethal injection and electrocution. For prisoners sentenced to death after the effective date of the act, lethal injection would be the only method of execution. The Interim Joint Committee on Judiciary recommended BR 245 for passage.

## FAULT VERSUS NO-FAULT DIVORCE

Prepared by Mac Lewis

### Issue

**Should fault be reintroduced in divorce cases?**

### Background

Prior to 1972, to be granted a divorce in Kentucky one needed to prove a claim of abuse, neglect, or adultery. No-fault divorce, also known as the irretrievably broken marriage in Kentucky law, was adopted in part to make divorce less complicated, by eliminating the need to prove these claims. In KRS 403.110 the legislature provided that the purpose of the statutes on dissolution of marriage and child custody was to: "strengthen and preserve the integrity of marriage and safeguard family relationships; promote the amicable settlement of disputes that have arisen between parties to a marriage; mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; make reasonable provision for spouse and minor children during and after litigation; and make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irretrievable breakdown of the marriage relationship the sole basis for its dissolution." No fault divorce prevented the stigma of blame and fault from being attached to either party and made divorce less complicated, with the additional benefit of allowing a partner to leave the marriage quickly, which in the case of an abusive situation was thought to be beneficial.

Since 1972, divorce rates in Kentucky have increased from a rate of 3.3 per one thousand population to 5.6 per one thousand. Nationwide, according to National Health Statistics cited by the Los Angeles Times in a May 1996 article, divorce among married women 15 and older had climbed to a rate of 20.5% by 1994 from less than 15% in 1970. The first law on no-fault divorce was enacted in California in 1969. Many experts claim that nearly 50% of all new marriages end in divorce but this is not tracked. There are statistics for marriages per year and divorces per year, but there is no tracking mechanism to determine exactly how many marriages end in divorce.

### Discussion

Proponents of eliminating no-fault divorce argue that fault should be brought back to cut the number of divorces. They feel that making divorce more difficult to obtain and making people provide a reason for the divorce would force people to work harder to keep a marriage intact. No-fault divorce, they feel, has made divorce easy. Proponents note that the economic burden of divorce generally falls upon women, especially women with children, in these newly created single-parent households. Proponents point to a 1988 study by the National Center for Health

Statistics that found that children of single-parent families may be more likely to become pregnant as teenagers, use drugs drop out of high school, and break the law.

Critics of eliminating no fault divorce say having only fault divorce would make divorce a much more traumatic experience. They say that no-fault exists because of the terrible burden fault divorce placed on the family. Divorce, they say, is an emotional experience that can only be made more difficult by having to prove that someone was at fault. Critics say that no matter how well intentioned, re-establishing fault divorce and eliminating no-fault divorce would not force people to stay together. They say it would not save marriages, but rather would worsen hostilities in a fault-based divorce proceeding, with more pain for the children. Many feel that if divorce laws were toughened, more people would likely choose to live together without benefit of marriage, which could mean even deeper financial and social insecurity for women and children. Critics site studies which show the deep emotional scarring of children of hostile divorces.

Many states are looking at the no-fault issue, including Michigan, Iowa, Pennsylvania, Idaho, Georgia and California. Louisiana is allowing two different marriage contracts, one that would allow couples the option of no-fault divorce and the other that requires counseling before marriage, and creates a tighter contract between the partners, and only allows fault divorce. Many of the states which have looked at changing their laws are not moving completely away from no-fault divorce. Some states are looking at allowing no-fault when both parties agree to a divorce, but not if one party objects.

## REMOVAL OF JUVENILES IN ABUSIVE OR NEGLECTFUL SITUATIONS

Prepared by Mac Lewis.

### Issue

**Should the state change its laws to make it easier to take children away from parents who abuse or neglect them?**

### Background

KRS 620.130(1) establishes priorities for handling neglect, abuse, and dependency. It provides that the court shall first "consider whether the child may be reasonably protected against the alleged dependency, neglect or abuse, by alternatives less restrictive than removal." If the court orders removal, KRS 620.130(2) requires trial services designed to "promote the return of the child to his home as soon as possible."

KRS 620.140 further provides that "Before any child is committed to the cabinet or placed out of his home under the supervision of the cabinet, the court shall determine that reasonable efforts have been made by the court or the cabinet to prevent or eliminate the need for removal and that continuation in the home would be contrary to the welfare of the child."

KRS 625.090 provides the grounds for termination of all parental rights "if the Circuit Court finds from the pleadings and by clear and convincing evidence that the child has been adjudged to be an abused or neglected child by a court of competent jurisdiction. . . and that termination would be in the best interest of the child." Some people argue that the statute should just stop there. But, Kentucky law goes on to say that the rights shall not be terminated unless the "circuit court also finds by clear and convincing evidence the existence of one (1) or more of the following grounds: (a) That the parent has abandoned the child for a period of not less than ninety (90) days; (b) That the parent has inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury; (c) That the parent has continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm; (d) That the parent, for a period of not less than six (6) months, has continuously or repeatedly failed or refused to provide or has been substantially incapable of providing essential parental care and protection for the child and that there is no reasonable expectation of improvement in parental care and protection, considering the age of the child; (e) That the parent has caused or allowed the child to be sexually abused or exploited; or (f) That the parent, for reasons other than poverty alone, has continuously or repeatedly failed to provide or is incapable of providing essential food, clothing, shelter, medical care, or education reasonably necessary and available for the child's well-being and that there is no reasonable expectation of significant improvement in the parent's conduct in the immediately foreseeable future, considering the age of the child." all of these things provide for factors that mitigate the best interest of the child standard in removal of the child from the home. The statute goes on to say that the courts should consider "whether the cabinet has rendered or attempted to render all reasonable services to the parent that reasonably might be expected to bring about a reunion of the family, including the parent's testimony concerning the services and whether additional services would be likely to bring about lasting parental adjustment enabling a return of the child to the parent within a reasonable period of time, considering the age of the child."

**Discussion**

Some people feel that Kentucky's efforts to preserve the family through these statutes and others are undercutting the "best interest of the child." Proponents of legislation to change policy emphasis from preservation of the family to best interest of the child feel that it is better to remove a child from a situation of neglect or abuse and to move toward termination of parental rights as expeditiously as possible. They cite the legislature's continuing move toward best interest of the child in recent adoption and paternity legislation, such as 96 HB 300. They explain that social services workers have a large caseloads and that there are not enough counselors to do the proper home check or to handle the proper counseling within the home. They also cite situations where abuse or neglect has escalated very quickly and the child has been injured or killed. These people feel that removing the child from a "bad situation" before it escalates is the ideal solution. Proponents feel that children are left in neglectful or abusive situations far longer than they can handle emotionally. They feel that the amount of time the child spends in foster care only makes the problem worse, and with proper termination procedures these children be eligible for adoption and be placed in permanent homes. They stress that these children need to have stability and permanence in their lives and they cite the difficulty in getting and receiving social services, such as Medicaid, for these children without parental rights being terminated. These groups feel that the physical health and well-being of the child far outweigh concerns about families being together.

Opponents offer several different propositions. They cite Kentucky's history of concern for keeping families together. They look toward the Family Preservation Program in KRS 200.590 to these families stay together and advocate financing the programs at a higher lever. There is much concern about the caseloads of the social services workers who do original investigations of many of these cases and there is concern about placement of children in temporary or foster homes, where they are often left far too long. They cite examples or where the children are abused in foster care situations or money granted for their care has not been used for their care. Opponents feel that foster care is often not adequate and that a child often simply moves from one bad situation to another; the court system and social services may leave the child to linger in foster care when the family could be working to rebuild itself. They feel that all effort should be made to keep these families together, and cite child developmental studies that suggest children are healthier, happier and more mentally stable when they grow up in their own home. Opponents also feel that once the family is separated, it is extremely difficult to put it back together. Often they say, the problem is that the parents just need to be trained in parental skills. They believe termination of parental rights should be the final option after all other methods of "fixing" the family have been exhausted. They favor parenting classes, help on a community-wide basis and classes on alcohol or drug dependence.

# LABOR AND INDUSTRY

## PREVAILING WAGE

Prepared by: Linda Bussell

### Issue

**Should the General Assembly amend the prevailing wage law in Kentucky?**

### Background

Kentucky's prevailing wage law, like similar laws in most other states, determines wages that will be paid workers on public construction projects. State prevailing wage laws, often referred to as "little Davis-Bacon Acts", have been in place since 1891. Interestingly, seven states had enacted prevailing wage laws before the federal prevailing wage legislation, the Davis-Bacon Act, was enacted in 1931.

There is general agreement that the original purpose of prevailing wage laws, including the federal legislation, was to prevent unfair wage competition in the construction industry, although a theory exists that the purpose of the federal legislation was to protect union wage rates from competition from nonunion wage rates.

Controversy has surrounded the prevailing wage laws since Kansas enacted the first of these laws. Some state laws have been repealed, while others have been narrowed in scope. Similarly, efforts have been made to repeal the federal Davis-Bacon Act. These efforts have been unsuccessful, although the federal law has been modified and narrowed since its inception.

The arguments espoused by proponents and opponents of prevailing wage laws have not changed significantly through the years. The proponents contend that prevailing wage legislation protects workers and the public from itinerant contractors who employ unskilled, untrained workers at inadequately low wages. Opponents contend that prevailing wage legislation artificially inflates the cost of construction, thereby imposing financial hardships on public entities and taxpayers.

### Discussion

Kentucky's prevailing wage law was enacted in 1940. Before 1982, the Kentucky law applied to most public construction projects that cost more than $500. In 1982, the General Assembly, through enactment of HB 299, made major revisions in Kentucky's prevailing wage law. For example, the threshold of projects subject to the law was raised to $250,000, and this amount was indexed annually thereafter according to the change in the Consumer Price Index. The actual threshold amount had risen to approximately $386,000 shortly before the prevailing wage law was revised by the 1996 General Assembly.

SB 226, enacted by the 1996 General Assembly, significantly expanded the prevailing wage provisions in Kentucky. The major revisions included: expansion of the scope of the law; lowering of the monetary threshold by which projects become subject to the law; and redefinition of locality in which a prevailing wage determination is applicable.

Following enactment of SB 226, several news articles reported that the revisions in the prevailing wage law resulted in increased costs for several local school construction projects. As a result of the allegations contained in the news articles, the Legislative Research Commission, at the request of the Interim Joint Committee on Labor and Industry, funded a limited study by the Auditor of Public Accounts to determine whether the costs of the school construction projects were increased because of the 1996 prevailing wage revisions.

A report of the study was provided at the August meeting of the Interim Joint Committee on Labor and Industry. The state auditor reported that the study involved a performance audit on the impact of the prevailing wage revisions on five school construction projects in Daviess, Fayette and Meade Counties. The study found that four of the projects were begun prior to the effective date of the new prevailing wage law, and therefore were not subject to the new provisions. Three of these projects, however, were bid in Daviess County during the same month in which the new law became effective. Officials in Daviess County indicated that construction activity in the area increased in response to the new prevailing wage law as other school districts attempted to get projects underway before the new law became effective. The increased construction activity apparently increased the cost of school construction generally.

Only one of the projects reviewed was bid after the effective date of the new prevailing wage provisions. The auditor determined that the contractor's bid for labor on the project increased by roughly 8.4%. Adding the dependent fees applicable to the percentage increase, the auditor determined that the total labor cost impact on the project was $584,000.

The second part of the auditor's study focused on the procedures that the Labor Cabinet followed in making the determination of prevailing wages. The study concluded that while the Labor Cabinet is making attempts to improve the frequency of its prevailing wage determination hearings, there are still counties in the Commonwealth where wage determination hearings have not been held since 1983. Four counties have not had a hearing since 1984, and five counties have not had a hearing since 1985. In addition, the study concluded that the existing procedures allow prevailing wage determinations to be made on very little data. The auditor contacted other states and compared procedures used to determine prevailing wages. Nationally, a variety of wage determination approaches exists. The auditor's report recommended that the Labor Cabinet examine other states' procedures and adapt the best practices in those states to the procedures utilized in Kentucky.

While current law prohibits the Labor Cabinet from requiring sworn affidavits by contractors or others who submit wage information to be considered in the wage determination process, the auditor's report recommended that the Labor Cabinet inform those who provide wage information that it is illegal to submit false or misleading information and that criminal penalties may be imposed for violations. The report also recommended that the Labor Cabinet develop a strategic plan for development of prevailing wage rates which would include consideration of the following subjects: duties of staff; innovative uses of technology; procedures for determination of the extent of the localities; protecting the process against fraud; consistency and sufficiency of information received; calculation methodology used in determining prevailing wages; stakeholder involvement; and performance measurement.

The auditor reported that the Secretary of the Labor Cabinet cooperated with the auditors who conducted the study, and agreed with the recommendations contained in the report. Finally, the auditor said there will be a follow-up during the next year to gauge compliance with the recommendations made in the report.

# LABOR AND INDUSTRY

## ALCOHOLIC BEVERAGE CONTROL

Prepared by Vida Murray

### Issue

**Should the General Assembly enact legislation to improve the administration and enforcement of the alcoholic beverage control laws?**

### Background

Recent newspaper articles have chronicled problems the Department of Alcoholic Beverage Control (ABC) has faced in licensing and in enforcing the alcoholic beverage laws. The overall impression of the articles is that in recent years the Department has been lax in enforcing its laws, and has been motivated by political and economic considerations. Specifically, the articles note that the Department's record keeping system is outdated and is not easily accessible to its investigators, and that there is no systematic policy in place for inspecting facilities. Other problems identified are: slow or non-existent follow-up to reported violations; leniency shown to violators; improper treatment of evidence; and case determinations being made in an improper manner. As documentation of the enforcement problem, one newspaper article points out that suspensions and revocations have declined from 20 in 1992 to four in 1996.

In response to this criticism, the Governor and the newly-appointed Commissioner have reorganized the department. Under the reorganization, the Enforcement Branch was abolished and an Enforcement Division was created. The newly-created division is headed by a director who is appointed by and responsible to the Commissioner, and a line of authority by which each officer has access to the Division Director is thus created. The Director oversees, maintains, and tracks all agent field reports and complaints. Previous concerns with maintaining the confidentiality and integrity of an ongoing investigation are minimized, since the reports are no longer viewed by general office support staff. In addition, the Office of Legal Services has been established, replacing the General Counsel Branch. The new office provides each enforcement officer direct access to the General Counsel and is designed to ensure that the General Counsel meets with the Enforcement Director regularly, in order to review agent reports and to determine whether the facts are sufficient to warrant further action.

In April, 1997, the Interim Joint Committee on Licensing and Occupations undertook a comprehensive review of alcoholic beverage control. At each of three consecutive meetings the Committee focused on a different set of issues; history and organizational structure, licensing and regulation, and enforcement activities. The Committee heard testimony from the Commissioner of the Department and other officials of the Department and the Public Protection Cabinet concerning changes in the Department that had already been implemented, as well as those still in the planning stages.

**Discussion**

According to the Department, enforcement efforts particularly have been hampered because of a shortage of enforcement officers. Each officer is assigned a number of counties and is responsible for field reports, renewal activities, inspections, investigation and compliance checks, including enforcing the sale of tobacco products to minors. Approximately 24 enforcement officers are responsible for enforcing the activities of approximately 8000 retail licensees and 65,000 tobacco outlets.

Historically, the ABC has had a shortage of enforcement officers. The number of enforcement officers has declined since the 1970's, although the officers' responsibilities have increased. The Department is operating with eight to ten fewer officers than it had in the 1970's, even though Ashland, Morehead, Floyd County, Pikeville, Wolfe County, Madisonville and Nicholas County have gone wet, and liquor by the drink is now available in Carrolton, Prestonsburg, and Nelson County. Moreover, the ABC must now enforce the prohibition against the sale of tobacco to minors in all 120 counties.

Officers may be required to act in an undercover capacity, conduct surveillance, serve search and arrest warrants, and conduct raids. As part of their enforcement duties, officers are also required to prepare cases for court presentation and administrative hearings before the board. The shortage of manpower makes it almost impossible to enforce illegal activities in dry territories. The department's approach is to address the issue of bootlegging at the supplier level. The Department plans to hire an experienced investigative auditor who will assist enforcement officers in auditing and examining the records of retailers and distributors suspected of large-scale sales to bootleggers,

One of the personnel problems confronting the Department is its ability to retain enforcement officers. Historically, the salaries of the ABC enforcement officers have been below the salaries of other state law enforcement officers with similar responsibilities. The Department is addressing salary parity by working with the Department of Personnel to upgrade the minimum qualifications and compensation of ABC enforcement officers. The proposed reallocations will group ABC enforcement officers into positions in the new Investigator series recently developed for the Attorney General's office. The new track will put the enforcement officer's classification on par with other similarly-situated law enforcement officers and will provide a career track by which promotions can be made commensurate with the officer's experience and qualifications, thus increasing the Department's opportunity to recruit and retain officers.

The Department has addressed the proper treatment of evidence by establishing four storage areas throughout the state and by requiring its officers to complete eight hours of training by the Kentucky State Police on the collection, processing, and storage of evidence. In addition, officers have been designated at each location to log in and record evidence and its disposition.

Other enforcement actions initiated or supported by the Department include:

- Making the complaint process more accessible to the public by instituting a toll-free number;
- Establishing a policy by which warning letters or citations are issued , only after consulting with the enforcement officer involved; and
- Prohibiting the issuance of licenses to those convicted of any felony.

Proposals generated in testimony before the Interim Joint Committee on Licensing and Occupations include:

- Requiring the malt beverage industry to generate moneys for enforcing the prohibition of the sale of alcohol to minors, since malt beverage is generally the drink of choice by minors;
- Simplifying the licensing process by establishing a common expiration date for licensing. Such a process would streamline the licensing process , particularly for those with multiple licenses; and
- Updating and or computerizing applications for licensing.

The Department also testified that an increase in its budget would be necessary to fully implement necessary changes.

## CHARITABLE GAMING

Prepared by Vida Murray

### Issue

**Should the General Assembly amend the charitable gaming statutes to address problems concerning facility fees and the proliferation of "casino night" gaming?**

### Background

In November 1992, Kentucky voters ratified an amendment to the Kentucky Constitution authorizing gaming for charitable purposes. The Constitutional amendment permitted charitable gaming, only if established by the General Assembly, and specifically charged the General Assembly to set out in any legislation enacted, the types of charitable enterprises which may be engaged in, the standards for the conduct of charitable gaming, and a mechanism to ensure that the moneys raised are expended for charitable purposes.

In the enabling legislation enacted in 1994, the General Assembly declared its intent as: preventing the commercialization of charitable gaming; preventing participation in charitable gaming by criminal and other undesirable elements; and preventing the diversion of funds from legitimate charitable purposes. Efforts to maintain the honesty, integrity, and charitable bent of the games have given rise, in part, to laws requiring that a threshold of the receipts go for charitable purposes; prohibiting the tipping of volunteers; limiting the number of bingo games that may be housed at a licensed facility; and prohibiting the involvement of owners, employees, or contractees of charitable gaming facilities, distributors, or manufacturers in conducting or marketing the games.

### Discussion

Maintaining the games' charitable thrust is a main concern of the General Assembly. The use of commercial facilities has been and continues to be a much discussed issue. During the initial drafting of the legislation, the Interim Joint Committee on Licensing and Occupations heard testimony that the owners or managers of some of the commercial facilities were actively involved in conducting the games and were diverting the moneys from gaming to their private use. As a result of the adverse publicity, there was strong support for outlawing commercial bingo halls. However, some of the smaller charitable organizations testified before the legislative committee that they would not be able to operate without the gaming facilities.

In an effort to curb the potential of abuse, the law requires: that an organization's rent be reasonable and not exceed prevailing market rates, that rent not be based on the game's attendance or proceeds, and that the gaming facility file a copy of each lease it enters into with the

Division. In addition, a gaming facility, its owners, and its employees are expressly restricted from providing managerial and accounting services and from advising the organization on expending its money.

In the three years since the enactment of the legislation, questions continue to arise on how reasonable rates are determined and on the factors to be considered in establishing a facility's rate. KRS 238.555 expressly requires that the rent charged be reasonable and be based on prevailing market rate. A representative of the Division of Charitable Gaming has testified that establishing prevailing market rates is difficult, since the bingo hall is a new industry and there are no comparables on rent on which to rely. Some antitrust concerns have also been noted. The representative notes that the statute is somewhat unclear about how prevailing rates should be determined, and questions whether prevailing rates should be based on a facility's location, its square footage, its use, or a combination of these factors. Currently, the Division is surveying facilities regarding their rates and is looking at whether a facility's rates are out-of -line with rates charged by other gaming facilities in the area. The Division also notes that it has seen the rates decline as the supply of bingo facilities has grown and that it expects this trend to continue.

The Legislative Research Commission staff recently surveyed a few states to determine how other states restrict rental prices. Indiana prohibits rents from exceeding a specified amount. Mississippi requires that a facility owner get two appraisals and adopt the average of the two. Michigan, Nebraska, and Louisiana require, like Kentucky, that reasonable or prevailing market rates be used. In Michigan , what constitutes reasonableness is set out in regulation. The state is divided into regions and the most common rate in each region is adopted. Nebraska considers the following factors in determining fair market value: the number of square feet; the days in use; and lease terms. Virginia supports free enterprise in this matter, but employs an indirect approach which requires that a percentage of the charity's gross receipts be used on the charity's goals. For this year, three percent is required for organizations grossing under $150,000; four percent for organizations grossing from $150,000 to $500,000; and six percent for those grossing over $500,000.

Another means by which the Kentucky General Assembly has tried to deter excessive spending on bingo halls has been by the adoption of the 40 percent rule. In 1996, a provision was enacted requiring that each organization devote at least 40 percent of its adjusted gross receipts to its charitable purposes. Under such a provision, after deducting the prizes, no more than 60 percent of the remaining proceeds may be spent on expenses during a two-quarter period. Those in favor of the 40 percent rule assert that this rule ensures that the game's charitable purposes are met, and that those charities that are making little or no profit should engage in other activities. Those opposed to the 40 percent rule posit that the threshold should be lowered, that a probation period should be established, or that profits should be looked at annually as part of the license renewal process, rather than semiannually, to take into account startup costs and inclement weather and give a more representative picture of the charities' finances. Advocates of this change also note that this review, if part of the renewal process, will be simpler for the Division to administer.

A related issue that has been hotly debated from the beginning is whether workers should be compensated. Most recently, this discussion has arisen in the form of whether volunteers may receive tips. Those in favor of tipping note that tipping serves as an incentive, and will be a means by which organizations with small memberships may sustain its volunteers. Those opposed believe that volunteerism should be promoted by the charities. KRS 238.540 expressly bans tipping, but some have read the prohibition as applying to the charitable organization only and question how one can legally or practically prevent a player from tipping a bingo worker. If the state continues to prohibit general compensation, some proponents have asked that charities at least be permitted to compensate a "caller", whose job requires some expertise.

An additional issue the General Assembly will likely look at is the conduct of "special limited charitable games." "Special limited charitable games," are "casino-type games" such as "roulette; blackjack; poker; keno; money wheel; baccarat; pusher-type games; any dice game where the player competes against the house; wagering on prerecorded horse races,...and any other game of chance as defined...[by] the division." Changes made to the charitable gaming laws in 1996 inadvertently led to a significant increase in "casino nights", particularly in the Louisville area. The problems identified with these games are that they: may be held at unlicensed facilities; may use real money, making it impossible to account for gross receipts; and are too long and too frequent. A licensed facility is restricted to seven such games a year; however, there are no restrictions on an unlicensed facility. An unlicensed facility, such as a bar or a hotel, may provide space to as many charitable organizations as the facility chooses if the facility does not receive compensation. The law merely requires that a facility be licensed if it leases to or receives financial consideration for its premises from two or more charitable organizations.

Suggestions for eliminating or alleviating some of the problems posed are to use a banker and play money or tokens, so that gross receipts may be accounted for; to require distributors to limit the time equipment may be left at a facility; to restrict the hours of play to a specified time each day of the event; to require that all facilities housing the games be licensed; and to require that the games be held in conjunction with a picnic or festival where the games are an incidental part of the festival or picnic.

## CONTINUING EDUCATION FOR COSMETOLOGISTS

Prepared by Allison C. Weber

### Issue

**Should mandatory continuing education be required for cosmetologists?**

### Background

During the 1996 regular session, SB 199 was passed and for the first time proof of continuing education (CE) credit became a requirement for cosmetology license renewal.

The effort behind the requirement began back in 1994 when the national Cosmetology Association, the Kentucky School Owners Association, and the Kentucky Congress of Cosmetologists asked the State Board of Hairdressers and Cosmetologists to consider mandatory CE for licensees. For several months, the Board debated the issue, eventually endorsing mandatory CE. As of July 1, 1997, proof of CE is required for annual license renewal--six hours for cosmetologists and nail technicians; eight hours for cosmetology instructors.

To implement the statute (KRS 317A.050(8)), the board promulgated 201 KAR 12.200. It sets forth, among other policies, that:

- All CE programs shall contribute directly to the competency of the licensee, pertain to practice and management, and pertain to the health and safety of the public.

- Approved sponsors of CE programs shall be private and vocational technical schools of cosmetology; associations of cosmetologists, colleges, and state agencies;

- Only programs using generic products shall be approved; and

- Attendance at manufacturer and distributor trade shows shall not be approved.

Testimony before the Interim Joint Committee on Licensing and Occupations suggests that during this period there was a communication breakdown between the Board and many of the 19,000-plus licensed cosmetologists. A number of cosmetologists testified that the Board neglected to notify the licensees that it was considering mandatory CE or to seek their input on the subject. For many, their first notice that the CE law was in effect and that only certain types of classes would qualify came with their renewed licenses in July 1996.

In response, the Committee asked the Board to conduct meetings throughout the state to explain the CE requirements and allow the cosmetologists to voice their views. Twelve such meetings were held between April and July 1997, with a total attendance of 1220. In addition, the Board received over 600 letters from cosmetologists who could not attend any of the meetings.

**Discussion**

The cosmetology CE issue is really two-fold: Should there be mandatory CE for license renewal, and if so, what type of CE should qualify? Currently, seven states, including the neighboring states of Illinois, Ohio, and Indiana, require mandatory CE for cosmetologists. Their individual requirements run the gamut from AIDS education alone to trade show classes taught with or without generic products, to licensed course instruction. No definitive research has been found to establish that mandatory CE actually enhances professional competency or reduces consumer complaints.

The Board maintains that CE is a valuable consumer protection device that will reduce customer complaints. In support of that position, the Board submitted to the Committee copies of five written complaints dated between 1994 and 1996.

Those cosmetologists opposed to CE claim that it creates an unnecessary burden, since existing market pressures adequately address the question of competency. For example, testimony before the Committee revealed that a considerable number of Kentucky cosmetologists either work a very few hours for a small clientele, work out of their homes in rural areas, or work mostly through funeral homes. They say mandatory classes on the latest trends and techniques or salon management are generally not applicable to such licensees.

Some full-time, full-service cosmetologists find the CE burden likewise severe when manufacturer and distributor trade show classes are excluded. Those who feel they must attend those shows to stay competitive face a further financial outlay plus time lost from work to attend Board-approved classes. These additional classes may involve costs of $5 to $100 an hour and travel of considerable distance, especially for those living in outlying areas.

Finally, there is concern that the trade show exemption creates a captive market for cosmetology schools and other Board-approved sources of CE.

In response to these concerns as expressed by the licensees at the statewide meetings, the Board has proposed two solutions--a new administrative regulation and an amendment to 201 KAR 12:200. The amendment would relax the deadlines for CE course providers to apply for approval by the Board and allow approval of programs previously approved by other state agencies, including the Kentucky Council on Higher Education. The new regulation would:

- Further define CE policies on course hours and carry-over of hours;

- Provide a waiver for those temporarily unable to meet the CE requirements;

- Create an "inactive" status for those not actively engaged in the practice of cosmetology. Although the renewal fee would be the same as for practicing cosmetologists, CE would not be required. "Inactive" status could be upgraded to "active" upon proof of six hours of CE.

In summary, two routes are available to address these CE concerns. For those who do not accept the public protection rationale behind mandatory CE, the following options are available:

- Repeal the requirement for mandatory CE.

- Repeal mandatory CE but permit the Board to issue advanced certificates to those who attend voluntarily.

For those who do believe there is a public protection rationale, the following options, which focus on actual need, may make CE more palatable to licensees:

· Require CE for health and safety practices only.

· Require proof of CE credits every third year instead of annually.

- Exempt those who have maintained licenses for a certain number of years from the mandatory CE requirement.

- Allow trade show demonstrations and classes using brand-specific products to qualify for CE credit.

## VLTs at Racetracks

Prepared by Michael Greer

### Issue

**Should the General Assembly legalize the operation of video lottery terminals (VLTs) at Kentucky racetracks?**

### Background

During the 1994 General Assembly, a central Kentucky racetrack official testified before the House Tourism Development and Energy Committee in opposition to casino gambling at racetracks. He characterized the support among elements of the racing industry as essentially a reaction to an unfounded fear of a "mythical armada" of riverboat casinos. At the time, only one boat, the Players riverboat at Metropolis, Illinois, was in operation, and its effects were not appreciably noted beyond the Paducah area.

Now, nearly four years later, the number of riverboat casinos has grown from one to four, with a fifth to become operational possibly within a year. In addition to the Players boat at Metropolis, there is the Casino Aztar boat at Evansville, Indiana, the football field size Grand Victoria II at Rising Sun, Indiana, and the Argosy Casino boat, which opened in December, 1996, at Lawrenceburg, Indiana. In the not too distant future, the mammoth Caesar's World boat will become operational in Harrison County, Indiana, a fifteen minute drive from Louisville.

Riverboat casinos are very lucrative and generate huge amounts of revenue. For example, the Grand Victoria, located close to Turfway Park in Northern Kentucky, is averaging approximately $120 million a month in handle. Track officials estimate that the combined handle of the two boats near Turfway will be in excess of $2 billion, a large portion of the entertainment dollar in that market, which they feel will cut deeply into Turfway's revenue. The handle for the December, 1996, holiday meet at Turfway Park was down 34.7 percent over the same period the previous year. There is some evidence, however, that a substantial amount of Turfway's decline may be attributed to the legalization of whole-card simulcasting at Ohio racetracks.

Even though the Caesar's World boat is not yet operating, some think Churchill Downs may be feeling the effects of the three current Indiana boats. Churchill's handle for its fall 1996 meet was down 14 percent from the previous year. In addition, intertrack wagering on the Churchill meet at Ellis Park and Turfway Park was also down considerably, with Turfway posting a 42 percent decline. Again, whole-card simulcasting in Ohio might account for much of the sharp decline at Turfway.

The threat from riverboat casinos is best illustrated by comparing revenues from the two industries. The Casino Aztar reported a total handle for 1995 of $1.2 billion. In contrast, the total handle for all Kentucky tracks, live and simulcasting, for 1995 was $672.5 million, slightly more than half the amount generated by one boat.

Video Lottery terminals, VLTs, electronic devices which can be programmed to play a variety of casino games as well as accept pari-mutuel wagers, have been a successful strategy to rescue financially beleaguered tracks in other states; notably West Virginia, Delaware, and Rhode Island. Supporters of VLTs contend that Kentucky tracks cannot compete with the casino boats without additional means to compete, such as allowing VLTs at racetracks.

In the fall of 1996, two Louisville legislators announced their intention to sponsor legislation authorizing VLTs at Kentucky racetracks. Their proposal would give the Kentucky Lottery Corporation regulatory authority over the operation of the VLTs and divide proceeds between the racing industry and the state, with the state's portion dedicated to the funding of post-secondary education; principally scholarships. After several months of negotiation with different groups in the racing industry, one of the potential sponsors announced that he had not been able to come to an agreement with the industry, and he would not continue his efforts until the industry reached a consensus.

**Discussion**

A number of issues have been raised regarding the operation of VLTs at Kentucky tracks. One issue is the constitutionality of conducting casino-type gaming through the lottery. In 1993, the Attorney General issued an opinion (OAG 93-58) on that issue. This opinion stated that casino-type games were lotteries, but the lottery amendment of 1988 did not permit casino gaming if conducted through the lottery. The conclusion was based on the supposition that, "When the voters of this state approved a ***state*** lottery, they had in mind a system typified by the lotteries of other states."

Supporters of VLTs disagree with this conclusion. They contend that in the absence of legislative history and intent in Kentucky, judges base their interpretation of the Constitution on the words as written. The lottery provision in Section 226 of the Constitution states:

> The general assembly may establish a state lottery to be conducted in cooperation with other states. Any lottery so established shall be operated by or on behalf of the Commonwealth of Kentucky.

Proponents feel there is nothing in this language to suggest that casino gaming could not be conducted by the lottery if the following tests were met:

1. The games played are lotteries by standard definition;

2. The games are operated by the Kentucky Lottery Corporation; and

3. A substantial portion of the proceeds accrues to the Commonwealth.

Proponents also point out that there is currently a statutory prohibition on the lottery engaging in casino gaming added to the law in 1990, because it was the sense of the General Assembly at the time that nothing in the Constitution prevented the lottery from such activities. The fact that the General Assembly felt compelled to put a prohibition in the statutes in 1990, they reason, is further evidence of the constitutionality of casino gaming through the lottery. They also note that constitutionality has not been an issue in the four states that permit VLTs at tracks through the state lottery.

Another constitutional issue is whether the restriction of VLTs to racetracks constitutes special legislation. There is a fear in the industry that regular lottery retailers might challenge enabling legislation, and if they prevail, VLTs could end up in hotels, bars, restaurants, and corner grocery stores all over the state. Proponents feel these fears are not well founded. They say that there is sufficient case law to permit limiting VLTs to tracks if there is a reasonable rationale for the restriction and it is stated in the enabling legislation.

While the short-term benefits of VLTs are generally acknowledged, there is also widespread concern within the racing industry over the long-term impact. There is fear that the profitability of the VLTs, contrasted with the concurrent decline in racing revenues, will put pressure on track owners and shareholders to cut back on racing to improve the bottom line. If this were to happen, tracks would become, to paraphrase Dr. William Eadington, a nationally noted authority on gaming, nothing more than gambling casinos with animals running around a track occasionally.

Proponents say the key to addressing this concern is to legislatively keep the emphasis on racing. In order to operate VLTs, tracks should be required to keep racing minimally at the same level as before VLTs. Tracks should not be allowed to segregate VLTs to the extent that pari-mutuel wagering would not be easily accessible to VLT players, and conversely, veteran race goers would not be able to play the VLTs between races. Finally, a substantial portion of the net proceeds from VLTs should go back into racing, to increase purses, fund capital improvements, and provide revenues to promote racing and enhance the fan base.

A related concern is that as the tracks become more profitable from VLTs, they will become more attractive to casino companies as investments, resulting in the takeover of tracks by casino companies. Proponents would address this concern by having any enabling legislation contain a provision which would invalidate a VLT license upon change of ownership, with relicensure dependent on the "suitability" of the purchaser. This provision would deny a license to persons deemed unsuitable, but it is questionable whether it could be used to deny a license to a casino company solely because it is a casino company.

In the opinion of some, the greatest deterrent to casino takeovers would be the distribution of the net proceeds, as provided for in the enabling legislation. Casino companies are businesses that are looking for the best return on investment, and if the net proceeds were to be returned to the racing industry and spent for college scholarships, tracks would not be as profitable an investment as land-based casinos and riverboats.

Churchill Downs has its own unique protection against takeover. Responding to rumors of a hostile takeover, the 1978 General Assembly, created in KRS Chapter 58, the Churchill Downs Authority, which may be activated by the Governor to acquire Churchill Downs in response to a potential takeover and operate the track on behalf of the state.

Opponents contend that expanded gambling through VLTs will increase gambling addiction and create other social problems. Proponents admit there is some truth to this, but they point out that these problems will occur anyway, since large numbers of Kentuckians are already crossing the Ohio River to gamble. By putting VLTs at tracks, proponents contend the state will at least be able to keep a portion of the money in-state to support the racing industry and provide scholarships. Using some of this money to treat problem gamblers has also been suggested.

The racing industry itself is deeply divided on the VLT issue. The division is no better exemplified than in opposing editorials from two prominent Central Kentucky horsemen that were published in the November 13, 1996, edition of the Lexington *Herald-Leader*. In support of VLTs, one made the following case:

> Finally, it is time for the industry to respond to the threat to track handle and purses posed by the spread of casinos and riverboats throughout the country....Therefore, I have concluded that the horse industry in Kentucky should encourage legislation to authorize video lottery terminals exclusively at racetracks....If we do not participate in the beginning, we may never have another opportunity.

The argument in opposition was as follows:

> I am against mixing thoroughbred racing with organized gambling in the state of Kentucky....We should not bring a dangerous competitor into our tracks....Proliferation of organized gambling would mean death for us, or if not death, a terrible debilitating illness.

How does the public feel about the issue of VLTs at racetracks? According to a 1996 survey conducted by a Lexington-based research group, the public is somewhat ambivalent. In a poll of 800 people, 65.8 percent said they were somewhat or strongly opposed to VLTs at racetracks. But 44.9 percent of the respondents said they would be more likely to support VLTs at tracks if the proceeds were earmarked for public higher education. One question listed four options for raising revenue to fund higher education reform; raising the sales tax, placing the sales tax on services, raising tuition at colleges and universities, and allowing video lottery terminals. The most desirable single option to the respondents was allowing video lottery terminals, garnering 39.3 percent of the responses.

# LOCAL GOVERNMENT

# JAILS

Prepared by Donna G. Weaver

## Issue

**Should the state assume more financial and administrative responsibility for local jails?**

## Background

Providing for the incarceration of prisoners is an expensive undertaking for counties. Some counties report that they are spending up to fifty percent of their general fund money on jails, and other smaller counties have closed their jails because they can no longer afford them. Currently, counties have the option of maintaining their own jail, contracting with another county or city for the use of its facilities, or participating in a regional jail system. If a county fiscal court contracts with another county or city, the county is still responsible for the costs of transporting prisoners.

State government provides financial assistance to counties to help them fund their jails. Currently, the state per diem to county jails for housing state prisoners is $22.66, and all counties receive a minimum of $24,000 from the state treasury for the care of prisoners charged with or convicted of violations of state law. Also, KRS 441.206 requires the state contribution to counties to be at least equal to that paid for fiscal year 1983-1984 or, in the case of certain counties that received disproportional amounts that year, the amount that should have been paid in 1983-1984. Any additional amounts are to be allocated according to the following formula:

Sixty percent of the allocation is based on the amount of the 1983-1984 funding formula each county received, or should have received, under the conditions set forth in KRS 441.206(5);

Ten percent of the allocation is based on a county's comparative ranking of median household income, in inverse order, as determined by the 1980 federal census of population; and

Thirty percent of the allocation is based on the proportion of each county's age-at-risk population (ages 18-34) to the state total, as determined by the 1980 federal census of population.

## Discussion

During the 1996-1997 interim , the Interim Joint Committee on Local Government and the Subcommittee on County Finance of the Task Force on Local Government Taxing Structures have heard testimony from jailers and county judge/executives on the operational and financial problems county jails are facing. Some of the issues brought before the committees are:

***Housing of juveniles.*** Juvenile crimes are on the increase, and, because of the severe restrictions on places of confinement for juvenile offenders, juveniles are prohibited from being incarcerated in a facility with adults. It is estimated that there are currently only sixteen facilities in the state that can house juveniles and that it costs $100 a day to house a juvenile.

***Housing of females.*** Like juveniles, female prisoners are hard to place, because there must be a full-time matron on duty if there is even one female prisoner. It was reported that counties are forced to transport female prisoners up to 200 miles away to find suitable holding cells.

***Transportation of prisoners.*** KRS Chapter 441 mandates that the fiscal court of each county must provide for the transportation of prisoners, as necessary, from the jail budget. The transportation costs include provision of vehicles, drivers and guards. Transporting hard-to-place prisoners, such as juveniles and women, can be costly and time-consuming. Sometimes transportation even includes out-of-state travel.

***State reimbursement.*** It was brought to the attention of the Task Force that the state does not reimburse counties for the cost of housing and transporting prisoners until they are convicted. If there is no conviction, there is no reimbursement. The problem is also compounded if a county has to provide long-term confinements for prisoners who are awaiting trial due to the massive backlogs in the federal and state court systems. It has been suggested that if the statutes were amended to require the reimbursement of counties for the cost of housing and transporting both adults and juveniles from the actual day they were arrested it would help alleviate some financial problems.

***Privatization.*** Private companies building and operating prisons is a rapidly growing industry in the United States. Currently, Kentucky has at least four privately operated facilities. Privatization is seen as a way to reduce rising jail costs because these private companies run the entire operation from the designing, contracting, financing, and construction of the facility. It was reported that it typically takes the state four to five years to get a jail ready for occupancy and a private corporation can do the same thing in 14 months. Representatives of a prison privatization company stated in a legislative committee meeting that in 1990, the Kentucky Department of Corrections asked the legislature for $26 million dollars to build a 500-bed minimum security prison in Lee County. The contract was eventually awarded to a private firm that built it for $5 million. These types of savings have all states looking at the issue of privatization, including the state of Tennessee, which is considering turning its entire system of corrections over to private corporations. However, it was also pointed out that counties are required to build and operate their jails at a higher standard than the private prisons. In addition, private jails are guaranteed an eighty percent state prisoner occupancy rate and receive a state per diem of nearly seven dollars more per day than the counties.

***Medical fees.*** The county is required to pay the cost of providing necessary medical, dental or psychological care for prisoners. The state is required to reimburse the county for that portion of the cost that exceeds $2,000, under specified terms and conditions. Legislation was enacted in 1994 to amend KRS 441.045 to allow jails to impose a reasonable fee for the use of jail medical facilities on prisoners who have the ability to pay for all or part of their medical expenses. These funds are deducted from the prisoner's inmate account. However, prisoners cannot be denied medical treatment because of a lack of funds in his individual "canteen" accounts. Even so, jails cite medical fees as an escalating expense. The costs of caring for aged inmates and those who are HIV positive represent a significant portion of such expenses.

As county governments are required to spend additional general fund dollars on jails from already strained budgets, there is likely to be a push for more state support of these facilities. County officials are reporting to the legislature that counties cannot continue to put more money into jails, nor can they afford to build new ones. If crime rates continue to rise, especially juvenile crimes, this problem will only be exacerbated. In the future, the legislature may have to address these concerns.

The following list includes just a few of the options that have been suggested to the legislature as solutions to these concerns:

1. Amend statutes to require the state to pay county governments for transporting juveniles to the proper facilities;

2. Amend statutes to require the state to pay county governments for housing prisoners from the day they are arrested and housed in a county facility;

3. Place more state money into the bonding authority for jails;

4. Guarantee a set number of state prisoners in county jails; and

5. Further explore the cost savings of the privatization of jails.

## FEE OFFICERS

Prepared by Mark Mitchell

### Issue

**Should there be a comprehensive restructuring of the funding of those local government offices currently funded under a fee system?**

### Background

Today, Kentucky only has two offices that are considered "fee offices"--that of the sheriff and county clerk. Fee offices are offices that raise their operating expenses from the collection of fees for services they provide. Such as, the registering of cars, or the serving of processes. Their current history can be traced back to the 1891 Constitutional Debates, when the drafters of our current Constitution discussed whether to have fee-based offices. Some debaters thought the only way to have the officers perform faithfully was to have their funds and salaries contingent upon the collection of these fees. Ultimately, sheriffs and county clerks ended up having the revenue of their offices based upon the collection of fees, and that practice has not changed since.

While the obligation to raise office operating expenses through the collection of fees is constitutionally dictated, the amounts of the fees are not. The amount of the fees is statutory. Thus, any changes in the amount of fees they collect can be changed through statutory amendment. The Constitution would have to be changed to remove the fee collection funding mechanism from the officers.

Even though the two offices are fee-based, that is where the similarities end. Each has its own set of circumstances which dictate the expenditure of revenue that is derived from these fees. Although through the years each office has had more and more duties assigned to it, some of these duties are compensated through the collection of additional fees, others are not.

### Discussion

During the 1996-97 interim, the issue of the financing of fee offices was discussed by the Subcommittee on County Finance of the Task Force on Local Government Taxing Structures. The following facts were revealed. Both offices are split into two categories, depending upon the size of the county wherein they operate. The only difference in administration is that in counties with populations greater than 70,000, twenty-five percent of the revenue of the office is directly relayed to the county government, and the office operates upon the remaining seventy-five percent. In other counties, the fee officer operates on 100 percent of the fee revenue generated. The duties of each office in each county population category do not change; however, the amount of fees collected by the officer in the county directly depends upon the population. For example, fewer people in the county means fewer cars to register. Thus, the general revenue declines directly as the population declines from county to county. The officers in smaller counties are the first to feel any "pinch" from revenue shortfalls.

***County clerks.*** It was pointed out in discussions that all but one or two county clerks currently receive the maximum salaries allowed by Constitution Section 246. The amount for 1997 is $47,899. The consensus of the speakers was that they were making enough money to operate the offices adequately, but the constitutional maximum on the salary is very unfair and does not allow consideration for the differences in duties that might be found in the various sized counties.

Over the past few years, the clerks have been given statutory fee raises for the services they provide. Various amendments to the fee statute have been made in 1996, 1994, 1992, and earlier, including the transferal of motor vehicle and water craft tax collection fees to the clerks, which is a significant amount of revenue. But the net effect of many of these increases was only to allow the majority of the clerks to reach the constitutional maximum salary. They still could not overcome the constitutional salary cap.

During the July meeting of the Interim Joint Committee on Local Government, the Clerks Association presented some legislation for consideration which would create a higher salary ceiling for clerks and would vary the clerks' salaries by size of county population. This would be accomplished by declaring a county clerk to be a state official by virtue of their state government related duties. In 1997, such offices were funded at a level of $79,832. Similar legislation was suggested in 1996, under HB 717.

***Sheriffs.*** Traditionally, a sheriff's main duty has been the collection of taxes. The gamut of duties also includes court services, law enforcement and election duties. In some counties, mainly small, rural ones, the sheriff becomes the most convenient source of law enforcement. These duties often take the sheriff and deputies away from the office and the loss of office time, vehicle usage, uniforms, and other various factors are drains on the revenues of the office.

The sheriffs have lost revenue from the transfer of the collection of motor vehicle and water craft tax, which gave this duty and these fees to the county clerks. They have also lost revenues from the bank shares tax legislation of 1996, and from the intangibles tax because of a recent ruling that declared stock and out of state bank deposits tax exempt. The sheriffs gained revenue from 1996 HB 299, which raised, doubled in some cases, the fees for certain services. 1996 legislation also changed the rate of pay for court services provided by the sheriffs and deputies. Both of these measures helped the office of sheriff, but the sheriffs believe them to be only a band-aid measure.

In addition to criticizing of the fee system, sheriffs suggested that they would like to be part of the Kentucky Law Enforcement Program Fund. The sheriffs would like more extensive training for themselves and their deputies. Problems occur with the tax calendar in that payments due the sheriffs are coming in late because the sheriffs receive the bills late from the state. This delay causes the subsequent tax payments to the sheriffs to come beyond the budget cycle. In addition, current statutory law dictates that sheriffs must serve warrants and deliver their recipients to the courts, but the sheriffs do not receive payment for that service unless the person is convicted. A person may also be transported several times during a case, and may be driven many miles, requiring many office hours.

The Interim Joint Committee on Local Government has indicated that it is interested in continuing the discussion regarding the potential restructuring of the local fee system during the remainder of this interim period.

# STATE GOVERNMENT

# VETERANS' NURSING HOMES

Prepared by Melvin D. LeCompte

## Issue

**Should the General Assembly establish additional veterans' nursing homes?**

## Background

In 1988, the General Assembly funded Kentucky's first veterans' nursing home, the Kentucky Veterans' Center in Wilmore, operated by the Finance and Administration Cabinet. This is a 300-bed facility that provides care for veterans who are residents of Kentucky. Currently, Kentucky has a veteran population of 359,600, of which 35%, or 127,700, are 65 or older. The Kentucky Veterans' Center is 100% occupied, and has an extensive waiting list of approved applicants.

Kentucky's veterans' groups adopted a resolution in 1997 urging the Governor and the General Assembly to establish two additional 120-bed veterans' nursing homes. One home would be placed in Western Kentucky and one in Eastern Kentucky.

KRS 36.355 allows the Commonwealth of Kentucky to establish and maintain state veterans' nursing homes. The Finance and Administration Cabinet may promulgate administrative regulations necessary to operate the homes to comply with state and federal statutes and regulations. The Kentucky Department of Veterans' Affairs may seek federal and private funding for the construction, renovation, and operation of Kentucky veterans' nursing homes.

## Discussion

The U.S. Department of Veterans Affairs provides health care programs for all segments of the U.S. veteran population. Acute medical care is provided to veterans by the Veterans Affairs (VA) medical facilities. Nursing home care for veterans is provided through a joint federal/state effort. The State Veterans' Nursing Home Construction program, within the U.S. Department of Veterans Affairs, constructs nursing homes on a 65/35 percent federal/state matching basis. It is estimated that the total cost for construction of an additional 120-bed nursing home in Kentucky will be $13.5 million. The estimated construction cost to the state would be $4.7 million. Kentucky's portion of the construction costs may be offset by contributions from local communities. The local contribution may include the donation of land and infrastructure.

The annual operational cost for each additional home is expected to be $5.5 million. Operational costs would be funded by federal per diem reimbursements paid to the facility, General Fund appropriations, and fees paid by residents. The estimated annual operational cost to the state's General Fund appropriations would be $2.2 million per home. Currently the state's appropriation to the 300-bed Kentucky Veterans Center in Wilmore is $5.8 million for FY 96/97 and $6.1 million for FY 97/98.

The U.S. Department of Veterans Affairs establishes a "priority one" list of applications for nursing home projects on August 15 of each fiscal year. Projects are funded from this list until all available federal funds are spent. To achieve a "priority one" ranking for the next federal fiscal year, Kentucky must ensure that the state's 35% share of the funding for construction costs is available prior to August 15, 1998.

As the demand for long-term care for veterans increases, states are beginning to utilize the federal program to develop nursing homes for veterans. There are currently 90 veterans' nursing homes in 42 states. Texas, for example, is currently seeking funding for four nursing homes. Oklahoma is currently in the process of establishing its seventh nursing home for veterans.

The 1998 General Assembly may want to consider the needs and the cost for establishing additional veterans' nursing homes.

## ELECTIONEERING

Prepared by Rob Williams

### Issue

**Should the General Assembly modify the statute prohibiting electioneering within five hundred feet of the polls on election day?**

### Background

Campaign-related activities referred to as "electioneering" include displaying campaign signs, distributing campaign literature, soliciting signatures to a petition, and soliciting votes for or against a candidate or ballot question. They do not include "exit polling" performed by the news media to gauge voting trends.

KRS 117.235 regulates electioneering. Prior to its amendment in 1988, electioneering was prohibited within a fifty-foot radius of a polling place, although a county could extend the electioneering-free zone on a county-wide basis by ordinance. The 1988 General Assembly increased the distance in which electioneering would be prohibited from fifty feet to five hundred feet, following recommendations by two blue ribbon panels appointed to investigate election fraud. Those panels had recommended a one-thousand-foot electioneering-free zone, but a five-hundred-foot limit was enacted instead. The 1988 amendment to KRS 117.235 also specifically stated that electioneering would not be prohibited within the five-hundred-foot limit if it were conducted within a private residence or establishment other than one in which a polling place is located by a person having an ownership interest in the property.

An amendment to KRS 117.235 enacted during the 1996 Regular Session deleted the application of the prohibition against electioneering in the proximity of the clerk's office during the period in which absentee ballots may be cast on a voting machine at the clerk's office before an election.

Since the adoption of the five hundred foot prohibition on electioneering, questions have been raised as to whether certain activities constitute electioneering, whether the five hundred foot distance unconstitutionally restricts free speech rights, whether the prohibition could be effectively enforced within the five-hundred-foot distance, and whether some restriction on electioneering should be applied during absentee voting periods.

## Discussion

Testimony received by LRC's Special Commission on Election Reform and the Attorney General's Task Force on Election Fraud during their deliberations in 1987 was the basis for the increase in the distance in which electioneering would be prohibited. That testimony indicated that the fifty foot ban in use at the time still made it fairly easy for persons interested in subverting the election process to accost voters going to and from the polls and to harass or to intimidate them within close proximity to the voting booth. Further, many witnesses found even "legitimate" electioneering, such as handing out campaign brochures, to be offensive when conducted near the polling place, especially when the resulting effect required a voter to "run a gauntlet" in order to enter the polling place. Additionally, the ability for "electioneers" to get close to the polling place made it easier for a vote buyer to collude with unethical precinct election officers to ensure that bought votes were cast for the appropriate candidates before the vote buyer would pay the voter. One witness even described a polling place so packed with electioneers that some people coming to vote found no available parking spaces close to the polls, so left without voting.

The Task Force on Elections and Constitutional Amendments received testimony at a public hearing in Bowling Green regarding the difficulty of applying the broad electioneering prohibition to specific cases. Since the electioneering statute prohibits "displaying of signs," questions were raised as to whether a precinct election worker or voter must remove a candidate's campaign button or T-shirt before coming within five hundred feet of the polls, and whether a voter, or even a non-voter, must likewise remove a candidate's bumper sticker from a car upon entering the electioneering-free zone, even if the person is not going to the polls at all. One county clerk testified that no one could park in the courthouse parking lot on election day if the vehicle had a candidate's bumper sticker on it. Discussion also focused on the ability to electioneer in a private residence or establishment within the five-hundred-foot limit by a person having an ownership interest in the property. Questions were raised as to whether a person who had a candidate's sign in the window of a home or place of business had to face the sign inward to come under the exemption, or whether the sign could face outward so that passersby could see it.

Some of these questions were addressed in Opinion of the Attorney General 92-73. The Attorney General determined that the wearing of campaign buttons or T-shirts to the polls does constitute electioneering, whether worn by a precinct election worker or a voter. It was also noted that at least one state appellate court (Missouri) had determined that electioneering included displaying a bumper sticker on an automobile. The Attorney General then sought to determine whether the state could enforce the prohibition based upon a person's constitutionally guaranteed right to free speech. The Attorney General concluded that the electioneering statute may be fully enforced against a precinct election worker, since the state has a compelling need to maintain orderly elections that outweighs the free speech rights of the precinct officers. However, the First Amendment to the United States Constitution precludes enforcement of the electioneering statute to prohibit a voter from wearing a campaign button, hat, T-shirt, or other similar item that solicits a vote for or against a candidate or ballot issue. The Attorney General noted that a voter could freely wear such campaign items to the polls, but the prohibition against electioneering would be imposed if the voter verbally sought to solicit the votes of other voters.

Whether five hundred feet from the polls is an acceptable distance in which electioneering can be prohibited has not received a definitive answer by the courts. In 1988, a federal court in Florida struck down a statute prohibiting solicitation of votes within 150 feet of the polls, stating that "a brief exposure to the grassroots democratic process, while unpalatable to some individuals, cannot justify a restriction of speech when the offensive activity can be readily avoided by communicating a declination of interest to the petitioner." In 1992, the United States Supreme Court upheld a Tennessee statute prohibiting electioneering within one hundred feet of the polls, finding that a voter has a right to be as free from interference as possible before entering the polling place and that a restricted zone around a polling place is necessary to protect that fundamental right. Three Justices disagreed with the majority ruling, claiming that the restricted zone "raised First Amendment questions of the first magnitude," and claimed that Tennessee's law covered at least 30,000 square feet around each polling place. The dissenting Justices noted that Kentucky and Wisconsin had five hundred foot limits, thereby "silencing a radius of seven hundred fifty thousand square feet" around each polling place.

Kentucky's five-hundred-foot electioneering limit has not been challenged in court. However, the General Assembly may wish to examine the effectiveness of prohibiting electioneering within such a large distance.

As noted above, electioneering is not prohibited within a private residence or establishment which is not used as a polling place when conducted by persons having an ownership interest in the property. County clerks have also raised questions regarding the application of this provision of the electioneering statute, especially concerning the placement of campaign signs on the inside and outside of a building, the placement of yard signs, and to what extent, if any, persons besides the property owner may electioneer on the property without violating the prohibition.

Some county clerks have also questioned the need to exclude absentee voting periods prior to an election from the application of the electioneering prohibition. They have urged that some restrictions apply to those voting periods as well, but acknowledge that applying the current prohibition to absentee voting conducted in the clerk's office poses the biggest enforcement problem, since that voting takes place not just on one day, but extends for a period of a minimum of twelve days up to a maximum of fifty days before the primary or regular election, and the duration of the absentee voting period varies by county. No specific proposal has been offered to address this situation thus far.

In general, the provisions of the electioneering statute are so broad that those charged with its enforcement have difficulty determining what activities are specifically prohibited and which are permissible. The General Assembly may wish to address some of the resulting confusion by clarifying its intent, where possible, while still effectuating the purpose to reduce or eliminate vote fraud.

## ELIGIBILITY FOR VOTING IN A PRIMARY ELECTION

Prepared by Rob Williams

### Issue

**Should the General Assembly amend the law regarding a voter's eligibility for voting in a political party's primary election?**

### Background

Under current Kentucky law (KRS 116.055), to be eligible to vote in a political party's primary election, a voter must have been registered as a member of the political party at the preceding regular election or, if a voter registers for the first time following a regular election, the voter must not have changed political party affiliations prior to the primary election.

In 1992, Kentucky's voters approved an amendment to the state constitution to require that all elections be held in even-numbered years, except those held to elect statewide constitutional officers, such as the Governor and Lieutenant Governor. The effect of the amendment is that one odd-numbered year of each four-year election cycle will have no elections. 1997 is the first year in which no elections are scheduled under the provisions of the constitutional amendment.

Earlier this year, questions were raised concerning the primary election voting eligibility requirement, since there would be no regular election held in November 1997. Applying current provisions of the law would prevent a voter from being eligible to vote in the May 1998 primary if the voter had changed political party affiliations any time since the November 1996 regular election, a period of eighteen months. In years not immediately following an election-free year, a voter wishing to vote in the next primary is prevented from changing political party affiliations for only the six month period following the preceding regular election. (To vote in a regular election, a person must be registered 28 days before that election, making the effective "blackout" period nineteen and seven months, respectively.)

In July 1997, the Republican Party of Kentucky filed suit in federal district court to have KRS 116.055 declared unconstitutional, since, when an election-free year intervenes between a regular election and a primary, a voter may not change political party affiliations during that eighteen-month period and vote in the next primary. The Republican Party asserted that such a long "blackout" period violates a voter's rights of free speech and freedom of association. In a consent judgment entered in the case, all parties agreed that the provisions of KRS 116.055, as applied to a voter's eligibility for voting in a primary following an election-free year, are indeed unconstitutional. As part of the consent decree, the State Board of Elections and the county clerks are enjoined from enforcing the current provisions of law to exclude a voter who has changed party affiliations since November 1996 from voting in the May 1998 primary.

**Discussion**

Kentucky is one of twenty-four states that nominate political party candidates by means of a closed primary voting system with a durational party affiliation requirement. Under that system, a voter must have been registered as a member of the political party as of a certain date before the primary to be eligible to vote. Twenty-three states utilize open primary voting systems with a contemporaneous party affiliation requirement, in which any registered voter may participate but a voter must declare a party affiliation at the polls and may vote for the candidates for only that party. Two states have "blanket" primaries with no party affiliation requirement, in which a voter may vote for candidates for all parties on the ballot, but may not vote for more than one candidate for each office. Louisiana's primaries are nonpartisan, so all voters may vote for any candidates on the primary ballot.

Legislative action would be required if the General Assembly desired to change the manner of nominating party candidates by the closed primary system now in use, and to implement an open primary or a blanket primary instead.

If the General Assembly desires political party candidates to continue to be nominated through a closed party system with a durational affiliation requirement, the "blackout" period could be maintained at its present duration, extended slightly, or even shortened. The U.S. Supreme Court upheld a durational requirement of eleven months in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), but invalidated a twenty-three month durational requirement in *Kusper v. Pontikes*, 414 U.S. 51 (1973). Other states have a durational affiliation requirement ranging from one to nine months before the primary. Since Kentucky's current durational affiliation requirement makes a voter ineligible to vote in a primary if a change in party affiliation is made after the preceding regular election, a voter would have to be registered as a member of the party in whose primary the voter would like to vote by the time the voter registration books close twenty-eight days before a regular election. This makes Kentucky's durational affiliation requirement seven months long in back-to-back election years.

If the General Assembly chooses to retain a durational affiliation requirement similar to the one in current law, legislative action is still required to address the unconstitutionality of KRS 116.055 as it is applied to changes made in party affiliations between a regular election and the next primary when an election-free year intervenes. To be constitutional, the durational affiliation requirement would likely need to be the same for those seeking to vote in primaries which follow an election-free year and those which follow a regular election held six months prior to the primary.

The Kentucky County Clerks' Association has proposed remedying the constitutional problem with KRS 116.055 by setting December 31 before a May primary as the last day on which a change in party affiliation may be made by a voter who wishes to vote in the primary. Therefore, under the proposal, the durational affiliation requirement would be some five months before a primary and would be the same whether or not a regular election was held the year before the primary. The County Clerks' proposal is contained in 98 RS BR 815.

Other proposals that have been suggested for remedying the constitutionality problem of KRS 116.055 include fixing the candidate filing deadline or the day before the registration books close before a primary as the last date on which a voter could change political party affiliations and be eligible to vote in the May primary. The candidate filing deadline is the last Tuesday in January before a May primary. Voter registration books close twenty-eight days before a primary.

## EXPANDING IMPLEMENTATION OF PERSONNEL PILOT PROGRAM INNOVATIONS

Prepared by Joyce S. Honaker

### Issue

**Should the General Assembly revise state personnel laws to permit, or require, wider application of changes in personnel policies and procedures tested in the Personnel Pilot Program authorized in 1994?**

### Background

In March, 1993, the Governor established a 55-member Commission on Quality and Efficiency to develop recommendations to improve state government's efficiency and the quality of its services. The Commission's final report, *Wake-up Call for Kentucky: Out of Crisis, Into Action*, was delivered to the Governor and members of the General Assembly in late 1993. Among over two hundred recommendations for change, the Commission proposed that Kentucky "reinvent" its merit system, employee evaluation process, and classification and compensation systems.

In response to the Commission's recommendations, the 1994 General Assembly enacted KRS 18A. 400 to 18A.450 authorizing pilot personnel programs in state government. The purpose of the law was "to determine and define new methods of quality management which should be adopted by the Commonwealth." Subject to approval by a majority of affected employees and approval and supervision by a Personnel Steering Committee, state agencies could institute changes in personnel policies and procedures on a trial basis.

While preserving statutory rights to appeal dismissals and other penalizations and statutes relating to lay-off rules and reemployment of career employees, the General Assembly authorized the temporary suspension of merit system laws in order to implement and assess innovative pilot programs.

### Discussion

As of March, 1997, ten pilot personnel programs were operating in seven program cabinets. They range widely in the scope of policies and procedures covered, the extent to which they suspend existing merit system laws, and the number of employees affected. The most comprehensive pilots, in the Workforce Development Cabinet's Department of Vocational Rehabilitation and Department for the Blind and Visually Impaired, deal with time and attendance, grievance procedures, performance review and career development, classification and compensation system revisions, and political activities of merit employees. Other cabinets operating pilot programs are the Cabinets for Families and Children, Finance and Administration, Health Services, Natural Resources and Environmental Protection, Personnel, and Revenue.

A Personnel Steering Committee report and recommendations to the General Assembly are anticipated prior to the 1998 Regular Session. The recommendations may include proposed revisions to KRS Chapter 18A to permit, or require, the application of pilot program innovations to other agencies in state government.

## EMPOWER KENTUCKY

Prepared by Barri Christian

### Issue

**Should the General Assembly appropriate an estimated $85 million to continue the EMPOWER Kentucky initiative?**

### Background

EMPOWER Kentucky is Governor Paul Patton's initiative to improve the efficiency and effectiveness of state government by investing in modern business processes and practices and state-of-the-art technological systems.

To effectuate these changes, the Governor recommended, and the 1996 General Assembly authorized for FY 1997-98, $103 million for EMPOWER Kentucky projects and initiatives, with the stated goal of identifying $50 million (General Fund dollars) in recurring annual savings and/or revenue enhancements.

On January 15, 1997, the EMPOWER Kentucky Redesign Steering Committee recommended the following seven projects:

1. Simplified Administrative Services - Improved financial, material, and personnel management and systems;

2. Simplified Revenue Systems - Improved and cross-referenced computer systems to increase tax collections and to provide quicker and more complete responses to taxpayers;

3. Simplified Access to Commonwealth Services - Improved technology and training to share information and transportation services between agencies when appropriate (linking some databases within Workforce Development, Families and Children, and Health Services);

4. Simplified Regulatory Systems - Streamlined permitting and licensing and inspection processes in Natural Resources, Agriculture, and Health Services;

5. Transportation Cabinet Process Improvements - Quickened vehicle titling and registration and increased tax collections from out-of-state commercial vehicles and from citizens not registering vehicles;

6. State Facilities Security - Increased use of electronic security and patrol officers; and

7. Library Technology Access - Improved public access to the Internet through work stations in county libraries.

As the seven recommended projects required an estimated $178.5 million to fully implement, the Steering Committee recommended full implementation of items 1 and 2 (totaling $87.2 million for FY 1997 through FY 2002) and partial implementation of items 3, 4 and 5 during FY 1997 and FY 1998, as shown in the chart below.

EMPOWER Kentucky Cash Flow - Investments

| PROGRAM ITEM | FY 1997 | FY 1998 | FY 1999 | FY 2000 | Beyond | TOTAL |
|---|---|---|---|---|---|---|
| Simplified Administrative Services | $2.3 | $14.9 | $22.2 | $8.9 | $2.8 | $51.1 |
| Simplified Revenue Systems | 2.2 | 4.3 | 18.7 | 7.5 | 3.4 | 36.1 |
| Simplified Access | 0.5 | 12.5 | 17.5 | 5.8 | | 36.3 |
| Simplified Regulatory Services | 0.5 | 10.0 | 7.7 | 3.7 | | 21.9 |
| Transportation | 0.4 | 6.0 | 2.0 | | | 8.4 |
| Technology Infrastructure | 2.4 | .3 | | | | 2.7 |
| Facilities Security | | .5 | | | | .5 |
| Libraries | | .8 | | | | .8 |
| Training, Change and Program Management | 2.0 | 2.1 | | | | 4.1 |
| Contingency | 5.0 | 5.0 | 6.6 | | | 16.6 |
| TOTAL | $15.3 | $56.4 | $74.7 | $25.9 | $6.2 | $178.5 |

*NOTE: Shaded area represents future funding requirements.*
*Source: EMPOWER Kentucky*

**Discussion**

According to EMPOWER staff, the 1998 General Assembly will be asked to fund an estimated $85 million in General Funds to continue and complete the EMPOWER recommendations.

While the Simplified Administrative Services and Simplified Revenue Systems initiatives have been fully funded and when totally implemented are projected to save $140.5 million (while at the same time enhancing revenues by $445.9 million), not enough data exists at this time to verify these estimates.

The "nonfunded processes" (items 3-7), for which the $85 million for FY 1999 and FY 2000 is required, are estimated to save $49.5 million and generate an additional $54.3 million through FY 2004. While the cost is only slightly lower than the predicted monetary gain, EMPOWER staff contend that the accelerated and simplified access to governmental services and the more efficient utilization of governmental staff is a gain that cannot be quantified.

EMPOWER staff have been investigating alternative and creative funding sources to complete implementation of all recommended processes: private vendor model systems development; federal funds; and Road Fund money for Transportation projects. Staff are currently evaluating vendor responses to a Request for Information as the initial step to developing a Request for Proposals for an "Enterprise-Wide Administrative Application System." It is anticipated that the contract will be finalized by December 31, 1997.

The 1998 General Assembly will need to consider questions relating to the amount and method of funding.

## ACQUISITION OF OFFICE SPACE FOR STATE GOVERNMENT

Prepared by Kimberly Burch

### Issue

**Should the state change the way it currently leases property for state government?**

### Background

The issue of how Kentucky leases property for state government surfaced as a concern to the Capital Projects and Bond Oversight Committee following an investigation by the Attorney General's Office into a proposed state lease. The investigation began after a newspaper article quoted a Cabinet secretary as saying his Cabinet had plans to move into a new building under construction in Frankfort. At the time, there was no active bid solicitation for lease of a new building for the Cabinet. Following this investigation, the Attorney General's Office recommended an independent review of future leases. Of concern is how property to be leased is selected, what role the agency in need of space plays in the selection process, and the nature of communication taking place between these actors and the potential lessor.

Under the current leasing process, the Department for Facilities Management in the Finance and Administration Cabinet determines an agency's need for leased space and advertises the general space needs (square footage and location). Kentucky statutes restrict discussion of space needs with potential landlords before advertisements are published. Potential landlords respond to the advertisement, and the Department for Facilities Management and the user agency inspect the property to draw up specifications for that particular piece of property to compete. (Comparison of offers of leased space is difficult because each potential unit of office space is unique, making it very different from comparison of new construction bids.) The potential lessors then submit a "best and final offer," from which the Commissioner of the Department for Facilities Management chooses the best proposal. Factors considered when choosing a lease include needs of the user agency, location and condition of the property, the property's conformity with health and safety requirements, and price.

### Discussion

The Attorney General's Office recommended the use of a lease selection committee to safeguard against improprieties and ensure procurement of leased space at the most favorable rate. A selection committee would provide independent review of leases of a certain size to make sure they are awarded on the basis of objective criteria. The members of this committee, as proposed, would include merit employees of the user agency, Finance Cabinet, and Auditor's Office, and individuals representing independent real estate appraisers. The committee's role would be to select the three best proposals and rank them in order of preference. Under this system, the Department for Facilities Management would be required to award the lease to the top-ranked proposal.

Selection committees are utilized in other areas of state contracts, such as in the selection of architects and engineers for state construction projects, and in the selection of financial advisors and underwriters for state bond issues. Also, such a committee is utilized for built-to-suit leases. A lease selection process provides a fair and equitable way for the state to obtain space at the most favorable rate, and it reduces the likelihood of collusion. However, it does extend the time it takes to arrive at a selection, and involves more staff time and resources of state employees.

Additional measures could be considered to strengthen the leasing process, such as tighter bidding requirements, stiffer penalties for violations of the leasing process, and greater legislative oversight.

Closely related to this issue is continuing interest in the state purchasing more office space and renting less. A recent study commissioned by the Finance Cabinet found that of states similar to Kentucky in size and demographics, Kentucky is unique in that state government dominates the capital city's commercial real estate market, a factor which may justify more oversight. Of the 5.03 million square feet of space occupied by state government in Frankfort, one-third (1.6 million square feet) is leased. The consultant recommended that the state reduce by 50% the amount of leased space in Frankfort. If the state purchased its space needs, or entered into a lease/purchase agreement, it would be able to acquire equity in the property. Owning state facilities provides additional options for housing agencies and frees the state from having to accept whatever space is available. However, state-owned facilities must be maintained at cost to the state, whereas leased facilities are maintained by the landlord.

## ELECTRONIC SIGNATURES

Prepared by Joyce N. Crofts

### Issue

**Should the General Assembly enact legislation to authorize electronic signatures in both the public and private sectors?**

### Background

With computer technology becoming pervasive in every aspect of business, commerce, and government, swift and secure authentication of documents is needed to ensure that electronic documents are accurate, have not been forged, and correctly verify the sender. Until now, an individual's handwritten signature has been the accepted authentication on contracts or any legal documents. Today, electronic signatures are increasingly replacing traditional paper-based signatures in financial and commercial transactions. For example, the banking industry already widely uses electronic signatures for electronic fund transfers. Other primary users are insurance companies, electronic commerce, business and industry, governmental agencies, and the legal and medical communities.

***Definitions of "Electronic Signature" and "Digital Signature":*** The terms "electronic signature" and "digital signature" can be confusing because the two terms may be used interchangeably, or the term "electronic signature" may be used as the broad category to cover more than one kind of digitized signature. Further, those unfamiliar with either term may assume incorrectly that a digital signature is a digitized handwritten signature. For purposes of this discussion, "electronic signature" is the general term to describe a variety of types of electronically based identifiers created by a computer (e.g., a digital signature, a digitized rendition of an inked signature, or a biometric signature, such as a digitized fingerprint) with the intent to authenticate an electronic document; and "digital signature" is a type of electronic signature that verifies the identity of the sender and optionally verifies that the content of the message has not been damaged or altered.

***How Does the Process of Sending Digitally Signed and Encrypted Information Work?*** In the process of sending information digitally to someone, the sender has the option of sending a message that is either digitally signed or encrypted or both. One system that uses both involves a "key pair" consisting of a "private key" and a "public key." Each "key" is a long sequence of 0s and 1s, or binary digits. The public key can be used to scramble, or encrypt, a message. The private key is the only key that can be used to unscramble, or decrypt, the information. Using digital signature software and accessing a certificate authority system, the computer user can obtain a key pair, retaining the private key in confidence and freely sharing the public key with others. The key pair owner uses his or her private key to sign a message, uniquely identifying this correspondence, and applies a second encryption using the public key of the recipient. The recipient then uses his or her private key to decrypt the message. Because only the private key can decrypt a message encrypted with the matching public key, only the intended recipient can decrypt and read the message.

Using the public key is like providing the world with a supply of self-addressed envelopes that can securely contain and protect information people might want to send to you. Everyone is able to place digital information into one of the envelopes and send it to you. However, once they seal it, they cannot open it. They can send it only to you, and your private key is the only mechanism for opening the envelope. The digital signature verifies the identity of the sender and the integrity of the message, ensuring that the encrypted message has not been modified in transit.

***How Is the Public Key Obtained and Verified?*** In order to authenticate a digital signature and verify the integrity of the message, the sender's public key is required; but how does the recipient obtain the public key and, once obtained, how does he or she verify that it belongs to the sender? To assure that each party is indeed identified with a particular key pair, one or more trusted third parties may be used to verify the sender's identity. The trusted third party, called a "certification authority," functions like a notary public, certifying that the person signing the document is the actual person. The certification authority issues public-private key pairs, manages them, and acts as a notary to verify certificates for the recipient. When the owner of a key pair sends a digitally signed document he or she includes the identity of the certification authority. The recipient of the message can then contact the certification authority to obtain the key pair owner's public key. Thus, a message signed with a certified digital signature can then rely on the certification authority as the guarantor of the identity of the key pair owner.

***How Secure Is a Digital Signature?*** It is next to impossible to forge a digital signature. A digital signature is a more complex process than just affixing a handwritten signature. There are several layers of encryption. For example, when the document is "digitally signed," the digital software scans the document and creates a calculation that represents the document and becomes part of the digital signature. When the recipient authenticates the signature, a similar process is carried out. Both the sender's and the recipient's calculations are then compared. If the results are the same, the signature is valid; if they are different, the signature is not valid. In short, the encryption system is so sophisticated that breaking the code is virtually impossible.

## Discussion

***Legislative Initiatives in Other States:*** The environment of communication is changing rapidly. For centuries, transactions and signatures have been based on paper and handwritten signatures and physically carried to their destinations. Today, computer-based technology is allowing us to make a transition to a paperless society where records are increasingly created, transmitted and stored in electronic media and parties are using computer networks to access and communicate information with other parties. With this revolution a number of issues arise. For example: What is the legal status of electronic signatures? Are electronic signatures the legal equivalent of a handwritten signature? What standards for electronic signatures should be established, and by whom? What type of public key system should be established? How should liability and risk be allocated in a public key system? What should be the role of government in this emerging industry? Still more questions will arise, such as those relating to consumer protection, quality control, and policy setting. With technology improving and evolving so quickly, new issues will continue to emerge.

Most state legislation to date focuses specifically on digital signatures created using public key cryptography. Some legislation also addresses "electronic signatures" in the broader sense, thus including other technological methods of authenticating electronic documents, such as biometric authentication. In 1995, Utah was the first state to enact legislation. To date, at least 28 states have enacted some type of legislation relating to electronic or digital signatures; and at least 11 additional states have introduced or are discussing such legislation. Further, the American Bar Association (ABA), through its Science and Technology Section's Information Security Committee, has developed model Guidelines for Digital Signatures.

Several states' statutes are of particular note:

1. Utah and Washington -- The Utah Digital Signatures Act (enacted March 1995, amended in 1996) and the Washington Electronic Authentication Act (enacted March 1996) are comprehensive and detailed laws focusing only on digital signatures and establishing provisions for certifying, validating, and relying on digital signatures. The ABA's Information Security Committee worked closely with Utah, and their guidelines are generally consistent with the Utah law. The Utah law specifies four purposes: (1) to facilitate commerce by means of reliable electronic messages; (2) to minimize the incidence of forged digital signatures and fraud in electronic commerce; (3) to implement legally the general import of relevant standards . . .; and (4) to establish, in coordination with multiple states, uniform rules regarding the authentication and reliability of electronic messages. More specifically, the Utah law addresses such issues as state licensing and regulation of certification authorities; qualifications for obtaining and holding a license; duties of a certification authority and a certificate holder; liability of a licensed certification authority, and the legal presumptions established by digital signatures. The Washington legislation is substantially similar to Utah's.

2. California -- In October 1995, California enacted digital signature legislation that was much narrower than Utah's. The law applies only to public sector transactions. It enables parties who comply with the statutory requirements to conduct transactions with public entities by affixing digital signatures to related electronic documents. The Act provides that the use of a digital signature shall have the same force and effect as a manual signature if and only if it: (1) is unique to the person using it, (2) is capable of verification, (3) is under the sole control of the person using it, (4) is linked to the data in such a manner that if the data are changed, the digital signature is invalidated, and (5) it conforms to the regulations adopted by the secretary of state. The use of digital signatures is optional.

3. Florida and Georgia -- The Florida Electronic Signature Act (enacted in 1996) and the Georgia Electronic Records and Signatures Act (enacted in 1997) do not focus on one

particular type of technology. Digital signatures are included as one of many possibilities for electronic signatures. The Florida law authorizes the secretary of state to be a certification authority and requires it to conduct a study of the use of electronic signatures for commercial purposes. Another Act authorizes the secretary of state to provide commissions for notaries public to perform electronic notarizations, to establish a voluntary licensure program for private certification authorities, and to issue rules. The Georgia legislation includes an expression of the legislature's desire to encourage state government agencies and the private sector to use electronic media to conduct their business and transactions. It authorizes all state agencies to establish pilot projects, one of which may involve digital signatures and the use of a public key infrastructure established by a service provider. It also creates an Electronic Commerce Study Committee to make recommendations for proposed legislation.

Regarding Kentucky state government activity relating to electronic signatures, HB 422, introduced to the 1996 General Assembly, would have allowed hospitals to use electronic or computer-generated signatures for authentication of medical records. In addition, currently, the Electronic Signatures Subcommittee of the Kentucky Information Resources Management (KIRM) Commission is studying electronic signatures and plans to have legislation introduced in the 1998 General Assembly. In July 1997, the Subcommittee adopted the Electronic Signature Scope for the Commonwealth of Kentucky. Generally, the statement focuses on adoption of "proven, standards-based electronic signature methodologies" to enable the electronic transaction of business both between state agencies and between state government and the private sector. The statement recommends that: (1) technologies and standards, guidelines, and acceptable use standards be established by administrative regulation; (2) the establishment and maintenance of electronic signature methodologies be coordinated to minimize or eliminate multiple electronic signature assignments for similar applications; (3) that different levels of security be selected based on certain criteria; and (4) that an independent body, such as KIRM, review and assist agencies with implementation of electronic signature methodologies.

# TRANSPORTATION

# GRADUATED DRIVER'S LICENSES

Prepared by Kathy A. Campbell

## Issue

**Should the General Assembly reduce some of the restrictions of the graduated driver's license?**

## Background

Kentucky has had the highest rate of teenage driver fatalities in the United States. In 1994, Kentucky's death rate for teenagers killed in motor vehicle accidents was 103 per 100,000 -- the national average in 1994 was 62 per 100,000. In an effort to reduce the number of teens killed on Kentucky's highways, the 1996 General Assembly enacted a "graduated driver's license". A graduated driver's license phases-in driving privileges and responsibilities for new drivers.

Prior to 1996, a person who turned sixteen applied for an instruction permit to operate a motor vehicle and was required to hold the permit thirty days before testing for their driver's license. The law required a permit holder to be accompanied by a "licensed driver" when operating a motor vehicle, but did not require the licensed driver to have any particular level of driving experience. The practical result of the statute allowed inexperienced sixteen-year-olds who had recently been issued a driver's license to supervise other sixteen-year-olds with an instruction permit.

## Discussion

The graduated driver's license created by the 1996 General Assembly increased the time a person must hold an instruction permit before testing for a driver's license from thirty days to six months. The age of the accompanying driver was set at twenty-one. A night time curfew was initiated, and a zero blood alcohol level on teen driving alcohol tolerance was adopted for persons under the age of twenty-one. Driver's education was mandated for persons under the age of eighteen.

The graduated driver's license legislation became effective October 1, 1996, and the following comments have most frequently been made relating to implementation of the law:

- The age of the accompanying driver (21) is too old and should be reduced to eighteen. The most frequent reason cited to legislators is that many families have a child 18 years of age or older in college who remains ineligible to supervise a sibling with an instruction permit; and

- The six-month period mandated before testing for a driver's license should only apply to persons 21 years of age or younger. Many legislators have immigrants in their districts who have relocated to Kentucky with a major corporation, immigrants seeking asylum from war torn countries such as Bosnia, or migrant workers. If these individuals do not possess an international driver's license, they are required to apply for an instruction permit, wait six months and be accompanied by a licensed driver 21 years old. The six-month waiting period has been cited as causing an undue economic hardship on many adults and families.

The General Assembly may need to consider whether the existing law should be "fine tuned," based upon comments received during the legislation's first year of implementation, or whether additional time should be given to study whether the current provisions are successfully reducing teenage driver fatalities.

# PERSONAL WATERCRAFT OPERATION

Prepared by Jeff Kell

## Issue

**Should the General Assembly impose restrictions on the operation of personal watercraft (PWC)?**

## Background

In recent years the popularity of personal watercraft (PWC), commonly known as jetskis, has soared. Over 140,000 were sold nationwide in 1994. Accidents involving these craft have also increased dramatically. According to the United States Coast Guard, 766 more PWC were involved in accidents in 1994 than in 1993, resulting in 423 more injuries and 21 additional fatalities. Eight out of ten PWC accidents involved collisions with other vessels. (The Coast Guard also reports that nearly 80 percent of all boating fatalities occur on boats where the operator had no formal boating instruction.) These statistics are the most recent available. The Coast Guard is in the process of combining data for 1995 and 1996, and will be publishing a consolidated report in September, 1997.

With each new model year, PWCs are getting faster and more powerful. Currently they are capable of speeds in excess of 70 miles per hour. Connecticut requires training before operating a PWC, and many of Kentucky's neighboring states are moving toward tightening restrictions on their use. Through June 30th of 1997, three of Kentucky's 13 boating related deaths involved personal watercraft.

## Discussion

Kentucky has an abundance of water, and many tourists visit the Commonwealth to enjoy water sports. Some visitors bring their PWCs with them or rent one at public marinas. The Division of Water Patrol, within the Department of Fish and Wildlife, is responsible for regulating the public waters of the Commonwealth. Aside from some general legislative boating guidelines, the statutes do not provide guidance to the Division on the subject of PWCs. The Division of Water Patrol does have authority to promulgate administrative regulations, and saw a need to propose some guidelines that were approved by the Fish and Wildlife Resources Commission in August 1995. 301 KAR 6:050 became effective November 11, 1995, setting forth safety requirements for personal watercraft. These included hours of operation, mandatory kill switches, and guidelines for safe operation. However, the issues of age and training of operators are not addressed, and these subjects received much discussion in the legislation that passed the House in 1996, but failed in the Senate.

Proponents of placing restrictions on the operation of personal watercraft advocate age limits be established, so that adolescents and teenagers may not operate a PWC without supervision; safety instructions or safe boating certificates be required for all operators; PWCs not be operated at night or in a manner that may endanger human life or property; and PWCs be equipped with engine cutoff devices.

Opponents of placing restrictions on the operation of personal watercraft say that restrictions will hurt the tourism industry; boating is a healthy activity for young people and restrictions will make it more difficult for them to engage in this activity; and more regulation is inconsistent with current trends toward less governmental interference.

Legislation has been prefiled for the 1998 Session to establish some general restrictions on the use of personal watercraft and set age and supervision requirements for operators.  This is the same proposal that passed the House in 1996.