ISSUES CONFRONTING THE 2003 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 2003 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.

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

Robert Sherman
Director

Frankfort, Kentucky
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AGRICULTURE AND
NATURAL RESOURCES

ANIMAL EUTHANASIA

Prepared by Biff Baker

Question

Should the General Assembly enact legislation prohibiting the use of gunshot as a routine method of euthanasia of animals?

Background

Euthanasia by gunshot is not specifically addressed in the Kentucky Revised Statutes. A decision that destruction of dogs by gunshot is not inhumane has recently been upheld in Kentucky courts.

Using gunshot as a means of euthanizing animals has been a controversial subject over the years. Specific methods of euthanasia are not addressed in Kentucky Revised Statutes Chapter 258 (Dog Law). The statutes allow the destruction of dogs that are running at large by "any reasonable and humane means." They also allow the destruction of impounded dogs "in some humane manner."

Various courts in Kentucky have examined whether euthanasia by gunshot is inhumane or cruel. A 1973 Attorney General's Opinion stated that gunshot does not constitute cruelty as long as death is instantaneous. More recently, in July 2002, a Kentucky judge upheld a Circuit Court ruling that the destruction of impounded dogs by gunshot is not inhumane. The ruling also stated that whether dogs should be killed by gunshot is a public policy question to be resolved only by the legislature.

In August 2002, an incident occurred in a Kentucky county regarding euthanasia by gunshot. An animal control officer was videotaped shooting dogs where death was not instantaneous. The incident made national news and touched off another round of debates as to the legitimacy of this type of euthanasia.

Discussion

Opponents of euthanasia by gunshot state that it is unacceptable, dangerous, inhumane, and casts Kentucky in a negative light.

Opponents of using gunshot as a routine method of euthanasia argue that despite the legal opinions, it is still an unacceptable way to dispose of an animal. They say that the use of a firearm presents a potential danger to the animal control officer and often causes great suffering to the animal. They state that other methods, such as injection, are more humane and efficient.

The American Veterinary Medical Association (AVMA) has also reviewed the issue. The 2000 Report of the AVMA Panel on Euthanasia recommends that gunshot not be used for routine euthanasia of animals in animal control situations such as municipal pounds or shelters.

Opponents of using gunshot also point out the poor image that is portrayed when municipalities practice that method of euthanasia. The shooting incident in August led to numerous negative comments in the national press and from the public regarding that type of disposal being legal in Kentucky.

Proponents of using gunshot submit that it is a legal, inexpensive way to dispose of unwanted animals. Supporters also point out that when properly administered, gunshot is an effective method of disposal.

Proponents of gunshot by euthanasia say that it is legal, effective, and is the most cost effective method of disposal for many communities in Kentucky.

Proponents also state that many communities in our state, particularly in rural areas, are in no financial condition to absorb the additional costs associated with other types of euthanasia. Implementing a program that would destroy animals by injection, for example, would involve purchasing supplies and drugs, and would require either training and certifying animal control officers to administer the drug or would require paying a veterinarian to administer the drug.

Supporters of using gunshot are also concerned that if shooting is banned, it could lead to certain animal control situations in which an officer would be unable to shoot a dangerous animal that was threatening other animals or persons.

NON-PARTICIPATING CIGARETTE MANUFACTURERS

Prepared by Dan Risch

Question

Should the General Assembly strengthen the state's sanctions against cigarette manufacturers that have chosen not to participate in the tobacco master settlement agreement?

Background

Kentucky expects $3.4 billion under the Tobacco Master Settlement Agreement signed November 23, 1998.

The Tobacco Master Settlement Agreement was established on November 23, 1998. The signatories included four of the nation's largest cigarette manufacturers and representatives of 46 states, including Kentucky. In broad outline, the agreement settled pending lawsuits begun by states against cigarette manufacturers and prohibited future lawsuits from being filed by the states. In return, cigarette manufacturers agreed to limit advertising to youths, to limit youth access to cigarettes, and to fund health studies and public education. In addition, the participating cigarette manufacturers agreed to make substantial payments to the states, which have become known as the Phase I payments. Kentucky is projected to receive $3.4 billion over 25 years.

The agreement contains provisions to preserve a competitive balance between agreement participants and non-participants.

Cigarette manufacturers that were not among the original signatories to the settlement agreement were given the opportunity to later become signatories. Many did so and now participate in making the payments to the states in exchange for the legal immunity granted by the agreement. However, many manufacturers have chosen not to participate in the agreement and thus do not have the expense of making the payments. The drafters of the agreement anticipated this circumstance and wrote into the agreement provisions to protect participating manufacturers from being placed at a competitive disadvantage because of the expense of making the payments.

All states responded to incentives and enacted the agreement's Model Act.

The mechanism to prevent an unfair market advantage from accruing to non-participating cigarette manufacturers is rooted in state "Model Acts." The agreement encouraged the states through a significant financial incentive to enact and enforce the Model Act contained in Appendix B of the agreement. All states have adopted the Model Act. When placed into law by a state, the act would require that non-participating manufacturers either sign the agreement and become obligated to contribute to the Phase I payments or pay an amount into an escrow account equivalent to payments it would make if it were subject to the agreement. The rationale for the escrow payments is that if a state were to seek and win a judgment against non-participating manufacturers, then there would be an account from which the judgment could be paid. The ancillary but nonetheless important effect of the Model Act would be that all cigarette manufacturers would have similar financial obligations and business expenses, thus helping to preserve a fair and competitive marketplace.

Discussion

The General Assembly passed and the Attorney General's Office enforces the Model Act.

In 2000, Kentucky General Assembly enacted the agreement's Model Act as House Bill 385. The bill, codified as KRS 131.600 and 131.602, is enforced by the Attorney General's Office with assistance from the Office of the State Budget Director and the Revenue Cabinet. A recent illustration of the state's diligent enforcement of these laws is the news released in mid-September, 2002 that a judgment was obtained by the Attorney General against four cigarette manufacturers for failing to abide by KRS 131.602.

Failing to give full force and effect to its Model Act leads to loss of Phase I payments to a state.

Because of certain interwoven provisions of the agreement, the states have been forced into a race to be at least as diligent as every other state in enforcing their model acts. The starting point for this race is the Non-Participating Manufacturers (NPM) Adjustment, which is a downward adjustment that may be claimed by participating manufacturers in making their annual Phase I payment if specified criteria are met. Each year an independent economic consultant determines if operation of the agreement significantly contributed to a market share loss for the participating manufacturers. If such a determination is made, the Non-Participating Manufacturers Adjustment is applied. For example, if the market loss is greater than 2 percent, the payment to the states is reduced by 3 percent for each one percent of loss above the 2 percent trigger.

What constitutes diligent enforcement is a judgment call made initially by cigarette manufacturers.

However, counterbalancing the NPM adjustment is the agreement's Model Act provisions. In essence, states that give "full force and effect" to their model acts, and thereby help preserve a competitive marketplace for participating manufacturers, will be immunized from losing Phase I payments due to the NPM adjustment. But the key to the immunization lies in a judgment call as to whether a state is doing all within its authority to "diligently enforce" their model act.

A determination of whether a state's model act is being enforced begins with data on a non-participating manufacturer's sales of cigarettes in the state. From this data a calculation can be made about how much the NPM should have deposited into the escrow account mandated by the Model Act (in Kentucky, KRS 131.602) because escrow payments, like Phase I payments, are based upon cigarette sales in a state. A difference between sales made and escrow payments deposited is a clear indicator that the NPM has failed to comply with the Model Act.

Diligence in enforcing model acts can include many actions, including bureaucratic mechanisms to determine sales made in a state as well as active pursuit of court determinations similar to September's announcements in Kentucky. But a perception exists that any state that fails to mimic actions viewed as effective enforcement in another state runs the risk of being judged by participating manufacturers as failing the diligent enforcement test, with the consequent loss of Phase I money.

An effective enforcement tool used elsewhere may need to be employed in Kentucky.

Kentucky officials intent on diligent enforcement of KRS 131.600 and .602 carefully monitor the actions of other states with a view toward preserving Kentucky's $3.4 billion share of the tobacco settlement money. These officials may ask the 2003 General Assembly to consider new or revised laws to strengthen their enforcement tools.

APPROPRIATIONS AND REVENUE

TAXATION OF LIMITED LIABILITY COMPANIES

Prepared by Louis Pierce

Question

Should the General Assembly require limited liability companies (LLCs) that are taxed as corporations for income tax purposes to pay a corporate license tax also?

Background

Kentucky first allowed businesses to organize as LLCs in 1994 as a way to combine the advantages of corporations and partnerships. As with a corporation, for example, members of an LLC are not personally liable for the debts, obligations, or other liabilities of the company. However, LLCs receive other advantages that pertain to partnerships.

LLCs have a tax advantage over corporations.

A significant advantage of LLCs is that they are taxed more favorably than corporations. Corporate income is taxed at the corporate level and is then taxed again when distributed to shareholders. Corporations are also required to pay a corporate license tax. LLCs, like partnerships, are not taxed at the business level, but only when income is "passed through" and distributed to the owners. Also, like partnerships, LLCs do not pay a license tax.

Corporations are converting to LLCs and avoiding the corporate license tax.

Since 1994, LLCs have become very popular, comprising almost 40percent of new business formations by the year 2000. Moreover, many existing corporations have reorganized as LLCs. To avoid substantial tax consequences from the reorganization, these new LLCs elect to continue being treated as corporations for income tax purposes. However, for all other purposes they are treated as LLCs and consequently do not pay the corporate license tax.

Corporations also sometimes establish subsidiary operations as LLCs. These "single-member" LLCs are not recognized as separate entities for income tax purposes, and like converted LLCs they continue to pay corporate income taxes. Once again, however, they are treated as LLCs for all other purposes and do not pay a corporate license tax.

Discussion

Some policy makers argue that corporations are unfairly using LLCs for tax avoidance.

Some policy makers are concerned about the loss of tax revenue resulting from the increased use of LLCs, particularly when it involves corporate conversions and single-member LLCs. They claim that the law permitting LLCs was enacted to improve the business position of professionals and other traditional partnerships, not to provide tax breaks for corporations. They argue that corporations are using LLCs primarily to avoid paying the corporate license tax.

Some people advocate imposing a license tax on certain LLCs to "close the loophole."

To remedy this perceived problem, some have proposed levying the corporate license tax against LLCs that are being treated as corporations for income tax purposes. These LLCs include those resulting from corporate conversions, single-member LLCs, and some new LLCs seeking a tax advantage. Advocates of this proposal claim that it would essentially close a loophole, imposing the tax in cases where LLCs may otherwise be used for tax avoidance, and deterring tax-based entity selection in the future. They also argue that the affected LLCs are so closely linked to corporate operations that they should be taxed as other corporations anyway.

The 2002 Report to the Subcommittee on Tax Policy Issues listed this license tax proposal as an option for the General Assembly to consider. Several other states have enacted this or similar proposals. A bill to impose the tax in Kentucky was introduced but not enacted in the 2002 session. The Revenue Cabinet estimated that the bill would have brought in $2.1 million in revenue in fiscal year 2003, increasing to $11 million by fiscal year 2008.

Others are opposed to this proposal.

On the other hand, some are opposed to levying a license tax against any LLCs. These opponents argue that there are other reasons, besides tax avoidance, for corporations to organize their operations as LLCs. These LLCs should not have to pay what is in effect a penalty for their choice. They also argue that it would be unfair to levy a license tax against some LLCs and not others.

TAXATION OF MULTI-STATE BUSINESSES

Prepared by Louis Pierce

Question

Should the General Assembly require that multi-state S-corporations, partnerships, and limited liability companies (LLCs) that are taxed like partnerships be taxed as corporations on their multi-state income?

Background

Multi-state businesses are generally subject to income tax in all states in which they operate. However, the United States Constitution and practical considerations prohibit more than one state from taxing the same business income. Therefore, the income must be apportioned among all the states involved.

Corporations are taxed based on a three-factor apportionment formula.

Almost all states apportion corporate income based on a three-factor formula that consists of property, payroll, and sales. The corporation is taxed according to the portion of its property, payroll, and sales in the taxing state compared to its property, payroll, and sales everywhere. States using this formula sometimes weigh one factor more heavily than others to promote specific state policies. Kentucky uses the three-factor formula for corporations but double-weights the sales factor, which tends to favor in-state businesses with a majority of their sales out of state.

S corporations, partnerships, and some limited liability companies are taxed based on a single-factor formula.

In contrast, Kentucky apportions income from S corporations, partnerships, and limited liability companies that are taxed like partnerships using only the sales factor. The effect of this single-factor formula is to decrease further the tax on in-state businesses, whose property and payroll are not considered at all in computing the income tax and whose out of state sales may not be weighed as heavily in computing the tax in those states. At the same time, the single-factor formula tends to increase the tax on out-of-state businesses making sales in Kentucky.

Discussion

Some people contend that Kentucky should adopt the three-factor apportionment formula for S corporations, partnerships, and limited liability companies. The 2002 Report to the Subcommittee on Tax Policy Issues listed this formula as an option for the General Assembly to consider. It was also discussed before the Appropriations and Revenue Committee during the 2001-2002 interim.

Some argue that Kentucky should use a three-factor formula for all multi-state businesses.

The argument for adopting the three-factor formula is that it would be fairer and more consistent to treat all multi-state businesses the same. It is also argued that the single-factor formula lends itself to tax avoidance. Non-corporate manufacturing firms can locate in Kentucky, and if most of their sales are out of state, they will pay relatively little in Kentucky income tax.

Others contend to this proposal as being too complicated.

Others oppose adopting the three-factor apportionment formula for S corporations, partnerships, and limited liability companies that are taxed like partnerships. They claim that these businesses tend to be smaller and more local in their operations than are corporations. They claim that using a single factor in these cases is simpler and better for Kentucky's small businesses.

MOTOR VEHICLE PROPERTY TAXES

Prepared by Terry Jones

Question

Constitutional amendment adopted in 1998 permitted the General Assembly to exempt motor vehicles from property tax.

Should the General Assembly consider legislation to repeal motor vehicle property taxes in Kentucky?

A Constitutional Amendment was adopted in 1998 that permits the General Assembly to exempt all or any portion of the property tax for any class of personal property. Many have argued that motor vehicles should be exempt from such taxes in the interest of fairness.

Motor vehicles are assessed on January 1 of each year at the average trade-in value of all vehicles of a specified model and year. The value is obtained from a manual prescribed by the Revenue Cabinet. The tax is collected by the county clerk upon the registration renewal of the vehicle.

- In 2000 there were approximately 3,500,000 vehicles on the tax rolls.
- The average assessed value for 2000 was approximately $5,100.
- Each month nearly 300,000 renewal notices are mailed out.
- The county clerk retains 4percent of the tax as a commission (approximately $9.5 million).
- The state tax rate is $0.45 per $1000 of assessed value and generates approximately $80 million annually.
- School district tax rates vary, but generate approximately $80 million annually.
- County and special taxing district tax rates vary, but generate approximately $50 million annually.
- City tax rates vary, but generate approximately $25 million annually.

Discussion

Proponents for repealing the property tax on motor vehicles contend that the tax is unfair and that voters overwhelmingly thought that they repealed the tax with the adoption of the enabling Constitutional amendment.

Proponents for removing the state portion of the property tax on motor vehicles contend that using the average trade-in value for assessing the property tax, rather than the actual value of a specific vehicle, results in the tax’s often being unfair. They also assert that voters thought they had repealed the tax when they overwhelmingly approved the related Constitutional amendment in 1998.

Opponents contend that repealing the state portion of the tax will provide very little tax relief.

Opponents of removing only the state portion of the property tax on motor vehicles contend that individuals will not perceive that their taxes have been cut unless the local portion of the property tax on motor vehicles is removed as well. Moreover, since local taxes account for two thirds of the tax bill it is argued that local governments and school districts cannot absorb a revenue loss of this magnitude without some source of replacement funds. Opponents also contend that the state's budget cannot absorb the loss of state revenues without replacement from some other source of funds.

BANKING AND INSURANCE

HEALTH INSURANCE

Prepared by Greg Freedman

Question

Should the General Assembly amend the health insurance statutes to address the rising cost of coverage for retirees, automatic bill cutting by insurers, reunderwriting, and medical savings accounts?

Background

Double digit premium increases are common.

Rising health care costs are significantly affecting state budgets, company profits, and physician salaries, as well as forcing painful choices on small employers and individuals (*The Washington Post*, July 9, 2002). Employers are cutting costs by increasing deductibles and copayments. Unpaid medical bills account for 200,000 personal bankruptcies annually. More than 9 million families spend over one-fifth of their income on health care. Nationwide, premiums rose 11 percent in 2001, 13 percent in 2002 and are expected to increase (*The Washington Post*, July 9, 2002). Annual increases of more than 10 percent have not been common since in the late 1980's and early 1990's before managed care became widespread (*The New York Times*, April 18, 2002).

Forty-two million Americans had no health insurance in 1999; 15 percent of Kentuckians have no health insurance.

Despite health insurance reforms enacted by states and Congress over the past decade, the number of uninsured has grown by ten million. Fewer Americans have health insurance through their jobs than did ten years ago. In 1999, forty-two million Americans, almost 18 percent of the total nonelderly population, were uninsured. Many of the uninsured do not qualify for public health coverage. A report released on July 19, 2001, by Families USA states that 81 percent of low income, uninsured adults (more than thirteen million people) do not qualify for Medicaid or other public health coverage in their state. In more than half of all states, a parent in a three-person family who works full time at the minimum wage is considered to have too much money to qualify for Medicaid. In forty-three states, including Kentucky, adults who are not parents of minor children are ineligible for Medicaid unless they have severe medical problems and extremely limited resources. According to the report, of the 116,000 persons in Kentucky with incomes below 200 percent of poverty, 65,600 are not eligible for Medicaid.

The majority of uninsured are in working families.

Although the poor and near-poor make up 65 percent of the uninsured population, the majority of the uninsured are in working families - 71 percent are employed full-time and 12 percent are employed part-time. According to a report by the Henry J. Kaiser Family Foundation, it is estimated that 566,060 persons are uninsured in Kentucky, which is 15 percent of the population.

Twelve percent of Kentuckians are on Medicare, 11 percent are on Medicaid, four percent are insured in the individual market, and 59 percent are insured through their employers.

HMO premiums are increasing, cost controls are decreasing.

According to the May 28, 2001, issue of *Business Insurance,* multiple attacks on HMOs, including class action lawsuits, are resulting in fewer effective cost controls. Incentive arrangements giving health care providers a bonus for keeping costs low are being curtailed. Capitation contracts with providers are being cut back. The number of procedures requiring physician precertification is being reduced. Fewer restrictions likely will mean costlier treatment, driving up health care costs. Mergers and acquisitions by hospitals have increased their power in local markets (*The New York Times,* May 25, 2001) and have resulted in some hospitals winning higher payments from insurers, which is adding to the rise in medical costs. Double-digit rate increases produced higher first quarter earnings in 2002 for managed care organizations and are expected to continue for employers through at least 2003 (*Business Insurance*, May 20 2002).

Four insurers have entered Kentucky's individual market since the first of the year when Kentucky Access began operations.

The latest health insurance reform enacted by the Kentucky General Assembly was the creation of Kentucky Access, a pool for high-cost Kentuckians, which has been in operation since January 1, 2001. Kentucky Access is funded in part by tobacco settlement funds. Proponents of the pool believe it will stabilize the individual market and attract more insurers to the Kentucky individual market. Kentucky Access will provide a source of health insurance for Kentuckians with high cost medical conditions. Proponents contend that the pool will benefit those unable to purchase coverage in the private market because they have been refused coverage by insurers or have not been able to obtain coverage at a premium lower than the Kentucky Access premium. Since the beginning of 2001, four insurers have entered the individual market, gives Kentuckians six companies from which to choose, along with the option of Kentucky Access.

Discussion

Health insurance continues to be a top state issue.

Health insurance is a difficult issue for state legislatures for many reasons. The number of persons without health insurance, increasing health insurance premiums, and rising medical costs are some of the reasons why health insurance remains one of the top issues confronting the General Assembly. Federal laws such as ERISA restrict the application of state laws in the area of health insurance. Large insurance companies operate in many states. Therefore, small states such as Kentucky are aware that insurers can pull out of the state if they perceive that legislation creates an unfavorable environment. Within each state the legislature must continually address which segments of the population are to be subsidized and to what extent, which benefits should be mandated and to what extent, and should and can insurance premiums and medical costs be regulated. As medical costs continue to rise and the demand for medical care increases, the General Assembly will consider proposals to increase the availability of affordable health insurance to all Kentuckians.

Health insurance costs for retirees are soaring.

Retirees. Health care costs for retirees are increasing 18 percent each year. Many large employers are cutting back on health care benefits for retirees. Accounting rules requiring companies to reflect future health care liabilities as a reduction in current earnings are causing large employers to limit the damage to profits by increasing co-pays, raising deductibles, and limiting coverage for retirees. According to the May 10, 2002, issue of *The New York Times*, retirees now pay all or part of the claims.

Reunderwriting. There are two ways of reunderwriting: (1) the insurer reviews diagnoses of disease and claims filed in the prior year and adjusts premiums accordingly or (2) the insurer totals the amount of claims paid on behalf of the person insured for the prior year and if it is, for example, 61 percent or more of that person's annual premium, renewal costs increase. Proponents of this practice argue that it limits rate increases for the healthiest customers and in the long run keeps rates lower for everyone. Opponents argue that it undermines the principle of risk sharing.

South Carolina insurance officials are considering issuing a bulletin saying reunderwriting is illegal. Pennsylvania has a legal analysis underway. Arkansas officials learned their laws do not bar the practice and have asked the American Academy of Actuaries to study the merits of the practice. Florida suspended the license of American Medical, based in Wisconsin, for one year because of that company's reunderwriting practices in Florida. The suspension has been lifted by a court pending an appeal. The insurance industry is split over the practice. The Health Insurance Association of America had denounced the rating practices of American Medical, which imposed rate increases of as much as 75 percent year after year, but the HIAA wants to preserve practices that allow more modest increases based on medical condition.

Federal law provides a tax incentive for medical savings accounts.

Medical Savings Account. Some advocates of more affordable health insurance options assert that the tax incentives for establishment of Medical Savings Accounts (MSA) provide a reasonable alternative to the purchase of health insurance. Opponents claim MSAs "cherrypick" those with low health risks and eventually narrow health care choices for everyone. Once a person buys a high deductible comprehensive health plan, the person can open an MSA. Federal law allows small employers (fifty or fewer employees) and self-employed persons to establish MSAs. Contributions to MSAs are exempt from a person's gross income for federal income tax purposes. Kentucky state law has adopted the federal deductions for purposes of state taxes. The General Assembly would need to enact legislation to extend a state tax deduction for MSAs to persons other than small employers and self-employed persons.

AUTOMOBILE AND HOMEOWNERS INSURANCE

Prepared by Greg Freedman

Question

Should legislation be enacted to hold down auto and homeowners insurance premium increases and regulate the practice of homeowners insurers' refusing to renew or write new business based on the number of claims filed by a homeowner?

Background

Auto and homeowners insurance rates are increasing.

The costs of automobile and homeowners insurance are increasing. In 2002, automobile insurance premiums were expected to increase by 8.5 percent, and homeowners insurance premiums were expected to increase 8 percent. Both automobile and homeowners insurance premiums are expected to increase by 9 percent in 2003, according to the Insurance Information Institute. Automobile rate increases are attributed to rising medical costs, repair costs, and jury awards. Homeowners increases are due to the number of catastrophes, increasing cost of home repairs, the aging housing stock, and an increasing number of claims related to mold damage.

The rising costs of automobile insurance and homeowners insurance raise questions from consumers about the effectiveness of Kentucky's automobile no-fault system in holding down costs, possible regulation of automobile rates, and the increasing practice of homeowners insurers refusing to renew or write new business based on a person's history of filing claims.

Discussion

The monetary threshold in Kentucky is the lowest in the country.

Auto No-Fault. None of the states that border Kentucky have a no-fault system. Kentucky's no-fault system has been in effect since 1975. Proponents argue the system is more efficient and less costly than the traditional tort system. Critics claim it allows individuals to inflate medical costs to meet the monetary threshold to file a lawsuit. In Kentucky that threshold is $1000. The threshold is $2000 in Massachusetts and Kansas; in Colorado, $2500; in Utah, $3000; in Minnesota, is $4000; and in Hawaii, $5000.

Florida has enacted legislation to reduce or eliminate personal injury protection fraud.

Under Kentucky's no-fault system, a policyholder's Personal Injury Protection (PIP) pays the policyholder's medical expenses up to $10,000. Florida has the same PIP coverage and discovered so much PIP fraud from inflated reimbursement costs that the legislature passed legislation in June 2001 to address the issue. Under the new law, clinics that treat accident victims must have a state license and adhere to a fee schedule that caps reimbursement rates. Because "runners" were obtaining accident reports and soliciting business for doctors and lawyers, the new law prohibits accident reports from becoming public for sixty days.

Kentucky is a "use and file" state.

Regulation of Auto Rates. Kentucky is a "use and file" state if the market is deemed competitive. An auto insurer in Kentucky can use rates and then file them with the Department of Insurance within fifteen days after first use. Some states require prior approval of rates by the state regulatory agency before they can be used. Others are "file and use" states which allow insurers to first file their rates and then use their rates before approval by the state regulatory agency. Some argue that states with more rate regulation have higher rates.

Fatalities of elderly drivers are nearly equal to fatalities of teen drivers.

Another auto insurance rate topic was raised by the Insurance Services Office (ISO). One-third of all auto insurers subscribe to the statistical reports produced by this organization. Due to the declining driving records of motorists over age 75, ISO has suggested eliminating the twenty percent insurance premium discount they receive. Fatalities of drivers age 70 and older have nearly equaled that of teens. The National Association of Independent Insurers is arguing for laws that require elderly drivers to renew licenses every two years. Some auto insurers also advocate tougher eye exams (Maine, North Carolina, and Utah require vision tests).

The largest homeowners insurer in Kentucky has stopped writing polices for new customers.

Homeowners Insurance. In a major shift in the homeowners insurance market, insurers are increasing rates, canceling coverage, and leaving some markets. The largest homeowners insurer in Kentucky announced on September 1, 2002, that it would no longer write policies for new customers in Kentucky, in order to slow the company's losses. The second largest homeowners insurer has had rate increases that average nearly 20 percent approved in 23 states. The largest homeowners insurer has stopped writing in Texas, California, and Louisiana. A.M. Best rating agency says the insurance industry has turned a profit on underwriting homes only once in the past two decades.

Insurers are refusing to renew homeowners who file too many claims.

Some companies are refusing to renew insureds who file too many claims. One large insurer may drop customers in its mid-Atlantic region if they file two claims in three years and will reject a new customer if they have filed a claim with another insurer in the last three years. Another insurer looks closely at an insured who files two claims in five years and will likely drop an insured who files three claims in five years. Some insurers base their decision on state averages. In Missouri, the average is one claim every thirteen years, while in Oklahoma it is one claim in every eight years. An insured could be refused renewal if he or she files claims substantially above the state's average.

In the mid-1990's the industry began using credit histories to predict future claims. It became easier in the 1990's for insurers to know the claims history of insureds because they could search a giant database of home and auto claims known as the Comprehensive Loss Underwriting Exchange, or CLUE. Insurers tap into CLUE each time a new customer applies.

PREDATORY LENDING
Prepared by Greg Freedman

Question

Should the General Assembly enact legislation to protect citizens against predatory lending?

Background

Subprime lenders in this country provide loans to persons who do not qualify for conventional prime loans at standard rates because of past credit problems or poor credit scores. Although subprime lending is a legitimate business, most predatory lending practices occur in the subprime lending market. Nationally, subprime loans to purchase homes increased from 16,000 in 1993 to 306,000 in 2000. During the same period, subprime home equity loans grew from 66,000 to 658,000. The chairman of Fannie Mae estimates that as many as half of subprime borrowers could have qualified for traditional mortgages with lower rates.

Certain activities are referred to collectively as predatory lending.

Predatory lending practices include:

- Steering–Deliberately directing borrowers who can qualify for conventional mortgages toward high-interest subprime loans.
- Packing–Inclusion of excessive fees, including unnecessary insurance coverage, in the loan agreement without a borrower's understanding.
- Flipping–Repeated refinancing of a loan by rolling the balance into a new loan, increasing both borrowers' costs and lenders' profits.
- Lending without regard to the borrower's ability to repay–Offering mortgages based on borrowers' equity in their homes, rather than their capacity to repay the loans, inevitably leading to default and foreclosure.

Certain persons are targeted by predatory lenders.

Victims of predatory lenders lose equity in their homes and sometimes lose their homes to foreclosure. Lenders often target elderly homeowners who tend to have the highest levels of equity in their homes. Other targeted groups include women, minorities, and lower-income households. At a hearing held in Lexington last June, the Commissioner of the Kentucky Department of Financial Institutions reported that her office has received more than 700 complaints about predatory lenders since January.

Discussion

There are federal laws that cover some predatory lending practices.

In 1994 Congress passed the Home Ownership and Equity Protection Act (HOEPA) to restrict predatory lending by banning certain practices if the loan is a refinancing or home equity installment loan that also meets the definition of a high-rate or high-fee loan. HOEPA does not cover loans to purchase or initially construct a home, reverse mortgages, or home equity lines of credit. HOEPA is directed at reverse redlining where residents of certain communities are targeted for credit on unfair terms. Other relevant federal laws include the Truth In Lending Act and the Real Estate Settlement Procedures Act (RESPA). Among the provisions in Truth in Lending is one that allows the consumer to cancel a consumer credit transaction involving the principal residence until midnight of the third business day after consummation of the deal. RESPA applies to federally regulated mortgage transactions and requires a uniform settlement statement.

Some argue that current federal legislation, which applies uniformly across the country, is sufficient and that 50 states with 50 different laws will confuse lenders trying to abide by all laws. Yet despite these federal laws, predatory lending has continued. That is why several states have enacted legislation that addresses predatory lending. State laws incorporate many of the provisions of the federal enactments but add provisions state legislatures believe are needed.

North Carolina was the first state to pass legislation on predatory lending.

North Carolina enacted the first comprehensive legislation in 1999. That law prohibits subprime loans that include balloon payments, prepayment penalties for loans under $150,000 and "flipping" of home loans where refinancing puts the borrower in a worse financial position. There is currently litigation to determine if North Carolina's law applies to out-of-state national banks. Last year, Connecticut, Texas, and Virginia enacted similar legislation.

Banks are pitted against credit unions in New Jersey.

In New Jersey, a bill has passed the House but has not been voted on in the Senate. The bill has been supported by credit unions but opposed by state banks. Banks in New Jersey contend that existing consumer fraud and usury laws are sufficient to protect consumers and that any new restrictions should apply to finance companies and loan brokers, but not to banks.

In 2000 Philadelphia passed a predatory lending ordinance. It was reported that banking interests lobbied the state legislature, which outlawed the Philadelphia ordinance and added an exemption for mortgage lending from the state fair-practices law. In Ohio, the legislature has passed a law that reiterates HOEPA standards and preempts local legislation. Despite the preemption, the city of

States may end up being preempted by federal legislation.

Cleveland went ahead and passed a strong predatory lending ordinance. Last April, Georgia passed the strongest state-level predatory lending bill. The industry is now considering asking Congress to preempt all state laws on the matter.

SB 145 was introduced at the 2002 Session of the Kentucky General Assembly to address predatory lending in the Commonwealth.

Senate Bill 145 was introduced in the 2002 Session of the Kentucky General Assembly. SB 145 was based on Connecticut's law which contains similar provisions to HOEPA. But unlike HOEPA, SB 145 would have applied not just to refinancings, but to high cost mortgage loans to cover the purchase or initial construction of a home. Six predatory lending activities were covered in SB 145 differently from how they are addressed in HOEPA. For example, more than two-thirds of subprime loans have prepayment penalties, while only two to three percent of conventional loans include prepayment penalties. The penalties are due when the borrower pays off the loan early, usually through a refinancing or sale of the home. HOEPA says that the lender can impose a prepayment penalty if the borrower prepays the loan during the first 5 years of the loan. SB 145 stated that the lender could impose the prepayment penalty only if the borrower prepays the loan during the first 3 years of the loan. Further, that legislation restricted what that prepayment penalty could be. The amount of the penalty would have been restricted to three percent of the balance prepaid for first year of loan, two percent between the first or second year of loan, and one percent for prepayment between the second and third years of the loan. Many times subprime borrowers refinance within 5 years and have to pay the penalties. SB 145 would have shortened the period and restricted the amount of the penalties. Given the growth in predatory lending and the strong opinions of those affected, it is likely that the General Assembly will consider related legislation again.

INSURANCE RISK SCORES

Prepared by Greg Freedman

Question

Should the General Assembly restrict or prohibit the use of risk scores in determining insurance and should insurers have to disclose the method used to calculate the score and the data that supports its use as a predictor of loss?

Background

Use of risk scoring in deciding insurance premiums by insurers is increasing.

Insurers use certain factors to determine whether to insure someone and to set the premium for automobile and homeowners insurance. Insurers are now supplementing the traditional factors with insurance scores based on credit information. According to a Conning and Co. study completed in July 2001, about 92 percent of insurers used risk scoring in deciding auto insurance policy premiums. Use of risk scoring has increased greatly since 1998. More than half the insurers surveyed said they use scores to place a person in a rate class and to set a price for the person within that class. Nearly all said they use it for new business only.

"Credit scores" are not the same as "insurance risk scores." Insurance risk scores are used to determine how likely an insured is to file a claim. Lenders use credit scores to determine how likely a borrower is to repay a loan or line of credit. Both credit scores and insurance risk scores are determined by looking at the same five characteristics in a person's credit report—past payment history, amount of credit owed, length of time credit established, new credit, and types of credit established. The data is weighted differently for purposes of an insurance risk score versus a credit score. Insurance risk scores are more concerned with how regularly a person pays rather than how much the person owes and how many different accounts a person has.

Kentucky has a statute that prohibits an auto insurer from refusing to issue or failing to renew or canceling a policy solely because of a person's credit history (KRS 304.20-020) and another statute that applies the same prohibition to all property and casualty insurance policies (KRS 304.20-042). Kentucky does not prohibit the use of insurance risk scores.

Discussion

According to State Farm Insurance Company, studies show a direct correlation between credit history and whether a person will file an insurance claim. The studies have found that people who have better credit tend to file fewer claims. Critics contend that because insurance risk scores are based on credit activity, your score will be downgraded if there is unusual activity within the month before you buy auto insurance. Critics also assert that while insurers can tell you there is a correlation between credit and insurance claims, the insurers cannot tell you why scoring works. The National Association of Independent Insurers argues that insurers have invested significant of time and money in their computer models to determine risk scores and they do not want the proprietary information leaked to other companies.

Like Kentucky, many states limit or prohibit the use of credit history as a determinant in issuing, renewing or canceling an insurance policy.

Many states have laws similar to Kentucky's that prohibit a property and casualty insurer from refusing to issue, failing to renew, or canceling a policy solely because of a person's credit history. Last April Minnesota passed a law that prohibits insurers from rejecting, canceling, or not renewing auto or home insurance based solely on a credit score. However, the Minnesota law goes further. It also provides that insurers cannot use a lack of credit history to reject, cancel, or nonrenew policies. Insurers will have to provide evidence that their use of credit scores is "legitimate, lawful, and fair." It requires the credit scoring methodology to be on file with the Commissioner of Insurance. Around the same time that Minnesota passed its law, the Maryland legislature passed legislation prohibiting home insurers from using credit scores in offering, canceling, renewing, or pricing home insurance. It allows auto insurers to use credit scores when the policy is first offered, but prohibits its use in canceling, nonrenewing, raising premiums upon renewal, or requiring a specific payment plan. The American Insurance Association says the Maryland statute is a misguided effort that will lead to higher insurance premiums. According to AIA, credit scores predict future losses and allow insurers to offer lower premiums for 70 percent of consumers.

Two bills were introduced at the 2002 Session of the Kentucky General Assembly.

During the 2002 Session of the Kentucky General Assembly, two bills pertaining to use of insurance risk scores (HB 563 and HB 564) were introduced but not enacted.

HB 563 would have prevented insurers from using consumer reporting agency information on the number of inquiries made about a person's credit history as a factor in determining credit risk, except those inquiries make as a result of the consumer's applying for credit.

HB 564 would have prohibited an insurer from basing rates upon an insurance risk score unless the method for calculating the score is identified in its rate filing and the Commissioner of Insurance determines that the insurance risk score has a substantial relationship to loss.

MEDICAL MALPRACTICE INSURANCE

Prepared by Greg Freedman, Robert Jenkins, and Norman Lawson

Question

Should the General Assembly take action to regulate doctors or the scope of medical practice, attorneys or the scope of legal practice, or insurance carriers in light of the high rate of increase of medical malpractice insurance premiums?

Background

The medical malpractice market is cyclical.

After almost a decade of flat prices, the cost of medical malpractice insurance has been rising for the past two years. The medical malpractice insurance market tends to be cyclical. During the last incidence of rapidly rising medical malpractice insurance premiums and tightening of the market, health care providers could pass on their higher insurance costs to patients. Now charges are controlled to some extent by contracts with health maintenance organizations and consumer awareness of high medical costs, which makes it harder to pass on additional costs.

AMA says there is a crisis in 12 states.

Some insurers are leaving the market.

A new 50-state analysis released by the American Medical Association asserts that problems with medical liability coverage have reached crisis proportions in 12 states (Florida, Georgia, Mississippi, Nevada, New Jersey, New York, Ohio, Oregon, Pennsylvania, Texas, Washington, and West Virginia) with more than 30 others states seeing signs of problems. Some medical malpractice insurers are leaving the market, some insurers are failing, and many health care providers are experiencing difficulties finding affordable insurance. The St. Paul Cos., the largest writer of medical malpractice in the United States, no longer offers medical malpractice insurance, purportedly because of significant underwriting and investment losses. The tightening market has affected some health care providers more than others. For example, obstetrician/gynecologists' medical malpractice insurance premiums rose by 7 percent in 2000, by 12.5 percent in 2001, and by an estimated 15 percent or more in 2002. According to "Confronting the New Health Care Crisis" a report issued on July 24, 2002, by the U.S. Department of Health and Human Services, doctors alone spent $6.3 billion last year on medical malpractice insurance coverage, and hospitals and nursing homes spent billions of dollars more. The report stated that premium increases have varied widely across states with some states experiencing increases from 30 to 75 percent.

The Kentucky Department of Insurance held a public hearing in July 2002.

The Kentucky Department of Insurance held a public hearing on medical malpractice insurance on July 12, 2002. Because its malpractice insurer refused to renew and other insurers wanted to charge up to five times the previous premium, a five-doctor clinic in Corbin had to close on July 1 until it could find coverage. Physicians testified that the number of insurers is shrinking. Some obstetricians and surgeons are switching to other fields, retiring, or leaving the state because of malpractice costs. According to testimony, Kentucky has 520 obstetricians, but a quarter of them have stopped delivering babies. An insurance company representative said Kentucky's rates are in the lower level of the top third of the country. The Kentucky Academy of Trial Lawyers agreed that the premium increases are outrageous and said that fewer than 4 percent of physicians account for 45 percent of malpractice claims. The attorneys' group said it is important to know how much of the insurer's premium actually goes to defending against malpractice claims and how much goes into reserves. The Commissioner of Insurance said she might require insurers to file information about their medical malpractice coverage rates.

Some contend that insurers underpriced their premiums for years while relying on high investment returns and have now increased premiums as those returns have declined. They also contend that health care providers are committing more acts of malpractice. Others assert that insurers are facing higher costs for defending against malpractice lawsuits and that the cost of settlements and verdicts against physicians have increased 25 percent over the last two years. Although most jury verdicts are in favor of doctors and the majority of cases are closed by insurers without making any payment, it costs an average of almost $25,000 to defend each claim, according to the U.S. Department of Health and Human Services.

Discussion

The premium increases and tightening market are causing hardship on health care providers and making some states more or less attractive to health care providers. The General Assembly may want to consider reforms to stabilize the escalating premiums and to improve health care quality in Kentucky by providing an attractive health care environment. Reforms fall into three major categories: insurance, tort/legal, and patient safety/medical reforms.

Insurance reforms include creation of patient compensation funds.

Kentucky's 1976 law was struck down by the Kentucky Supreme Court.

Insurance reforms include creation of patient compensation funds. During a perceived medical malpractice insurance crisis in the early 1970's, every state except West Virginia passed reforms. The Kentucky General Assembly enacted similar legislation in 1976. In *McGuffey v. Hall* (557 SW2d 401, KY S. Ct, 1977) the Kentucky Supreme Court in struck down the principal provisions of the Act as unconstitutional. The Act created the Kentucky Patient's Compensation Fund and required all physicians and hospitals in Kentucky to be members. Every member had to carry liability insurance of $100,000 per claim/ $300,000 per occurrence and pay an annual assessment into the Fund of not more than 10 percent of the member's insurance premium. The Fund was to pay judgments in excess of the member's insurance, up to $1 million per claimant. The Supreme Court held the fund to be unconstitutional because a provision in the law required that, if the Fund were exhausted, claims were to be paid out of the General Fund of the Commonwealth. Today, at least ten states (Florida, Indiana, Kansas, Louisiana, Nebraska, New Mexico, Pennsylvania, South Carolina, Wisconsin, and Wyoming) have patient compensation funds.

Other insurance reforms include mandatory filing and approval of rates, joint underwriting associations, and requirements to report the final disposition of claims. The West Virginia Medical Association is planning to form a nonprofit physicians' mutual association to provide coverage for physicians in that state.

Tort/legal reforms include caps on damages.

Kentucky's Constitution prohibits laws that limit damages for death or for injuries to person or property.

Tort/legal reforms include caps on medical malpractice judgments, particularly limits on noneconomic damages. Section 54 of the Constitution of Kentucky, however, prohibits the General Assembly from passing laws that limit the amount to be recovered for injuries resulting in death or for injuries to person or property. Other significant constitutional provisions are Section 14, which guarantees access to the courts and a right of judicial remedy for any injury and Section 241 which guarantees the right to recover damages for wrongful death. Amendments to one or more of these sections may be necessary for any tort reform initiative.

Other tort/legal reforms include mandatory or voluntary arbitration or mediation, changes in the collateral source rule to allow juries to be informed of other sources of payment available to the plaintiff for injuries, periodic payment of judgments, and caps on attorneys' fees.

Patient safety/medical reforms include mandatory reporting of medical errors and electronic health.

Patient safety/medical reforms include the development of practice parameters designed to eliminate poor medical practice. According to the National Conference of State Legislatures, sixteen states (Colorado, Florida, Kansas, Maine, Massachusetts, Nebraska, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Washington) have laws or regulations requiring mandatory reporting of adverse events and medical errors in hospitals. A new Pennsylvania law created the

Patient Safety Authority and requires medical facilities to develop a patient safety system that allows health care workers to report medical errors without retaliation. Electronic health or electronic medical records may reduce the occurrence of medical errors. Some studies indicate some hospital infections result from errors in treatment due to delayed medical record entries or indecipherable medical record notations.

Program Review and Investigations Committee is studying the effects of medical malpractice rates.

At its June 2002 meeting, the Program Review and Investigations Committee of the Kentucky General Assembly directed staff to study medical malpractice premium rates for health care providers in Kentucky. The committee will examine whether the rates influence the cost of providing health care to state employees and Medicaid recipients specifically and Kentucky residents in general, and whether access to providers is affected. The study will cover the experiences of other states with tort reform and various legislative changes adopted as means of limiting premium rate increases.

ECONOMIC DEVELOPMENT AND TOURISM

THE KENTUCKY ENTERPRISE ZONE PROGRAM

Prepared by John Buckner

Question

Should the General Assembly extend or modify Enterprise Zone Program (KRS 154.45)?

Background

The legislative intent of Kentucky's enterprise zone program was to revitalize economically depressed areas of the state.

In order to revitalize economically depressed areas of the state, the Kentucky General Assembly in 1982 passed HB 505 creating the enterprise zone program. To accomplish this goal, the legislation contains four major components: (1) tax credits available to qualified businesses; (2) eligibility requirements placed upon businesses; (3) how cities may apply for a zone designation, and (4) sunset provisions.

Enterprise zones offer a variety of tax credits to eligible businesses and residents. Qualified businesses must employ a minimum percentage of persons within a targeted workforce.

Local governments must apply and be approved for an enterprise zone area

To create an enterprise zone, a local government must apply to the Enterprise Zone Authority, an eleven-member oversight and governing body appointed by the Governor. The application designates an area within its jurisdiction to be economically depressed. Such an area must meet the following criteria:

- a contiguous boundary;
- for the most recent eighteen months at least one and one-half times the average national rate of unemployment;
- at least 70 percent of its residents with incomes below 80 percent of the median income of the jurisdiction requesting zone designation;
- within the proposed zone a population of all census tracts which has decreased by 10 percent or more between 1980 and 1990; and
- proof by the local government that chronic abandonment or demolition of structures or substantial tax arrearages of commercial or residential property has occurred in the area.

There are ten enterprise zones in the state with statutorily established termination dates.

The original legislation called for seven areas to be eligible for enterprise zone designation; it was later amended to allow for ten zones. The ten areas receiving enterprise zone designation were statutorily given twenty years of eligibility for the incentives offered by the program. After that twenty-year period, zones were set to expire. The existing zones and their expiration dates are noted in the table:

ENTERPRISE ZONES	
LOCATION	**EXPIRATION DATE**
Louisville	December 31, 2003
Hickman	December 31, 2003
Ashland	December 31, 2004
Covington	December 31, 2004
Owensboro	December 31, 2005
Lexington	December 31, 2005
Knox County	December 31, 2006
Campbell County	December 31, 2006
Paducah	December 31, 2006
Hopkinsville	December 31, 2007

The authority also has the right to remove the designation of an enterprise zone if the area no longer meets the qualifying criteria. However, businesses eligible for tax credits prior to the decertification of a zone retain eligibility for the life of the program even if a zone is decertified.

Finally, legislation provided for zone boundaries to be amended by application from the local government to the authority, providing that the proposed area to be included in the zone complies with the provisions necessary for the area as a whole to be declared an enterprise zone.

Discussion

Several possible problems have been raised regarding both the legal status of the enterprise zone program and its efficacy in achieving the goals of reducing unemployment and improving the quality of life within a zone by encouraging businesses to increase hiring. In 1992, the Kentucky Attorney General issued an opinion (OAG 92-86) that asserted that specific sections of the program were unconstitutional special legislation under Sections 59 and 60 of the Kentucky Constitution.

A 1992 opinion by the Kentucky Attorney General raised questions concerning the constitutionality of the enterprise zone program.

The opinion went on to state that the ten areas designated by the enterprise zone authority do not necessarily represent the most economically depressed areas of the state, and that granting benefits to ten areas on a first-come first-serve basis necessarily discriminates against other areas that might otherwise qualify for benefits on the basis of economic need. As such, the Attorney

General found no justification for establishing an arbitrary limit on the number of areas that may receive benefits.

Studies have been unable to establish a direct linkage between the existence of a zone and a decrease in unemployment within a zone.

In regard to the efficacy of the program in achieving the goals of reducing unemployment by attracting new industries to designated areas, thorough, objective studies of this issue have been unable to show a direct linkage between the existence of an enterprise zone and improvements of socioeconomic measures within a zone. A study of the Louisville enterprise zone (Thomas E. Lambert and Paul A. Coomes. "An Evaluation of the Effectiveness of Louisville's Enterprise Zone." *Economic Development Quarterly*; 15.2 May 2001) found that while it was not feasible to calculate precise estimates of the program benefits in Louisville,

> A minimum of $55 million in forgone tax revenues and fees and administrative costs was attributable to the program. Despite this, both the number of jobs and the number of employed residents in the EZ fell, whereas the rest of Jefferson county was posting growth in both measures.

They continued by stating:

> Job losses continued in the original EZ area, whereas a comparable area not treated by EZ incentives managed to add jobs. Very little residential investment occurred in the EZ neighborhoods, and outward migration continued. Socioeconomic conditions in most of the EZ neighborhoods showed relatively little progress during the period studied.

The authors conclude by stating:

> Given the high program costs, the low economic benefits, the weak link between EZ incentives and private investments in the zone, as well as the continual decline in economic conditions for the remaining residents of the original zone, it is difficult to document that this program has been effective.

A recent study by the State Budget Director raised concerns about the cost effectiveness of enterprise zones.

A study conducted by the State Budget Director of Kentucky's Enterprise Zones reached largely the same conclusions (Office of the State Budget Director, Governor's Office for Policy Research, Policy Paper Series 2, Issue 1, January 2002). The authors found that the program is more costly than previously known – the Budget Director's office estimating the cumulative cost of the zone program in forgone tax revenues at $284 million. The report also states that the enterprise zones "… have lost their original focus on distressed communities. The zones now cover 221 square miles, including some of Kentucky's most productive manufacturing and distribution centers and a large portion of a rural county." The report concludes by finding that:

> Arguably, some of the incentives provided over the life of the program have been unintended consequences, resulting in subsidies for economic activity that would have occurred anyway. These events clearly raise questions concerning the effectiveness of the zones as part of a comprehensive economic development policy.

A January 2002 study of the Louisville enterprise zone found that the program has been marginally effective in retaining jobs within the zone.

The most recent study of the Kentucky Enterprise Zone program was commissioned by the Louisville Board of Alderman (Tom Lambert and John Nelson. *A Second Look At Louisville's Enterprise Zone and a Review of Other Local Business Incentives*. Spalding University School of Business. September 2002). Although the study is largely focused on the Louisville zone, the study's conclusions may help to shed light on the other nine zones in the state. At the risk of vastly oversimplifying the study's analysis, one conclusion that the authors reach is:

> For Louisville, it appears from the analysis thus far that the EZ program has not been a good generator of net new jobs, with perhaps the exception of the Louisville airport. The EZ possibly has worked best as an attempt to retain jobs. Also, the EZ program has not been completely successful with regard to the social and economic revitalization of EZ neighborhoods when compared to a control community (Newberg area).

Put differently, if the goal is that of job *retention* rather than job *creation*, then it might be said that the zone program has been marginally effective in the Louisville area.

A recently released study of Kentucky's Enterprise Zone program by the Legislative Research Commission's Program Review and Investigations Committee provided an analysis of the costs and benefits of the program, and an evaluation of the monitoring procedures for the program ("The Costs, Benefits, and Monitoring of Kentucky's Enterprise Zones"). Among some of its findings, the study found that while it is not possible to isolate the effects of the enterprise zones, there is little evidence that the economic conditions of zone residents have improved, that zones have not performed as well as the counties in which they are located, and that research suggests that enterprise zone programs may not attract many firms from outside the state. In regard to monitoring the program, the study found that much of the information collected by the Enterprise Zone Authority concerning eligibility requirements for firms, whether an employee is a resident within a zone, a firm's total employment, and increases in capital investment by firms is self-reported and is not independently verified. The study also found that the most serious issue concerning monitoring is a lack of procedures to ensure that only eligible firms and zone residents receive the sales and use tax exemptions. The study concludes with several recommendations that center upon improved monitoring procedures to ensure greater compliance with statutory requirements.

ECONOMIC DEVELOPMENT ACCOUNTABILITY

Prepared by Laura Marshall Taylor

Question

Should the General Assembly implement greater accountability measures for companies receiving state economic development incentives ?

Background

Following a succession of manufacturing plant closures and relocations in the 1980s, the Kentucky General Assembly enacted a series of economic development incentives intended to lure businesses to the Commonwealth and to help existing companies survive. In addition to traditional loans and grants, these incentives include various tax credit programs, some of which allow companies meeting job creation and investment criteria to claim corporate income tax exemptions against the costs of fixed assets related to a move, start-up, or expansion. While figures from the Cabinet for Economic Development are said to illustrate the success of tax incentives in creating Kentucky jobs, questions have been raised regarding the undisclosed cost of forgone tax revenue as well as the long term effectiveness of the programs in retaining quality jobs.

In 2000 and 2002, Kentucky's General Assembly responded to concerns regarding the cost and effectiveness of state economic development incentives by enacting accountability measures.

In response to these concerns, the General Assembly included a requirement in the FY 2000-2002 budget that the Cabinet for Economic Development submit quarterly reports on incentives to the Legislative Research Commission. The budget required that the reports include company-specific information on projected new jobs, average wages, potential tax credits that might be claimed, and the potential cost per job. It should be noted, however, that as this reporting requirement was a provision of the previous budget, it expired in June 2002. The 2002 General Assembly established additional accountability with the passage of House Bill 372, implementing wage and benefit standards for companies receiving tax credits through Kentucky Economic Development Finance Authority programs.

Discussion

Proponents of additional accountability legislation assert that a transparent system for monitoring and evaluating incentives is necessary for policymakers to wisely manage economic development spending and maximize the state's return on its investment. Many contend that an accountability system could be used to identify best practices, support long-term planning efforts, and help motivate personnel.

Some insist additional accountability legislation is necessary to ensure public funds are wisely spent; others argue it would make companies less likely to locate in Kentucky.

Critics argue that additional accountability legislation would deter companies from locating in Kentucky. While opponents are generally supportive of accountability measures that have been enacted in recent years, especially with regard to wage and benefit standards, they maintain that additional measures would place Kentucky at a competitive disadvantage in relation to other states that do not have similar laws, thus encouraging firms to locate in states with more favorable business climates at the cost of potential Kentucky jobs.

Fundamental to the accountability issue is centralized disclosure, whereby company-specific data detailing actual state costs and benefits is collected in a central place and made public. Although the 2000-2002 budget requires reporting on *potential* public expenditures and *projected* new jobs related to specific incentive projects, it does not list the jobs and associated wages actually created and retained from a project, nor does it give dollar amounts of tax credits taken. Much of this undisclosed company information is deemed proprietary, and by definition could place the company at a competitive disadvantage if released. Proprietary company information used by the Cabinet for Economic Development remains confidential under an exemption from Kentucky Open Records law, KRS 61.878(1)(c), and corporate income tax returns are kept confidential under KRS 131.190.

Nine states provide some level of centralized disclosure, and three of these disclose company-specific information on earned corporate income tax credits.

According to Good Jobs First, a project of the Institute on Taxation and Economic Policy, nine states currently provide some level of centralized disclosure. Three states—Maine, West Virginia and North Carolina—disclose company-specific information on earned corporate income tax credits. These three states have determined that corporate income tax credits should be viewed as any other public expenditure for economic development and therefore should be equally transparent. Six additional states provide detailed disclosure of various other incentives including property tax abatements and enterprise zone tax credits.

A complete and impartial performance review of Kentucky's tax incentive programs has never been conducted.

Another component of accountability involves oversight and evaluation. Since the inception of Kentucky's tax incentive programs, a complete and impartial review of their performance has not been conducted, possibly due in part to the aforementioned nondisclosure of proprietary company information. This type of information is critical to an effective performance audit. Another issue that may account for the lack of review is the absence of statutory direction. KRS Chapter 154 requires the Kentucky Economic Development Partnership to conduct periodic evaluations of projects funded or assisted by the Cabinet for

Economic Development. It further directs the Cabinet to perform auditing, monitoring, and compliance functions of certain incentive programs, including tax incentives. But the statutes give no specifications on monitoring methodology, evaluation criteria, or timeframe, and have no requirements for legislative oversight. As such, the Cabinet conducts its own monitoring system, whereby companies receiving incentives submit annual, CPA certified job creation reports, and cabinet officials perform on-site visits to confirm these numbers. The Cabinet reports that it will monitor the recently enacted wage and benefit standards through a similar system.

45 states have conducted state economic development audits, most of which are performance reviews of incentive programs by legislative or state auditors.

Good Jobs First maintains a list of state economic development audits, most of which are performance reviews of incentive programs conducted within the past decade by legislative or state auditors. Forty-five states have conducted audits, many of which are critical of tax incentive programs or report inconclusive findings due to a dearth of accessible information. Recurring themes throughout the evaluations are inadequate performance measures and objectives as well as weak data collection and program monitoring. Since the audits were conducted, a number of these states have revised their incentive programs in an attempt to correct their shortcomings.

A few states, such as Texas, have established a system for transparency, oversight, and evaluation by combining all forms of development spending in a unified economic development budget.

A few states, such as Texas, have established a system for transparency, oversight, and evaluation by combining all forms of development spending—both direct and tax expenditures—in a unified economic development budget (UEDB), also called an integrated economic development budget, as a complement to existing budget documents. The Corporation for Enterprise Development suggests a UEDB as a tool for clarifying existing commitments and ensuring regular, comprehensive program evaluation, but warns that the process of collecting and categorizing state economic development expenditures is challenging and could be costly.

A number of states have enacted penalties for companies that fail to comply with incentive requirements.

Taking accountability a step further, a number of states have enacted penalties to enforce incentive requirements. Penalties include restrictions on receiving future incentives as well as clawback provisions—requiring a company to pay back all or part of the incentive (in some cases, plus interest) if it fails to fulfill the requirements of the incentive contract. Common requirements to which clawbacks are attached include:

- Number of new jobs created;

- Wage and benefit levels of new jobs or all jobs;
- Level of capital investment; and
- A specified length of time a company must stay at the subsidized location.

While Kentucky law requires that incentives be discontinued for a breech of contract, it does not have clawbacks or other penalties. Proponents of penalties contend that without these provisions, incentive-receiving companies have no motivation to remain in Kentucky if they are offered a better deal in another state. Opponents assert, however, that penalties, like other forms of accountability legislation, would discourage firms from locating in Kentucky. Additionally, critics contend that since subsidized companies would not have located in Kentucky without incentives, revenue surrendered through tax credit programs is money the state would not have otherwise generated, and therefore should not be refunded if companies choose to relocate.

EDUCATION

SUPPORT EDUCATION EXCELLENCE IN KENTUCKY
EQUITY AND ADEQUACY OF FUNDING

Prepared by Ethel R. Alston

Question

Should the General Assembly make changes in the Support Education Excellence in Kentucky (SEEK) and other funding programs for public education?

Background

Support Education Excellence in Kentucky is intended to provide an equitable and adequate education for all Kentucky students.

In response to the Kentucky Supreme Court's landmark decision in *Rose v. The Council For Better Education*, the General Assembly in the 1990 Regular Session passed House Bill 940 establishing new structures of curriculum, governance, and finance for the public system of education. The General Assembly created the school finance program, Support Education Excellence in Kentucky (SEEK), as a state and local funding mechanism to provide an equitable and adequate education for Kentucky's students. Since its inception, SEEK has remained virtually unchanged. Codified in KRS 157.360, SEEK is a tiered program with the following major components:

1. Base Funding Per Pupil. A guaranteed amount of funding is based on the district's previous year's average daily attendance (ADA) adjusted for growth. Since 1990, the guaranteed base per pupil established in the biennial budget bills has ranged from $2,305 in FY 1990-1991 to $3,066 in FY 2001-2002. (The Governor's Spending Plan for FY 2002-2003 set the amount at $3,149). The guaranteed base per pupil, multiplied by the district's prior year ADA adjusted for growth, equals the district's base SEEK amount.

Each district's base SEEK is adjusted to reflect characteristics specific to the district. Additional funding is prorated for at-risk students, identified as those who qualify for the free lunch program based on family income; students with disabilities; transporting children to and from school; and children receiving home and hospital instruction due to short-term medical impairments.

SEEK is based on a combination of state and local funding.

2. Required Local Effort. School districts are required to levy a minimum equivalent tax rate of $.30 per $100 property valuation for general school purposes through property taxes, permissive taxes including an occupational license tax, and utility gross receipts license taxes including cable television. The income from all taxes levied divided by total assessed value of property plus the motor vehicle assessment. The difference between the required

local effort and the adjusted base SEEK is the amount of state funding for adjusted base SEEK.

3. Tier I is an optional tax levy that allows school districts to generate additional taxes by levying an equivalent tax rate that produces up to 15 percent of the district's adjusted base SEEK. Revenues generated by this levy are equalized at 150 percent of the statewide per pupil assessment to provide additional funding, based on their tax effort, to districts with lower property values.

4. Tier II permits a school district, subject to voter approval, to increase taxes up to no more than 30 percent of the revenues guaranteed by SEEK and generated by Tier I. These taxes are not equalized by the state.

SEEK has produced a high level of equity among school districts.

SEEK was designed to achieve equity in the quality of educational opportunities and to provide sufficient funding for an adequate education for all children. State and local funding of education has increased dramatically since 1990. From 1990 to 2000, $32.8 billion was spent on public education in Kentucky. Of this amount, $24.5 billion or 74.5 percent represented state appropriations, with $17 billion or 69.5 percent distributed under SEEK. The remaining amount of $7.5 billion was distributed through grants and earmarked appropriations to categorical programs.

SEEK has narrowed the gap in per pupil spending between property-wealthy and property-poorer districts. Two recent studies that reviewed the equity of Kentucky's school finance system have reached similar conclusions that the goal of equity in education funding has been met.

Discussion

While state and local funding has increased and funding equity has in large measure been achieved, many assert that revenue problems continue to exist because of the effect of some SEEK components and because of school funding programs outside of SEEK. The following issues have been raised.

Unpredictable growth in student population in selected districts creates unique problems.

Growth Districts. Significant growth in student populations causes unique problems for selected school districts. Unpredictable growth throughout a school year strains academic and instructional programs, facilities, and transportation capacities. SEEK funds are generated based on the prior year's average daily attendance, plus growth in the number of students in the first two months of the current year relative to the same period of the prior year.

In response to the problem, the 1994 General Assembly passed House Bill 810 (KRS 157.621) to permit eligible high growth districts to levy a five cent tax for debt service and new facilities. The tax is not subject to recall vote and is not equalized by state funding. In accordance with the sunset clause in KRS 157.621, the provision expired in 1996 with full funding of the School Facilities Support Program of Kentucky (FSPK), but was re-enacted in the 2000-2002 Biennial Budget even though FSPK was fully funded in the biennium. No reference to this provision is made in the Governor's Spending Plan.

In the 2002 Regular Session of the General Assembly, Senate Bill 241 proposed to create a school growth trust fund for districts that levied the five cents tax under KRS 157.621. This legislation was not enacted.

Since 1994, twenty–two school districts have levied the tax. With the trend of increasing enrollments, the General Assembly has the option of repealing the sunset clause that depends on fully funding the FSPK, thereby permitting districts the discretion to levy the tax as needed. In addition, a declaration that the sunset provision is in effect may have a negative impact on those districts that experience growth and have restricted capital outlay accounts that are insufficient to fund facility projects.

Limits on the amount of tax revenue that may be raised impact selected school districts.

House Bill 44 and Property Tax Limitations. House Bill 44 passed in the 1979 Extraordinary Session was in effect at the time of enactment of the Kentucky Education Reform Act of 1990. House Bill 44 limits property tax revenue increases to no more than four percent over the amount of revenue produced by the tax levy the previous year, excluding revenue from new real property and personal property. Those school districts that experience slow growth in property value assessments may not be able to produce even up to a four percent increase in revenue because of the maximum tax rate limitation in KRS 160.470(1). The Kentucky Department of Education estimates that seventy–six school districts have been affected by this limitation since FY 1993-1994.

Legislation was introduced but not passed in the 2002 Regular Session of the General Assembly to eliminate the tax rate limitation in KRS 160.470(1). House Bill 869 proposed to permit all school districts to levy a tax rate that does not produce more than four percent more revenue than the compensating tax rate defined in KRS 132.010.

State funding for hold harmless districts equals funding received in FY 1992-1993.

Hold Harmless Districts. Since FY 1992-1993, the General Assembly has guaranteed that every local school district will receive at least the same amount of SEEK state funding per pupil as was received in FY 1991-1992 in the biennial budgets. The number of school districts has declined from twenty–one receiving $11 million in FY 1993-1994 to only two school districts projected to receive about $222,000 in hold harmless funding for FY 2002-2003.

The hold harmless guarantee that per pupil funding equal the amount received ten years ago indicates negative growth in state funding. These districts believe that the hold harmless figure should be adjusted to reflect inflation.

Attendance is a major component of the SEEK calculation and accurate data is essential.

Attendance and the SEEK Calculation. The Program Review and Investigations Committee recently published the report "The SEEK Formula for Funding Kentucky's School Districts: An Evaluation of Data, Procedures, and Budgeting." Among the research issues of concern are the validity of underlying data, particularly attendance statistics reported by school districts and the process of calculating SEEK, and the difficulty in projecting attendance and local tax assessments for biennium budgeting for SEEK.

The report points out that attendance data is critical to correctly calculating SEEK funding. However, errors in the attendance data reported by school districts and the inadequate process of verifying data by the Kentucky Department of Education have resulted in SEEK calculation errors. Recognizing that SEEK comprises about 25 percent of the General Fund budget, small errors can cause over-funding or under-funding of SEEK by millions of dollars. Recommendations are offered concerning improving and verifying the accuracy of information used and the process for calculating SEEK.

Projections for attendance and local tax assessments are critical to formulating the biennium budget.

To provide dollar amounts recommended for SEEK in the biennial budget, projections must be made for the average daily attendance and local tax assessments for the upcoming two-year budget cycle. This process has proven difficult, given the fact that projections must be made about two years in advance of compilation of actual data on attendance. The report describes the funded ADA with the growth factor and local tax assessments as the most critical variables, and slight changes in these figures can equal millions of dollars in changes to SEEK and the General Fund. In past bienniums, SEEK has been over-funded due to projection errors. Recently, however, projection errors have led to underfunding.

Studies of adequacy may raise new issues.

Future Studies. The Council on Better Education, a group composed of most school superintendents, has commissioned an adequacy study of the SEEK program to determine whether the current level of funding, even if equitably distributed, is adequate to provide all Kentucky students with a quality education. The Kentucky Board of Education is also studying the adequacy of the SEEK program to meet education goals.

ELECTIONS, CONSTITUTIONAL AMENDMENTS, AND INTERGOVERNMENTAL AFFAIRS

FEDERAL ELECTION REFORM AND KENTUCKY

Prepared by Laura H. Hendrix

Question

What changes in Kentucky election laws should the General Assembly consider for the Commonwealth to be eligible for federal election reform funds and to comply with the new federal law?

Background

The 2000 Presidential election induced states and the federal government to examine election laws and procedures

The 2000 Presidential election raised issues of outdated election laws and procedures throughout the country. States and the federal government continue to examine various proposals to address election reform. At least 100 related bills have passed in state legislatures. The federal government has been encouraged to assist states with the costs of providing new technology, additional personnel, and training, as well as provide a "floor" for state elections procedures so that there can be some uniformity across the country. Kentucky may have to make changes in its laws and policies in order to become eligible for federal funds.

Discussion

Kentucky may be eligible for federal election reform funds, provided Congress passes a spending bill.

In October 2002, Congress passed the Help America Vote Act, H.R. 3295. This law expands the federal role in elections, which have traditionally been left to the states. The law provides $3.9 billion in federal funds to states for various election reforms, including upgrading punch card and lever machines to electronic voting machines, training poll workers, establishing accurate voter lists, and ensuring accessible polling places for voters with disabilities. An additional federal spending bill will need to be passed before this money actually becomes available to the states. However, many provisions of the Act must be implemented by the states regardless of whether federal funding is available to assist states in meeting the Act's requirements.

The federal Act provides that a new federal agency, the Election Assistance Commission, will administer most provisions of the law. Until that commission is constituted, the General Services Administration administers the payment provisions of the Act.

The Act provides for "Early Out Money," which is a guaranteed minimum payment to the state of $5 million to upgrade election equipment and improve election administration.

The federal Act guarantees each state a minimum aggregate payment of $5 million to update old election equipment, including lever machines and punch card systems, and implement election systems improvements. This program is referred to as "Early Out Money," and the Governor, in consultation with the Chief Election Official of a state that wishes to receive the funds, must apply to the General Services Administration by April 29, 2003. The Congressional Research Service estimates that Kentucky would be eligible to receive over $5.8 million to implement election improvements or replace its lever machines. One hundred–eleven of Kentucky's counties use electronic machines; only 8 counties use lever machines. Jefferson county uses optical scan machines. No county uses punch cards.

This "Early Out Money" may be used to:

- Meet the Title III requirements of the Act (see below);
- Improve election administration for federal elections;
- Educate voters regarding voting rights, procedures and technology;
- Train election officials, poll workers, and volunteers;
- Develop the State Plan that is used to apply for money to implement the Title III requirements of the Act;
- Improve, acquire, lease, modify, or replace voting systems and technology for casting and counting votes;
- Improve accessibility of polling places; and
- Establish toll-free phone numbers for reporting of voting fraud, obtaining general election information, and accessing voter registration status and polling place location.

States that receive "Early Out Money" must certify that all of the punch card or lever machines in the state have been replaced in time for the general election in November 2004. However, a state may request a waiver of this requirement until the first election for federal office held after January 1, 2006. Additionally, states that wish to receive federal funds must establish a separate "Election Fund" in their General Fund.

States, including Kentucky, must meet the new requirements of the federal Act under Title III of the Act, and the Act provides additional funds to meet those requirements.

Title III of the Act also imposes certain election requirements on the states and provides $3 billion for meeting these requirements and providing other measures to improve elections, contingent upon the passage of an appropriations bill. Each state will be eligible for payments based upon a formula in which each state is guaranteed to receive one–half of one percent of the total amount that is appropriated for meeting the requirements. According to the Congressional Research Service, it is estimated that Kentucky would be eligible to receive about $42 million in federal funds to implement the provisions of Title III. As noted above, however, an appropriation bill to provide these funds has not yet been passed.

In order to be eligible for these funds, a state must file a State Plan with the Election Assistance Commission. The plan must be completed by September 15, 2003, with public notice and comment, and must be published in the Federal Register by October 15, 2003. The state must also provide a 5 percent match for the funds requested. For Kentucky, this would be approximately $2.2 million. The state must appropriate this match to the "Election Fund" referenced above.

Title III of the Act imposes requirements for voting systems, provisional voting, voting information, voter registration, and complaint processes.

Title III of the Act imposes several requirements on states in the five following areas: voting systems, provisional voting, voting information, voter registration, and complaint processes. Kentucky meets the requirements in two of the five areas.

In the area of voting system standards, all voting systems must:

- Provide voters the opportunity to privately check and correct ballot errors;

- Have voting systems with manual audit capacity;

- Provide at least one voting machine accessible to the disabled per precinct;

- Provide alternative language accessibility under the Voting Rights Act;

- Have voting systems that do not exceed a specified error rate;

- Have a standard for determining what constitutes a legal vote for each type of voting machine in the state.

States must meet these voting system requirements by January 1, 2006. Currently, the voting systems used in Kentucky do not meet all of these requirements, and there is no definition of what constitutes a legal vote for each type of voting machine in the state.

The second area of requirements involves provisional voting, which permits a voter whose eligibility to vote is questioned or who does not appear on a voter registration list to vote at the polling place, subject to a later determination of eligibility. The Act requires that states have a procedure in place for provisional voting by January 1, 2004. Kentucky does not have a procedure for provisional voting.

The third area of requirements involves voter information. It is required that state elections officials post voting information at each polling place on election day, including a sample ballot, voting instructions, information on voting rights, and information on who to contact in case of fraud. These requirements must be in place by January 1, 2004.

The fourth area of requirements provides that each state must implement a computerized statewide voter registration list which is coordinated with other databases and is maintained at the state level. This list must be established by January 1, 2004, and Kentucky is one of the few states that already has such a list in place.

The fifth requirement pertains to voter registration. New voter registrations for federal elections may not be accepted unless a voter has included a driver's license number or the last four digits of a social security number, or assigns a unique identifier. Kentucky meets this requirement, as it uses the social security number. New voters that have registered by mail will be required to present identification when they vote. These requirements apply to new voters registering after January 1, 2003. Kentucky requires election officers to confirm the identity of voters by personal acquaintance or by documentation such as a driver's license or social security card.

Finally, states must establish an administrative complaint process to remedy grievances relating to elections. If a state does not apply for any funds, this grievance procedure must be in place by January 1, 2004. If a state receives federal funds, the grievance procedure must be set out in the State Plan.

The Act also imposes a maintenance of effort requirement if federal funds are received.

One important feature of the Act is a maintenance of effort requirement. This requirement states that, in order to receive federal money, the state has to "maintain the expenditures of the State of activities funded by the payment at a level that is not less than the level of such expenditures maintained by the State for the fiscal year ending prior to November 2000." This requirement may present a budgetary issue for the funding of state elections in the future.

States must also comply with requirements for military and overseas voters.

The Act also imposes new requirements for military and overseas voters. With respect to military and overseas voters, states must:

- Establish a single state office to provide information on registration and absentee voting;

- Report the number of military and overseas ballots and applications received;

- Provide absentee ballots for two general elections to voters who request them;

- Accept a standard oath for verifying election materials;

- Not refuse ballots for being submitted too early;

- Notify overseas and military votes whose applications have been rejected.

Additional grant programs are established by the Act.

Additional "access grants" totaling $100 million are available for increasing polling place access for disabled voters. State protection and advocacy systems will be eligible for $40 million in payments to assure full participation in the electoral process by individuals with disabilities. Research grants are available to test new voting systems and technology. The Help America Vote College Program provides $5 million to encourage college students to become poll workers and encourages states and localities to use students in that capacity. The Help America Vote Foundation has the same purpose for secondary school students and is also provided with $5 million for implementation.

PUBLIC FINANCING OF GUBERNATORIAL ELECTIONS

Prepared by Laura H. Hendrix

Question

Should public financing for gubernatorial elections be maintained?

Background

Voluntary public financing programs respond to Supreme Court rulings that prohibit mandatory spending limits on candidates.

In 1992, the General Assembly enacted legislation providing for partial public financing for gubernatorial slates. The public financing program was implemented in the 1995 gubernatorial elections and was in place for the 1999 gubernatorial elections but was not utilized in that election. In the 2002 legislative session, the Executive Branch budget bill was not passed due, in part, to a disagreement over whether or not to provide funds for the public financing program. Additionally, the General Assembly did not enact a budget in 2002 special session for the same reason. The Governor has issued a spending plan which provides funds for the public financing program. However, recent published statements by policymakers indicate that the allotted funds will not be spent for that purpose.

Public financing programs for candidates are designed to provide public funds in exchange for a candidate's promise not to exceed a certain spending limit. Because of U.S. Supreme Court decisions, any expenditure limits on candidates must be voluntary. Many state legislatures and Congress have enacted voluntary public financing programs that condition a candidate's acceptance of public financing on an agreement to limit spending. According to the National Conference of State Legislatures, as of 2001, 17 states had some type of partial public financing and seven states had full public financing for either legislative or gubernatorial races or both. Since 1976 public financing has also been provided to presidential candidates and to the major party conventions.

Discussion

Kentucky's public financing program was enacted in 1992 and was first implemented in 1995.

Kentucky's program is a partial public financing program which permits a limited amount of private contributions to be raised by participating slates. Contributions are then matched with public funds. Public funds are available only to slates of candidates for Governor and Lieutenant Governor. Slates are not required to participate in the program.

Kentucky's program provides public funds for slates in the primary, runoff primary, and general election, if slates meet certain criteria. Funds for public financing are provided through matching transfers from the election campaign fund, which is a specially designated fund within the General Fund. The fund receives general fund appropriations, surplus candidate campaign funds, surplus public funding for gubernatorial candidates, and candidate filing fees over $20.

Gubernatorial slates must meet criteria to participate in the public financing program and must limit their spending to a certain amount.

All gubernatorial slates, whether or not they want to participate in the program, must file a statement of intent with the Registry of Election Finance by the filing deadline for nomination papers, which is the last Tuesday in January. This statement may be rescinded not later than 10 days after the filing deadline. Slates wishing to participate in the program must file a statement of intent to accept spending limits for the entire campaign. A slate that rejects spending limits in the primary is not eligible to receive funds in the runoff primary or the general election. Slates that qualify and participate in the program agree to limit their spending to $1.8 million in the primary, $1.8 million in the general election, and $300,000 in the runoff election. Participating slates may not exceed spending limits through expenditures by others that do not qualify as independent expenditures.

A slate must raise a certain amount in qualifying contributions order to be eligible for state funds.

Additionally, in order for a slate to receive transfers from the fund in a primary or general election, the slate must show that it has raised a minimum threshold qualifying amount of $300,000 in qualifying contributions. These qualifying contributions must be paid by personal check, cashier's check, or money order, and include cash, loans, pledges, in-kind contributions, or contributions in excess of the $1,000 contribution limit. Also, not more than 50percent of the threshold qualifying amount may be received from residents of the same congressional district. Finally, qualifying slates do not receive transfers unless at least one other opposing slate in the primary or general election has received and deposited funds in excess of the minimum threshold qualifying amount of $300,000.

Private contributions are matched with state funds at a ratio of $2 in state funds for each $1 of private contributions.

Qualifying slates may raise private qualifying contributions of up to $600,000, in a primary or general election. These private contributions may then be matched with public funds from the election campaign fund at a ratio of $2 in public funds for every $1 raised in private funds, up to a maximum of $1.2 million in public funds, in a primary or general election. In a runoff primary, qualifying slates do not raise any qualifying contributions, and they are eligible to receive $300,000 from the fund.

If a nonparticipating slate receives contributions or spends in excess of the $1.8 million spending limit in the primary or general election, participating slates are released from the spending limits. If this occurs, participating slates may then resume fundraising, and any additional qualifying contributions which are raised may then be matched at the 2:1 ratio with public funds, with no limitation on the amount of funds raised or public funds received. In a runoff election, if this "trigger" is activated, the spending limit is lifted and the qualifying slate may resume fundraising, but these funds are not matched with public funds.

The public financing program presents policy choices for the General Assembly.

In 1975, the candidates for Governor and Lieutenant Governor spent around $3.4 million in the primary and general elections. In 1991, the candidates spent $24 million. The public financing program was first implemented in 1995, which was also the first year that candidates for Governor and Lieutenant Governor were required to run as a slate. In 1995, there were three participating and qualifying slates in the primary election and two participating and qualifying slates in the general election. There was no runoff election in 1995. In 1995, the expenditures for slates were about $10 million, with $6 million being public funds. In 1999, there were no slates that qualified to receive public funds.

Proponents of the program believe that the program reduces spending on gubernatorial races and allows candidates to concentrate on issues.

There are some basic policy choices to be made with respect to the public financing program. The program could either remain in statute and be funded for the next election, remain in statute and not be repealed as a whole, or amended by the General Assembly. Proponents of public financing seek to keep the program in place because they maintain that there is no other constitutional way that states can limit spending on campaigns. They state that the increasing spending on campaigns in the years prior to the passage of the public financing program and public discontent with this phenomenon justified the creation of the program, and that the program effectively limited spending in the one race in which it was used. Proponents believe that slates are better able to debate issues and policies, rather than concentrate on solely raising funds and running political ads. They also argue that the public financing program, which has been in place for decades in other states, should be allowed to operate longer before change or repeal. They contend that increased disclosure, or further study to identify minor improvements could enable the law to be more effective. Some say that increasing the spending limit, decreasing the amount of public funds available, or including expenditures by other groups in the spending limit may make the law better. They argue that the amount spent on public financing of the gubernatorial race is small, compared to the total amount of the state's budget and the previous cost of statewide races. Finally, they contend that the public financing law helped to make the 1995 gubernatorial race one of the most competitive in memory, gave the public a viable choice of slates in the primary and general elections and allowed slates to focus on issues rather than the need to raise funds or reward large contributors.

Opponents of the program believe that public funding should not be used for candidates' campaigns.

Opponents of the public financing law believe that state funds should not be used for candidates' campaigns and stress that the budget situation is such that these funds would be better used elsewhere. They point out that since slates can receive state matching funds up to an unlimited amount, the budget could be compromised if one slate breaks the spending limit. They also note that political parties are not constrained by the spending limits, unless the parties have coordinated their spending with a slate; so, there is no effective limit on party spending in the gubernatorial race. Similarly, independent expenditures by outside groups which expressly advocate the election or defeat of a slate cannot be prohibited, although the expenditures must be reported. Issue ads, which do not involve express advocacy, cannot be regulated at all and further undermine the purpose of the spending limit. Opponents argue that the law also penalizes taxpayers who do not have the opportunity to decide which candidates receive public funds, unlike a check-off program. Finally, many opponents believe that public financing programs violate the free speech of candidates who choose not to participate in the public financing program.

HEALTH AND WELFARE

DO NOT RESUSCITATE ORDERS

Prepared by Eric T. Clark

Question

Should the General Assembly require Emergency Medical Services personnel to honor advance directives with "Do Not Resuscitate Orders"?

Background

A Do Not Resuscitate Order *(DNR Order) is a request from a person, or a person's legal surrogate, to withhold methods of resuscitation.*

A "Do Not Resuscitate Order" or DNR Order is a request from an individual or an individual's legal surrogate to withhold external chest compressions, incubation, defibrillation, cardiac medications, and artificial respiration for a person in cardiac or respiratory arrest. The Kentucky Emergency Medical Services Board (EMS) uses a DNR form, developed by the Kentucky Board of Medical Licensure, in acknowledging such wishes usually from a terminally ill patient. An EMS DNR Order only applies to a resuscitation attempt by a health care provider in a prehospital setting—in a patient's home, long-term care facility, during transport to or from a health care facility, or in other locations outside of an acute care hospital. The EMS DNR Order does not affect other forms of emergency care, such as oxygen administration, suctioning, control of bleeding, comfort care, and the administration of an analgesic.

An EMS DNR Order form must be completed and readily available to EMS personnel on the spot in order for EMS to honor DNR Orders.

Any adult may execute an EMS DNR Order, although it is usually executed in consultation with a physician. If a person for whom the EMS DNR Order is contemplated is unable to give informed consent or is a minor, that person's legal surrogate may sign and date the DNR Order. The original, completed EMS DNR Order must be readily available to EMS personnel in order for it to be honored. Also, a person may wear a bracelet on an ankle or wrist to indicate the existence of a DNR Order. If the EMS DNR form or bracelet is not readily available when EMS personnel arrive at a scene, a resuscitation attempt will be initiated until the form or bracelet is presented and the identity of the patient is confirmed by EMS personnel. An EMS DNR Order may be revoked at any time by the individual originally requesting it or a legal surrogate.

Discussion

Many Kentuckians are not aware that a DNR Order within an advance directive is not honored by EMS personnel.

Many Kentucky citizens are not aware of the EMS DNR Order or the form required before EMS personnel will honor a DNR Order outside the hospital setting. As a result, some Kentuckians may be including "Do Not Resuscitate Orders" within advance directives but are not simultaneously completing the EMS DNR Order form. A DNR Order within an advance directive is honored by physicians, hospitals, and nursing homes, but it is not honored by EMS personnel. Unnecessary grief among family members, *Possible General Assembly Action may include requiring the EMS Board to honor DNR Orders within advance directives or encouraging the EMS Board and all providers to create a universal DNR form.*

patients, and the EMS community may result if EMS personnel resuscitate an individual in accordance with training and protocols, unaware that the person had mistakenly believed that a DNR Order in an advance directive, without an EMS DNR Order, was legally sufficient.

The General Assembly may wish to review current EMS DNR Order protocol and enact law to further clarify the intent of the EMS DNR Order. If the EMS DNR Order form is considered redundant with an advance directive, the General Assembly may consider deleting this requirement within the EMS Board's scope of practice and require the Board to honor a DNR order in an advance directive. If the EMS DNR form is relevant to the Board's scope of practice, the General Assembly may consider encouraging the EMS Board and other health care providers to create a universal DNR form to be used by all providers to facilitate the wishes of the individual who does not want to be resuscitated.

CERTIFICATE OF NEED

Prepared by Eric T. Clark

Question

Should the General Assembly limit or repeal the "certificate of need" process?

Background

A certificate of need is an authorization from the Cabinet for Health Services to acquire, establish, offer, or substantially change a health service. The original purpose of the certificate of need, as established by the federal government, was to improve quality and increase access to health facilities, services, and providers, and to create a cost-efficient health care delivery system.

The certificate of need process provides the state with a mechanism to control Medicaid expenditures by limiting the number of medical services.

According to the Cabinet for Health Services, Kentucky's Medicaid expenditures have increased from over $2 billion during the 1996 fiscal year to projected expenditures of over $3.7 billion for FY 2002 and over $3.9 billion for FY 2004. The U.S. Census Bureau indicates that there were approximately 505,000 Kentuckians over the age of 65 in the year 2000. The Kentucky State Data Center projects the population of Kentuckians over the age of 65 will grow to over 804,000 by the year 2020. This growing population will have a major impact on nursing homes, hospitals, and other long-term care facilities, all of which are subject to the certificate of need requirements. Expenses for all of these facilities have continued to grow year after year, and as more facilities are constructed and more Medicaid recipients utilize them, the Medicaid budget could expand significantly.

The State Health Plan is the backbone of the certificate of need process.

The State Health Plan sets forth the review criteria that are used when reviewing applications for certificates of need. This plan is prepared triennially, updated annually, and approved by the Governor. By following the recommendations of the State Health Plan, the certificate of need process impacts the delivery of medical services by controlling awards of applications for the construction of health care facilities and the purchase of medical equipment, the use of which would be reimbursed by Medicaid. The State Health Plan is only one step in the approval process of certificates of need; there are biennial budget authorizations and limitations as well.

Discussion

With a Medicaid budget shortfall projected for the next several fiscal years, the General Assembly will be looking for ways to help fund Medicaid programs. There has been much debate on the effect of certificate of need requirements on cost, consumer choice, geographic access, and the quality of health care, as well as the propriety of knowingly engaging in action that may make access to health care services more difficult. Some people view this access issue as an important policy consideration.

One method utilized by some states to control Medicaid expenditures has been to limit access by placing a moratorium on some or all aspects of the certificate of need process, thereby limiting or preventing construction of new facilities or the opening of new provider offices. The Governor previously placed a moratorium on certain portions of Kentucky's certificate of need program, but the moratorium expired in early 2002.

Removal of the federal mandate to implement the certificate of need process resulted in some states repealing or modifying certificate of need laws.

The federal mandate on the states to implement the certificate of need process was lifted on January 1, 1987, leading at least fourteen states to repeal or modify their certificate of need laws. These changes range from reducing the actions requiring a certificate of need to repealing the entire certificate of need process.

Proponents of Kentucky's existing certificate of need process claim that this program helps the Department for Medicaid Services project future expenditures and service demands. The certificate of need also limits the duplication of medical services within geographic regions of the state. Due to current budget constraints, the General Assembly may wish to review the certificate of need process.

Opponents of the existing certificate of need process argue that the General Assembly should modify or repeal it to enable an unlimited free market system to shape access to health care services. They further argue that government intrusion arbitrarily denies access to health care in areas of the state that have too few health care providers.

OLMSTEAD COMPLIANCE

Prepared by Robert Jenkins

Question

Should the General Assembly reallocate funding to provide more community-based services in lieu of institutional services as a result of the United States' Supreme Court's decision in *Olmstead v. L.C.*?

Background

A United States Supreme Court decision has mandated that states develop a plan to move disabled person into less restrictive environments in the community.

In *Olmstead v. L.C., 527 U.S. 581 (1999)*, the United States Supreme Court interpreted the Americans with Disabilities Act (ADA) to prohibit any state from discriminating against people with disabilities by not providing long-term community-based service alternatives to qualified individuals who prefer them. Aspects of the decision could impact the General Assembly's policy decisions for many years and will likely affect many programs offered by state government.

The U.S. Center for Medicare and Medicaid Services (CMS) has mandated a compliance plan for each state, and Kentucky is working toward its own comprehensive working plan for placing all qualified persons with disabilities into less restrictive settings. *Olmstead* does not require a state to close long-term care institutions or ignore budgetary restrictions, but it requires the state to review demographics and policies in light of current and projected funding to steadily move toward the goal of providing alternatives to restrictive care or institutionalization.

Many Kentuckians will be affected by the Olmstead decision.

It has been estimated that approximately 795,000 individuals could be affected at some point by this compliance plan, or 19.8 percent of Kentucky's population, taking into account the total number of Kentuckians who either are living with a disability or are *at risk* of being institutionalized for long-term care treatment of an ADA-relevant disability. In response to *Olmstead,* Kentucky will be required to utilize a test to determine if community placement is appropriate, if the transfer from an institution is unopposed by the person, and if the placement can be reasonably accommodated. The federal Office of Civil Rights (OCR) will work with the state on compliance planning, and CMS will provide support and guidance. Kentucky was the first state to receive OCR assistance with its compliance plan.

Kentucky has already taken action to begin implementation of its working plan:

Kentucky will use many sources of funding and program support to work toward implementation of its comprehensive working plan.

- The Cabinet for Health Services is looking at Medicaid waivers with an emphasis on changing the current service delivery system by exploring new federal program opportunities such as Ticket-to-Work, which would help maintain people in the workforce while providing state medical assistance. The Cabinet also is considering options to transition current long-term facility residents back into the community with ample supports.

- The Cabinet for Health Services is seeking a federal Nursing Home Transition Grant and a Real C.H.O.I.C.E.S (Citizen monitoring, Housing Options and Investing in Creative Educational Solutions) Grant to assist in notifying people of alternatives to nursing home placement prior to admission. The long-range implementation of the *Olmstead* plan will require an on-going strategic plan with many revisions to meet the goals and objectives of the planning initiatives and to maximize consumer involvement and participation.

- In November of 2000, Kentucky was one of seven states to receive a Robert Wood Johnson Foundation grant to develop a comprehensive Olmstead plan. The Cabinet for Health Services contracted with the UK-Interdisciplinary Human Development Institute (IHDI) to facilitate the planning initiatives and coordinate activities of all stakeholders, and it established a state Olmstead Planning Committee to develop mission and vision statements and guiding principles with the participation of a wide range of stakeholders.

- The Coordinator of the Olmstead State Plan Project has indicated that the planning committee would (1) evaluate whether the formal assessment process that is completed when an individual enters a long-term care facility is a fair process, (2) develop a method to inform individuals of alternatives that exist to allow them to leave a facility and return to the community, and (3) investigate the feasibility of providing a grant to individuals who leave a facility but would have to meet Medicaid spend-down requirements to receive reimbursement for community-based services.

- Kentucky continues to evaluate its mental health service delivery system and other programs that could potentially involve institutionalization of program participants.

Discussion

Kentucky's ability to respond to *Olmstead* will be ultimately determined by budgetary priorities. While many people may agree with the basic concept of favoring community services over institutionalization, maintenance of a person in the community may, in fact, be much more costly. The United States Supreme Court expressly held that a state's response may appropriately be guided by budget considerations.

The Medicaid program plays a large role in the care of persons requiring long-term care who may be eligible for Olmstead-related community services.

The Medicaid budget currently constitutes over three billion dollars in annual spending, and a large portion of this spending involves *Olmstead*-related services. To qualify for Medicaid, an elderly person must, under federal law, meet an institutional level of care. If a person requires institutional-level care but is able to remain at home due to family care and home health services, that person is not eligible for Medicaid. If the same person agrees to nursing home placement, then Medicaid will pay for all medical services and care. This statutory favoritism for nursing home placement is known as the "institutional bias" in Medicaid. Many people believe that Medicaid could save millions of dollars if the institutional bias were removed. Opponents to this theory argue that nursing home care for remaining residents would suffer due to decreased reimbursement, and that savings might not result to the program because the costs of community care can be expected to increase and because more people would avail themselves of community care than would enter a nursing home.

Opponents of changes in the community-based services system also argue that people who are currently receiving little state support but who are adequately cared for by their families could, instead, elect for community-based service care, adding to Medicaid costs. Proponents argue that Kentucky could limit the number of people eligible for care under the home and community-based Medicaid waiver by accurately assessing the numbers of persons living in nursing homes who might be eligible for the care and by targeting any expansion of the program to these individuals.

The General Assembly may be consider consolidation of programs from different agencies to provide maximum coordination and efficiency.

The General Assembly may consider consolidation of offices to limit duplication of administration and oversight. Possible consolidation might involve the long-term care programs from the Department for Medicaid Services, the Office of Aging Services, and the Department for Mental Health/Mental Retardation Services. Community-based coordination might be encouraged by the Department for Public Health in conjunction with the Department for Community-Based Services. Administration may be streamlined by dedicating dollars for "person-centered funding," whereby individuals would be given an account with a specific sum of money from which to pay for any combination of long-term care services, community-based services, health care, *Person-centered funding has been used by many states to allow more persons to receive care outside of an institution.*

adult day care, home care, or other personal care services. Proponents of these ideas laud the flexibility that these approaches give to the individual, but opponents fear that the funds may not be appropriately managed without close supervision, and that costs could increase.

Kentucky faces several other barriers to a full and complete *Olmstead*-compliance plan. Health care workforce shortages could limit options for care. Housing shortages for persons with disabilities might not allow some persons who wish to leave institutional settings to move into less restrictive environments. Lack of access to transportation may prevent persons from receiving appropriate personal care or medical treatment that otherwise would be provided in an institution. A lack of relevant data will make planning and evaluation of budget considerations difficult. Innovative approaches to addressing these barriers may be necessary for adequate implementation of the dictates of the U.S. Supreme Court's decision.

FEDERAL REAUTHORIZATION OF THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROGRAM

Prepared by DeeAnn Mansfield

Question

Should the General Assembly reallocate funds to address the effects of increased work participation requirements under the reauthorization of the Temporary Assistance for Needy Families (TANF) program?

Background

The TANF block grant to states replaced the AFDC entitlement for poor families in 1996.

The federal Temporary Assistance for Needy Families (TANF) block grant to states replaced the former Aid to Families with Dependent Children (AFDC) entitlement with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193 (PRWORA). Under the TANF block grant, states are guaranteed a fixed amount of funding from the federal government for six years. The provisions of TANF require states: to provide time-limited assistance, to employ strict work requirements, to address family formation goals, and to meet maintenance of effort requirements for funding. The flexibility of TANF permits states to design programs to fit their own needs.

K-TAP's annual budget has been $253.9 since 1996.

Kentucky's TANF program, the Kentucky Transitional Assistance Program (K-TAP), annually receives about $181.3 million in federal funds and about $72.6 million in state funds. As required under TANF, Kentucky limits cash assistance to a lifetime total of 60 months, requires all families to have a welfare-to-work plan within 24 months, and enforces TANF work requirements. Current work requirements are 20 hours per week for single mothers with children under age 6 years, 30 hours per week for single parents with older children, and 35 hours per week for two parent families. Mothers are exempt from the work requirements for one child under one year of age. Kentucky uses the flexibility under TANF to permit the use of higher education and job training to meet work requirements, to transfer funds to the Social Services Block Grant and the Child Care Development Block Grant, and to provide support services to eligible families not receiving cash assistance.

Reauthorization proposals include flat funding and increased work requirements for recipients.

The TANF block grant was scheduled for federal reauthorization in 2002 but is currently operating under a Continuing Resolution (H.J. Res. 124) that extends funding for government programs, including TANF, through January 11, 2003. There are several TANF reauthorization plans under consideration. Most plans retain current levels of block grant funding and increase work participation requirements. The proposals include requiring a higher proportion of all recipients to meet the work participation requirements, additional hours of employment for recipients, limits on the activities that may be counted toward the work requirements, and more rapid movement of recipients into employment.

Discussion

The combined impact of the increased work requirements may be significant.

The combined impact of the proposals to increase work requirements could result in significant challenges for state programs. States currently receive credit for having significant caseload reductions. This credit would be phased out under the proposal to increase TANF work participation requirements. Kentucky has relied on the credit to meet the requirements. In 1999, Kentucky's work participation rate was 25.6 percent and the required rate under TANF was 40 percent. Kentucky met the 40 percent requirement by receiving credit for reducing its total caseload from 75,384 in 1995 to 44,491 in 1999. Without the caseload reduction credit, the federal government may have imposed penalties for the 14.4 percent deficiency by reducing the total block grant.

Kentucky may need to identify more work activities and redistribute child care funds.

In order to avoid federal penalties under the proposed work requirements, Kentucky would need to require employment of more welfare recipients. Kentucky currently has 12,902 K-TAP recipients participating in work activities for at least 20 hours per week. Potentially, more than 5,000 additional adults will need to find employment, and many will need to work additional hours. This may be difficult because many recipients face multiple barriers to employment including high local unemployment rates and low educational achievement.

Kentucky may also need to identify work activities to replace education and job training activities. In 2001, approximately 2,033 recipients were using education and skills training activities to meet the work requirements. It could make it more difficult for recipients to increase their employability if these activities became ineligible.

Increased work requirements may press Kentucky to reallocate additional child care subsidies. Kentucky currently provides child care subsidies for approximately 43,300 children whose families have incomes below 165 percent of the poverty level. For fiscal year 2002, Kentucky transferred $36.2 million in TANF block grant funds to help cover child care costs. Maintaining or increasing this level of spending on child care may involve serving fewer families or providing less to more families.

Some possible actions by the General Assembly include reallocating TANF funds, reallocating funds from other programs, creating new sources of funds, and taking no action if the Kentucky economy can accommodate increased employment without additional training and child care costs.

Some possible actions that may be taken by the General Assembly to address the effects of the proposed changes in the TANF block grant include:

- Reallocating TANF funds to expand employment opportunities and employment supports for recipients. One disadvantage to this action may be that TANF funded programs related to strengthening families, such as the Kinship Care program, may be reduced. An advantage may be that new funding would not be required.

- Reallocating funds from other assistance programs, such as the KIDS NOW early childhood initiatives. This action would not require additional funds, but programs that are intended to have the effect of improving the future employability of children may be reduced.

- Creating new sources of funds to offset the increased need. For example, a child support–pass through program would target more funds to children. Kentucky currently returns child support collected on behalf of recipients to the federal government. Returning collected child support to children may help families address the increased costs of child care.

- Taking no action. It is possible that there would be room in the Kentucky economy to accommodate an increase in employment without providing additional training and without creating a need for additional child care. If realized, this outcome would avoid strain on the budgets of current family and children programs.

The current TANF block grant program may be extended.

The United States Congress may delay reauthorization of the TANF block grant program and instead approve additional extensions of the current TANF block grant program. A congressional extension would delay the need for immediate state action.

CHILD SUPPORT AND SHARED-PARENTING TIME
Prepared by DeeAnn Mansfield

Question

Should the General Assembly modify child support obligations based on proportion of parenting time that is shared?

Background

Child Support Guidelines had been based on the assumption that fathers were parenting their children 30percent of the time.

Several states, including Virginia, Indiana, Colorado, California, and New Jersey, have enacted provisions to modify child support awards according to the proportion of shared parenting time. The need for these provisions results from the perception of legislators, judges, attorneys, and parents that fathers appear to be spending more time parenting than they had in the past. Previously, states designed their child support guidelines under the assumption that mothers spent more time parenting than fathers. The amount of time that fathers spent with their children likely varied, but it was typically assumed that children were with their fathers thirty percent of the time and with their mothers seventy percent of the time.

Social changes have increased the proportion of time that fathers spend parenting.

Some say that several factors lend credence to the perception of a more balanced distribution of parenting time. The growth in the proportion of mothers in the labor force has necessitated some increased fathering time. Studies demonstrating the psychological and social importance of fathering for children may have spurred some fathers to spend more time with their children. Due to federal requirements, state child support agencies have made greater efforts to establish paternity in cases of out-of-wedlock births. Some fathers appear to take more active interest in their children if paternity has been established and they are required by law to pay child support.

Kentucky law does not provide specific guidance on adjustments for shared parenting time.

Current Kentucky law permits modification of the obligation amount in the child support guidelines table in KRS 403.212(6) for health insurance payments, child care expenses, and pre-existing orders for prior-born children. The 2000 General Assembly added a provision to adjust child support awards in cases of split-custody arrangements where it is assumed there is an equal split in residential and legal custody. Judicial discretion can also be used to deviate from the guidelines but there is little statutory guidance.

Discussion

There are two general approaches that other states have taken to permit an adjustment to child support awards based on shared parenting time. The "Cliff" approach makes an adjustment in the amount of child support awarded when visitation reaches a particular number of days. No further adjustments are made. Experience with increased litigation associated with this approach

Those states that allow modifications of child support based on the amount of parenting time generally provide for a gradual adjustment.

led some states, such as Virginia and Colorado, to adopt a "modified Cliff" approach that provides for gradual adjustments after visitation reaches successive numbers of days. This is the most common approach used by states.

New Jersey and California use an approach that makes adjustments to child support awards on the premise that when income and time in both households are equal, then no child support is awarded. To the extent that income and time vary, adjustments up or down are made in the award amounts. These states require court approved software to be used to compute the child support awards.

Some states have incorporated provisions for deviations for shared parenting time into the formula used to calculate an obligation amount. This allows states to stay in line with the Family Support Act of 1988 [P.L. 100-485] that requires accountability for judicial deviations from the guidelines.

Adopting a shared parenting time adjustment could result in more uniformity and a greater sense of fairness.

One advantage to providing more uniform standards for modifying child support awards for shared parenting time is that it could result in more standard practice across the state. Currently, judicial deviations in child support awards for shared parenting time vary greatly. Statutory guidance could set the conditions under which deviations may be considered.

Alternatively, the provision of more uniform standards for modifying child support awards could be disadvantageous. Rigid rules regarding shared parenting time may tie the hands of local judges too tightly. Statutory language is unlikely to fit all of the many variations in parent and child arrangements. Current judicial discretion permits judges to deviate from the guidelines in order to award appropriate child support based on individual situations.

Modifications for shared parenting time may not be in the best interest of children.

A second advantage may be a greater perception of fairness by parents. Some parents believe that obligation amounts are either too excessive or too low because their child spends a disproportionate amount of time with them rather than with the other parent. However, permitting a modification in child support awards for shared parenting time may increase the number of legal battles between parents who are attempting to decrease or increase award amounts. This may seem more fair to some parents but may not be in the best interest of children.

MEDICAID BUY-IN PROGRAM

Prepared by Murray Wood

Question

Should the General Assembly mandate a new Medicaid "buy-in" program for disabled workers?

Background

The Medicaid buy-in option permits states to extend Medicaid coverage to working people with disabilities whose incomes from employment would otherwise disqualify them from Medicaid. States may establish income and assets guidelines, and impose copayments, fees, premiums, or other cost sharing measures for participants.

Title II of the Social Security Act established the Social Security Disability Insurance Program (SSDI) that provides monthly cash benefits for workers who have been employed and contributed to the Social Security trust funds and who meet disability standards or become blind before retirement age. SSDI benefits are paid from the Social Security Trust Fund and are based on earnings. Benefits may be paid to spouses with disabilities, dependent children, and adult disabled children (if the permanent disability occurred before age 22) upon the retirement, disability, or death of the insured worker. The Social Security Administration reports that a "typical" disabled worker will receive $833 per month for FFY 2003.

Over 238,000 persons receive federal disability benefits in Kentucky.

Title XVI of the Social Security Act established the Supplemental Security Income Program (SSI) that provides monthly cash benefits to low-income persons with limited resources on the basis of age, blindness, and disability. Benefits are paid from federal general revenues. Eligibility for SSI is based on financial need. The maximum monthly benefit for FFY 2003 is $552 for an individual and $829 for a couple.

SSDI and SSI are administered by the Social Security Administration. Some disabled individuals receive both SSDI and SSI. SSI recipients are automatically eligible for Medicaid; SSDI recipients are eligible for Medicare after 24 months of disability and may be eligible for Medicaid if they meet income guidelines or by "spending down" on health care to meet the income guidelines.

Both programs have rules that may affect a person's incentive to seek employment. An SSDI recipient may not earn more than $780 per month (federally defined as "substantial gainful activity") for a set period of time without losing benefits. An SSI recipient loses cash benefits when earnings exceed $12,000 per year, and loses

The risk of losing Medicare or Medicaid is a major disincentive to employment for disabled persons.

Medicaid eligibility when earnings exceed $20,819. Disabled students seeking postsecondary degrees and higher paying jobs are particularly affected by the earnings limits of SSI.

The U.S. General Accounting Office estimates that less than one-half of one percent of SSDI and SSI recipients leave the disability rolls and return to work. Many persons with disabilities are unable to obtain health insurance in the private sector, especially health plans that provide the services and supports that enable them to live independently and enter, remain in, or rejoin the workforce.

Congress and the Executive Branch have a history of supporting employment incentives.

Eliminating barriers to health care coverage and other needed supports and creating financial incentives to work can improve the short and long-term financial independence of persons with disabilities. Congress has enacted several measures to support those goals and provide more opportunities for employment for disabled persons:

- Rehabilitation Act;
- Individuals with Disabilities Education Act (IDEA);
- Workforce Investment Act;
- Americans with Disabilities Act of 1990;
- Work incentives in Section 1619 of the Social Security Act;
- Medicaid Buy-In Option of the Balanced Budget Act (BBA) of 1997; and
- Ticket To Work and Work Incentives Improvement Act of 1999.

In February 2001, the President announced a New Freedom Initiative that includes goals of expanding educational and employment opportunities for persons with disabilities.

Discussion

The Medicaid buy-in option is offered under the BBA of 1997 and the Ticket to Work Act. There are differences in the program requirements under each federal law, and states can choose either approach. Kentucky disability advocates favor implementation under the BBA of 1997 because it allows higher premiums for the Medicaid buy-in.

A Medicaid buy-in program could be coordinated with the Ticket to Work program.

Kentucky began implementation of the “Ticket to Work” program in November 2002. The program provides a “ticket” to SSDI and SSI recipients that can be used to obtain employment services from a variety of providers. The providers are then paid a percentage of the “ticketholder’s” monthly disability benefits when the holder becomes employed and no longer receives disability benefits, or the provider may receive up to four payments (not to exceed $1,000) when the holder becomes employed but continues to receive disability benefits. The Ticket to Work Act also includes provisions to extend Medicare to those employed or working toward employment. Medicaid benefits may be extended through a buy-in program.

Of the first two rounds of the “Ticket” roll out (32 states and the District of Columbia), Kentucky has the highest percentage of population receiving tickets at 5.9 percent of the total population. Mississippi is second highest at 5.5 percent. As of December 2002, the Social Security Administration has mailed more than 22,000 tickets.

Enactment of a buy-in program could extend Medicaid to the following groups:

- SSI recipients who have higher unearned income and more resources than currently allowed;
- SSI recipients who earn more than $20,819;
- SSI recipients who marry someone not on SSI who has more income or resources than currently allowed;
- SSDI recipients who participate in other Medicaid programs that require low earned income limits, low unearned income, or low resource limits;
- SSDI recipients in a trial work period who would use Medicaid as a Medicare supplement;
- SSDI recipients in the 2-year qualifying period, before Medicare is available; and
- SSDI recipients who use Medicaid as a “wrap around” for required services that Medicare does not cover.

The Medicaid buy-in program is also presented as an employment and economic independence issue. Disability advocates say the

Providing extended health care coverage may enable disabled workers to progress financially and eventually forego public assistance.

goals are to increase the productivity of disabled residents and to enhance the economic and fiscal status of the State. It is said the program could increase employment, earned wages and tax receipts, and could fuel the state economy by adding the purchasing power of the disabled workers. For example, disabled workers receiving benefits contributed more than $1.3 million in state and federal taxes in 2001. The buy-in program may move some persons with disabilities from existing Medicaid waiver programs and permit others to receive those services and reduce current waiting lists.

As of May 2002, 19 states have implemented a Medicaid-buy-in program and 10 additional states have enacted legislation to create a buy-in program. Each state differs in its approach and its program design. Nebraska enrolled 112 of 24,590 (0.5percent) of its SSDI population in its buy-in program, which is deemed a "restrictive" program. Minnesota enrolled 6,200 of 64,370 (9.6percent) of its SSDI population, which is deemed a "permissive" program. Oregon, which has the longest experience with a buy-in program implemented in 1999, has 511 enrollees out of a SSDI population of 54,950 (0.9percent). Kentucky's SSDI population as of December 2001 was 175,958 with 115,747 of the total between the ages of 18 and 64.

Monthly premiums could be designed to cover the state's share of Medicaid expenditures for buy-in participants.

The Medicaid buy-in, as proposed by Kentucky advocacy groups, would require participants to pay a monthly premium for Medicaid and permit premiums to reflect the state's share of Medicaid expenditures. A minimum premium of $133 per month has been suggested, based on the statewide average of per member per month cost of Medicaid (based on the total Medicaid population). The maximum premium suggested would not exceed $234, the amount of the state contribution for health care for a single employee. The Cabinet for Health Services has stated that the per member per month state share estimate based on the total Medicaid population is not an accurate estimate. The Cabinet projects that the per member per month state share for the disabled population will be $769 per month for FY 2003 and $864 per month for FY 2004.

Federal regulations specify that cost sharing amounts collected from premiums paid by participants cannot be used to draw down federal Medicaid dollars; however, the General Assembly could specify another use of premium funds.

The Cabinet for Health Services, in response to inquiries about developing a Medicaid buy-in program, has stated that because of budget constraints, it has made a commitment not to engage in any initiative which would increase Medicaid expenditures. The Cabinet also indicated that cost projections for buy-in programs in other states have been inaccurate and excessive costs have caused significant budget problems.

Policymakers have flexibility to design a buy-in program to target a certain population of disabled individuals.

The flexibility of rules for the Medicaid buy-in programs present several options for policymakers. The focus of the program is a necessary first decision: whether to enable disabled persons with substantial employment and earnings to buy into Medicaid, or to enable significant numbers of disabled workers with modest employment and earnings to increase their disposable income by buying into Medicaid. Generally, programs that have higher earnings levels, lower unearned income levels, and higher premiums based on unearned income reduce the participation rate and lower the costs of the program.

A Medicaid buy-in program is one strategy for enhancing economic self-sufficiency for persons with disabilities. Other fiscally responsible initiatives could include additions or modifications to existing state policies and effective and efficient administration of those policies.

ELECTRONIC HEALTH INFORMATION SYSTEM

Prepared by Barbara Baker

Question

Should the General Assembly require statewide electronic health information system?

Background

The cost and overall quality of care have been raised as critical problems in health care. These concerns resulted in the Institute of Medicine calling for the restructuring of the health care system "to ensure that all Americans receive care that is safe, effective, patient centered, timely, efficient, and equitable." Information technology was identified as a strategy with potential to improve health care with regard to all of these areas. Furthermore, both the Institute and the Leapfrog Group advocate electronic-health information systems to support evidence based medicine and reduce medical errors. There has been a tremendous increase in medical research and development over the past 30 years. Unfortunately, there is a lag between these discoveries and the use of this information in every day clinical practice.

In its report, "To Err is Human: Building a Safer Health System," the Institute of Medicine (IOM) reported that up to 98,000 deaths occur each year due to medical error. The IOM reported that 30 percent of medical care is unnecessary and causes more harm than benefits, and that many people are not getting necessary care. The IOM also estimated an annual cost of $50 billion related to adverse events.

The federal government required the electronic transfer of certain health information in the 1996 Health Insurance Portability and Accountability Act (HIPAA), which guaranteed security and privacy of health information. In addition, the Agency for Healthcare Research and Quality reported that evidence-based medical care would be considered in setting future research agendas.

The 2002 General Assembly considered, but did not adopt, legislation on this issue.

Legislation to study the feasibility of developing a Kentucky e-health network was considered, but not adopted, by the 2002 General Assembly. The Telehealth Board would have been redesigned to include the overall electronic health network, with telehealth being one component. This legislation would have required a feasibility study with results being reported to the General Assembly prior to implementation. The system under study would have been required to support administrative, financial, clinical, public health, and research activities.

Discussion

Some proponents see e-health as a method of improving personal clinical health and population health through improved efficiency. This approach would be patient-centered and would facilitate access to clinical information and health education. It would also expand health care delivery into the home, workplace, and schools.

Architecture

Medical records would remain with the provider and be shared only with the consent of the patient.

Proponents of an electronic health information network foresee a public and private partnership with some state governance, particularly related to standards and security of patient information. The design would be distributive, meaning that the medical record would remain the property of the provider and personal, identifiable medical information would be shared only with the patients' informed consent. The network would connect the many Kentucky providers that already have electronic health systems.

An important feature of a statewide system would be its capability to allow public health officials to communicate information in real-time alerts to providers and to receive disease surveillance information back from health care providers. Timely information would help the medical community to recognize unusual diseases quickly and respond appropriately.

Compatibility with existing health information systems is important in the design of an electronic network for Kentucky.

Opponents of an electronic health information system fear that computer systems already in place would not be compatible with a new health information network. Proponents argue that the new system would be designed to link major existing systems, including the Medicaid management information system used for billing, the KASPER system used for tracking prescriptions for controlled substances, and the Medicaid eligibility system, as well as maintain the integrity of investments already made by providers. A well designed system should be flexible enough to add additional modules to clinical decisions, as well as administrative, financial, homeland security, educational, and research functions.

Quality of Health Care

The IOM advocates for electronic health systems to assist physicians use the latest research findings in their clinical practice.

Proponents view an electronic health information network as a means to distributing the latest research to practicing physicians and as a strategy to reduce medical errors. According to the IOM, medical science and technology have advanced rapidly and the health care delivery system has fallen short in translating that knowledge in clinical practice.

A research study indicates that electronic medical record could improve medical management.

According to a report by the First Consulting Group for the California Healthcare Foundation, paper-based records are burdensome for small physician offices, increase the risk of medical errors, and increase the risk of denial of payment from managed care companies. Paper-based records have also been linked to allegations of fraud from federal health care programs. The report argues that doctors need to have up-to-date information about treatment options, new drugs, and other information relevant to the care of their patients.

Cost

While there is research to support the use of electronic medical records to prevent errors, opponents may be concerned with the costs associated with the network and the security of electronic transactions. However, proponents believe that the benefits of implementing an electronic health network would outweigh the costs.

Implementation of electronic health information systems resulted in savings.

The New England Healthcare EDI Network, a consortium of providers and payors in Boston, Massachusetts, was organized for administrative simplification. This network reported a savings of $66 million, which was a 7.5 times return on investment over the first five years of operation. The cost of processing a claim reportedly fell from $6 to $0.25 by moving from paper to electronic processing. Opponents note that it is not clear how much it would cost to electronically connect Kentucky providers.

Security

Proponents of electronic medical records argue that these would be far more secure than the current paper system. There is no feasible way to track the numerous individuals who touch paper medical records. An electronic system would track everyone accessing the patient record. And any transmission of electronic personal medical information would have to meet the federal HIPAA privacy rules for electronic transactions.

Opponents fear that insurance companies could gain access to an individual's health information and use the information to establish excessive premiums. Proponents argue that these companies already have information regarding their clients' medical history.

Opponents also fear that electronic medical records might not be secure and that data could be accessed through a central data base. However, a centralized data base of identifiable patient medical information was not an option for the design of the electronic health information network that has been proposed for Kentucky in prior legislation or in bills prefiled for the 2003 General Assembly. To the contrary, proponents advocate for a decentralized network design, with the individual health care provider maintaining ownership of its patients' medical or health record. Consent of the patient would be required prior to the release of medical information to another provider, just as it is required with paper records today. Also, the federal HIPAA guarantees the security and privacy of health information. A patient registry or index with demographic data could be placed on a central server for purposes of patient registration or identification of providers who hold medical information for the patient. Also, information for certain state registries, such as the cancer registry, could be placed on a central server for use by public health officials, policy makers, or researchers, but this information would not contain any patient identifiers.

PRESCRIPTION DRUG COVERAGE FOR THE ELDERLY

Prepared by Barbara Baker

Question

Should the General Assembly implement a state prescription drug coverage program for the elderly in Kentucky?

Background

Based on the 1999 current population survey and the Kentucky Health Insurance Survey, over 158,000 Kentucky seniors aged 65 and older lack prescription drug coverage of any kind. This number is expected to grow. Population projections from the University of Louisville's Kentucky Data Center indicate that there are nearly 495,000 Kentucky residents over age sixty-five, and that this number will increase to over 551,000 by 2010 and to nearly 720,000 by 2020.

Many older people do not have insurance coverage (either Medicare or private) for drug therapies.

Most of the elderly who have drug coverage have private Medicare supplemental coverage, either through employer-sponsored plans or individually purchased policies. About one-fifth of this number had coverage through a Medicare HMO, although many HMOs are terminating their relationship with Medicare. Many poor Medicare recipients cannot afford any type of supplemental Medicare coverage, and some of the plans (Medicare HMOs) previously available in some areas were not available in others. Of those persons with *no* drug coverage, most have private supplemental health insurance that covers health benefits other than prescriptions.

Families USA estimated that Americans aged 65 and older spend an average of $1,205 a year for prescription medication, up from $559 in 1992. Kentucky seniors pay out of pocket for about 67 percent of their total drug costs, which is the highest percentage in the United States. Individuals without prescription drug coverage typically pay an average of six times as much for their generic medications and three times as much for brand name medications as compared to those with coverage. According to the Kaiser Family Foundation, Medicare beneficiaries without drug coverage averaged nearly eight fewer prescriptions per year compared to those with coverage likely because of their inability to afford the prescriptions.

Drug therapies are allowing people to live longer and with a better quality of life.

Many factors have contributed to the lack of prescription drug coverage. Medicare has not kept up with the advances in health care. When the program was created in 1965, prescription drug coverage was not included. At that time, the wide range of drugs that sustain life and prevent chronic illness were not available. Because fewer people are purchasing coverage on their own, the risk is not being spread over as large a population. Other persons have been denied drug coverage because of health problems, while others were unable to afford the deductible and cost-sharing requirements. Yet another problem is that in the future fewer retirees may have coverage under employer-sponsored plans because of retiree health coverage being offered by a declining number of employers.

Many states currently offer some form of prescription drug assistance to their older citizens.

In the absence of a Medicare prescription drug benefit, at least 34 states have established or authorized some type of program in response to the concerns of their citizens. At least 27 states have state-funded programs in operation, and an additional seven states are awaiting implementation of programs authorized by legislation. These programs are funded with state appropriations and tobacco settlement funds. The amount of drug coverage, types of drugs covered, and requirements for coverage differ substantially among the states. Seven states have discount programs for seniors based on the Medicaid rates. Other states have made broader use of federal health centers and bulk purchasing to achieve greater price discounts, while others have price controls or set maximum prices.

Until federal legislation is passed to include prescription drugs under Medicare, the federal Centers for Medicare and Medicaid Services (CMS) is filling in the gaps by providing states with greater flexibility in designing programs under the "Pharmacy Plus" 1115 waiver program. At least four states have received approval for a waiver, and several other states have applications pending. CMS is also planning to offer a Medicare-endorsed prescription drug card for seniors and disabled Medicare beneficiaries. This program is expected to save Medicare beneficiaries from 20 percent to 25 percent on prescription drug prices.

Drug companies offer discount cards to eligible seniors.

The pharmaceutical industry is also helping to fill in the gaps by offering discount cards and free drugs for seniors. These include the Together Rx card, which provides eligible seniors with savings of approximately 20 to 40 percent on covered medications from several drug companies. The Pfizer "Share Card" and the Eli Lilly "LillyAnswers Card" offer eligible seniors any of their outpatient drugs for a set fee of $15 and $12 respectively. Eligibility for the discount cards is established by the respective drug company. Pfizer and Lilly offer their cards to individuals with a family income up to about 200 percent of the federal poverty guidelines, and the Together Rx card is offered to individuals with an income up to about 310 percent of the federal poverty guidelines.

Individuals with public or private health insurance coverage for prescription medications are not eligible for these discount cards.

The Kentucky General Assembly considered legislation on this issue in 2000, 2001, and 2002.

Senate Concurrent Resolution 185 of the 2002 Regular Session of the Kentucky General Assembly created a subcommittee of the Interim Joint Committee on Health and Welfare to study issues related to senior prescription drug coverage. The 2002 Kentucky General Assembly also considered HB 819, which did not pass. The bill would have required the Department for Medicaid Services to apply for a "Pharmacy Plus" Medicaid waiver. Legislation to create pharmacy coverage for seniors was also considered by the 2000 and 2001 Kentucky General Assembly, HB 364 and SB 103 respectively. None of these were enacted.

Discussion

While there is general consensus that seniors need better access to prescription drugs, advocates for a state–only funded program are concerned about the cost of the program in light of the current budget deficit. Advocates of a "Pharmacy Plus" Medicaid waiver argue that the waiver would have to be budget neutral. Proponents of this program believe that the Medicaid match could be burdensome on the budget.

Many believe that the drug discount cards and free drug program offered by the pharmaceutical companies offer the most viable option to help senior at this time. However, each of these programs has a different application and process for distributing the drugs. These differences, along with the requirement that a physician sign the application, make it difficult for patients to access the drugs. Many individuals believe that a statewide coordinated service to assist citizens to access these drug programs would be helpful.

Options to Consider

If the issue is to be considered during an upcoming session, certain decisions relating to coverage may be necessary. The General Assembly may want to consider:

Many options are available for inclusion in a pharmaceutical assistance program.

- Whether the Federal Government has mandated drug coverage in Medicare or implemented a Medicare Rx Discount Card Program.
- Whether Kentucky should request a 1115 demonstration Medicaid waiver to provide prescription drugs through a "Pharmacy Plus" program;

- Whether Kentucky should identify strategies to provide consumer education and assistance in completing the application process for free or discounted drugs;

- Whether Kentucky should identify strategies to coordinate access to applications for free or discounted drugs;

- Whether state assistance may take the form of tax credits or deductions;

- Whether the elderly, pharmacies, pharmaceutical companies, or a combination of these groups should bear the brunt of the cost of the program; and

- Whether premiums, deductibles, copayments, and/or a maximum benefit should be imposed on any drug program.

JUDICIARY

GRANDPARENTS' RIGHTS

Prepared by Norman W. Lawson, Jr.

Question

Should grandparents have a right to go to court to force visitation with grandchildren against the wishes of the parent or guardian?

Background

The General Assembly enacted legislation granting some visitation rights for grandparents.

Grandparents frequently provide care for grandchildren in addition to, or in lieu of, that provided by a child's parents. Some grandparents feel that they have a natural right to visit their grandchildren. Parents, for any variety of reasons, might object to grandparents' visiting with their children. Grandparents groups successfully lobbied the General Assembly to pass legislation to permit a court to order the parents or guardians to allow grandparent visitation when the visitation is "in the best interest of the child." This statute, which is similar to statutes in other states, has been the subject of much litigation on both the state and federal level.

Recent court cases have restricted the visitation rights of grandparents granted by the adopted legislation.

In 2000, the Supreme Court of the United States in the case of *Troxell, et vir. v. Granville*, ruled that a Washington state statute which provided that any person could petition for visitation rights unconstitutionally interfered with parents' "fundamental right to rear their children" unless the visitation was necessary to prevent harm or potential harm to the child. The Washington statute did not require the visitation to prevent harm or potential harm to the child. In 2002, the Kentucky Court of Appeals in the case of *Scott v. Scott* ruled that the Kentucky Statute, KRS 405.021 provides for grandparent visitation if two tests are met. First, as required by the Troxell case there is a presumption that custodial parents are fit and that visitation cannot be granted to grandparents unless they can prove that the custodial parents are unfit. Additionally, the grandparents must, according to the opinion, show by clear and convincing evidence that harm to the child will result from a deprivation of visitation with the grandparent.

Discussion

Proponents

Proponents of additional legislation feel that in some cases where parents may not be providing good care for a child; where parents, because of factors beyond their control cannot provide care that the grandparents may be able to provide; or where the parents just do not want the grandparents to see the child, the grandparents should have the right to go to court to force the parents or guardians to permit grandparents to visit with the child. Many grandparents would like to expand the legislation to provide for longer periods of visitation.

Opponents

Opponents of the legislation argue that parents should be the natural custodians of their own children and that no court should be able to permit grandparents or anyone else to require that they give up their own "natural" parental rights. Parents assert that they have both the right and the duty to control whom their children visit and that, in some cases, visitation with grandparents can harm the child or place the child in a position of choosing between what can be offered by the parents versus what can be offered by the grandparents. Parents say they resent the intervention of the courts.

DOMESTIC VIOLENCE ORDERS

Prepared by Norman W. Lawson, Jr.

Question

Should domestic violence orders apply to both parties?

Background

Currently domestic violence orders apply only to the party who has committed domestic violence.

Presently, when a domestic violence order is issued, the order prevents the person found to have committed the domestic violence from engaging in various acts with the victim and typically includes "no contact" and other provisions. Proposals have been made in recent years to have a domestic violence order apply to both parties. The effect would be to require both parties to obey the order to stay away from each other and would permit the court to punish either or both parties for violation of the order. As used in this discussion, the term "domestic violence order" includes both the emergency protective order issued for short periods of time and not requiring the presence of the defendant, and the domestic violence order issued after defendants have a chance to defend themselves, which is generally issued for lengthy periods and may be renewed.

Discussion

Some believe domestic violence orders can be used inappropriately by the victim.

Proponents of the legislation feel that the present situation allows the person granted the order to have an unfair advantage over the person against whom the order is issued. The proponents cite instances in which the person granted the order voluntarily associates with the restrained party. When the new relationship deteriorates and the abuse reoccurs or the person granted the order gets mad at the other party, he or she can turn in the "violator" without any fear of being punished for complicity.

Others believe that applying an order to both parties gives additional unfair advantage to the person against whom the order is filed.

Domestic violence groups and other opponents of the legislation feel that it would permit the batterer to claim that involuntary relationships were voluntary and thus escape punishment or even cause the victim to be punished. With little more than he said/she said evidence, proving allegations would be problematic. Opponents also fear that the battered person would feel less likely to report further violation of the order for fear of punishment.

There is some question as to whether adoption of this kind of legislation would impact receipt of federal funds.

Some opponents state that passage of such a proposal could cause the Commonwealth to lose Federal funds. Currently, it would not; and given frequent changes in qualifying for federal funds, the risk of loss is unpredictable. Similarly, the amount of available federal money might not be large enough to justify the state's expense in complying with federal requirements, or large enough to outweigh the desires of the citizenry and the General Assembly regarding a particular statute or program.

A compromise proposal would leave discretion for applying the order to the court.

Compromise proposals have been made to permit the court to issue orders applying to both parties when the court finds it in the interest of justice to do so. Proponents of the initial legislation feel that this proposal, while not giving all of the relief they seek, may be acceptable. Opponents of the initial legislation oppose this compromise for the same reasons they oppose the initial legislation.

ELDER ABUSE

Prepared by Norman W. Lawson, Jr.

Question

Should legislation be passed to provide enhanced protection and greater penalties for various forms of abuse and exploitation of the elderly?

Background

There is evidence that the incidence of elder abuse is on the rise.

Abuse of the elderly is an increasingly frequent crime, partly because more persons reach their older years each year and the elderly are living longer. The result of this is that more persons are unable to properly protect themselves from physical or economic abuse, various scams and frauds, home repair schemes, and various other forms of abuse. Law enforcement records indicate that the elderly are increasingly being targeted by individual criminals, criminal gangs, and even dishonest relatives and caretakers. Proposals have been made to revise the current legislation relating to abuse of the elderly to address these problems.

Discussion

Current proposals would increase the number of crimes and enhance penalties.

The current proposals would designate additional behaviors that would be considered as crimes against the elderly. Persons in a position of special trust such as caretakers would incur higher penalties or be subject to specialized offenses, including various types of negligence and failure to recognize and deal with risks. Most current misdemeanor penalties would be raised to felonies and the number of available felony classifications would increase from the traditional Class D felony with a 1 to 5 year sentence for most theft offenses to Class C felonies with 5 to 10 year sentences and Class B felonies with 10 to 20 year sentences.

Proponents believe that stronger laws will provide more effective protection of the elderly.

Proponents of the legislation cite the increasing number of crimes against the elderly. They believe that the present legislation, found in KRS Chapter 209, was designed to protect persons primarily in nursing home situations, and although application has been expanded in recent years, low penalties and generic crimes in the penal code are inadequate to protect the elderly and to punish violators. Proponents cite the success of targeting persons of special trust in sexual offense legislation for enhanced penalties in controlling the abuse perpetrated by such persons. Prosecutors and law enforcement authorities feel that new crimes, increased punishment for aggravating circumstances, more prosecutorial discretion, and enhanced penalties for victim targeting will enable law enforcement and prosecutors to protect the elderly more effectively. Proponents feel for instance that, if an elderly person's life savings are stolen, the 1 to 5 year Class D felony penalty is simply not punishment enough and does not deter the crime and that it is difficult or impossible to prove deception or various types of fraud because the elderly person is not physically or mentally capable of telling what happened. Proponents would also like to have a speedy trial provision in the situation where the elderly person might not survive or might become incapacitated.

Opponents of stricter legislation fear that it could be applied inappropriately.

Opponents of the legislation have serious reservations regarding what they consider to be the breadth of the elements of the crimes created by the legislation and the "excessive" enhancement of the penalties. They fear potential abuse of the legislation not only by law enforcement and prosecutorial authorities but by relatives who are not satisfied with the caretakers or who have family feuds.

KENTUCKY PENAL CODE

Prepared by Norman W. Lawson, Jr.

Question

Should the Kentucky Penal Code be extensively revised or replaced?

Background

The Criminal Justice Council is undertaking a review of the Penal Code.

The Kentucky Penal Code was written in the early 1970's and was adopted in 1974 with an effective date of January 1, 1975. The Penal Code has been amended many times since 1975 creating new crimes, changing penalties, and creating what some persons view as conflicts. The General Assembly charged the Criminal Justice Council with review of the Penal Code. A Penal Code subcommittee of that council is considering a total revision of the code.

Discussion

Two options for updating the Penal Code have been proposed. First would be to replace the entire Kentucky Penal Code with a new document. Second would be to make extensive revisions to the existing code, including:

- Placing controlled substances laws and various other criminal offenses now elsewhere in the Kentucky Revised Statutes in the Penal Code;
- Revising the underlying principals of the code;
- Revising criminal mental states and defenses to crimes; and
- Making various other changes to modernize the code and harmonize its provisions.

Proponents claim a revised or replaced code will allow for greater consistency.

Proponents argue that the changes to the code made since 1975 have resulted in a situation where the code is out of date with regard to current criminal justice philosophy and has conflicting provisions. There is also concern that some lesser crimes have more serious penalties than more serious crimes due to public reactions to particular crimes.

Proponents want to completely replace or extensively revise the current Penal Code in a multi-year process which will result in the submission of an entirely new package of legislation in one bill to the General Assembly. Proponents would include crimes such as drug offenses and driving under the influence, which are currently outside of the Penal Code, in the code for a more complete document with all "criminal" offenses in one location. Proponents also see this as an opportunity to provide new alternatives to incarceration. Proponents believe that a new code could provide an updated, compact, and more usable document.

Opponents believe lesser changes will accomplish the same ends.

Opponents assert that the current code could be reviewed and revised in a much less extensive manner, that current anomalies can be easily corrected, and that the current law is working well. They assert that persons are being incarcerated or fined and that an extensive change will unnecessarily disrupt the criminal justice system. Opponents argue that changes to the code might result in even more imprisonment or the provision of alternatives to incarceration which might be overly costly or which could not be adequately delivered on a statewide basis. Opponents say that crimes are currently outside the code for valid reasons since language for those crimes might not match the code language or that specialized penalties not authorized by the code are necessary for proper enforcement of these outside laws. Opponents fear that a major revision will be an opportunity for special interests to create "designer crimes" to cover situations which are adequately covered by current law or to provide "enhancements" which overly penalize crimes in which they have special interests and which would result in lesser crimes being more harshly punished than crimes most persons perceive to be more serious.

A "designer crime" may be established to address a specific incidence and is very restrictive in the penalties that apply.

A typical example of a "designer" or "custom" crime was the incident of a child perishing in a motor vehicle. Under existing law, depending on intent and degree of recklessness, the placing of a child in a motor vehicle and a resulting death could be punished anywhere from murder to reckless homicide, and any result less than death could be punished either as an assault or as reckless homicide. In a "designer crime," if a child dies in a vehicle there is only one penalty regardless of the level of negligence involved.

"Enhancer" crimes may lead to inconsistencies in the application of penalties.

A typical example of an "enhancer" would be a proposal to increase the penalty for fraudulently applying for a handicapped license plate. Problems with "enhancers" are that if there is a crime with a lesser penalty and another similar crime with a higher penalty, and should the lower one be increased to the level of the higher one, then there is no need for two different levels of offense. If both penalties are raised, then the penalty for this crime may be significantly higher than a similar crime committed under different circumstances. Thus, lying on an application for a handicapped license plate could result in a stiffer penalty than lying on any other application.

HUMAN CLONING

Prepared by Norman W. Lawson, Jr.

Question

Should legislation be passed prohibiting or regulating human cloning?

Background

Medical science has now progressed to the point where human cloning and production of other human cells and body organs is possible through the use of human stem cells and other human cells. The production of new human cells through cloning, presently requires destroying cells in a human embryo. A Kentucky doctor has announced his intention to produce a cloned human being.

Discussion

One proposal would ban all human cloning, cloning with the purpose of producing a human being, and cloning with the purpose of producing human cells or any other product which requires destruction of a human embryo.

Proponents of a total ban on human cloning cite moral, scientific, and legal reasons for such legislation.

Proponents of this legislation cite religious and moral reasons for not engaging in any of these practices because the process results in the destruction of a human embryo. Proponents argue that, since cloning constitutes the destruction of human life, it should not be sanctioned by the state, and should be punished. Proponents of this legislation also believe that producing a human being by cloning could result in human beings with serious genetic flaws; create legal problems with regard to parenting, inheritance, wills and estates; and have various other presently unknown and unforeseen results.

Opponents of total ban legislation say it would hamper medical advances leading to new treatments and cures for diseases.

Opponents of this proposal say that cloning is a natural progression of science and cite successes in cloning of various other animals. They also argue that human stem cell research, cloning, and other research procedures can lead to new medicines and treatments for those who are paralyzed, injured, or diseased. Opponents assert a total ban on such procedures could slow discovery of new cures.

An alternative proposal to ban only research and procedures intended to clone a human being has academic pharmaceutical, and medical support.

Another proposal has been advanced by universities, drug and pharmaceutical researchers, and some in the medical community. It would allow any research and developmental activity, together with the production of new medications and perhaps even new organs and body parts, but would ban research and procedures intended to produce a cloned human being.

Proponents cite medical benefits and contend that protections against human cloning would satisfy the medical and legal objections.

Proponents of this proposal cite the benefits in producing potential cures for a range of diseases and injuries as well as for other human conditions. They believe that the ban against cloning a human being would satisfy potential medical and legal objections related to human cloning.

Additional concerns regarding intellectual property rights might call for legislation to protect Kentucky's interests.

If cloning research continues at state universities, Kentucky risks financial loss should researchers leave state employment and market their discoveries in the private sector. This concern regarding ownership of intellectual property might call for legislation to protect Kentucky's interests.

Opponents of a partial ban cite the same moral, legal, and medical objections they raise regarding the total ban proposal.

Opponents of this proposal have the same moral, legal, and medical objections cited regarding the first proposal. Opponents do not want human embryos destroyed for any reason and feel that such research would inevitably lead to human cloning.

PRIVACY RIGHTS

Prepared by Norman W. Lawson, Jr.

Question

Should legislation be passed prohibiting or limiting access to personal information?

Background

In this information rich age, government, private organizations, insurance companies, schools, licensing agencies, and various other persons and organizations are collecting vast amounts of personal information about all persons from the time they draw their first breath until the time they die, and sometimes both before and after. Various persons and groups would like to make use of this information for numerous legitimate, commercial, criminal, and other purposes ranging from advertising, research, computer hacking, spying, and theft.

Discussion

Past legislation limited the collection, dissemination, and use of information which is collected by private persons, private organizations, and government agencies. Prohibitions range from:

- Not allowing collection of certain information;
- Requiring that some information be masked, such as providing other identifying numbers for social security numbers;
- Making some types of information confidential by law;
- Not permitting its use or dissemination without the permission of the person who is the subject of the information; and
- Providing penalties of various severity for violation of the law.

Proponents contend that public access to personal databases is intrusive and should be limited.

Proponents of such legislation cite the creation of private data banks which have been assembled by various commercial entities, government agencies, and criminals and the associated fear that the information can be misused, that the right to privacy has been unalterably damaged, and that further damage should be prevented. New drivers' licenses contain a magnetic code containing personal information that can easily be decoded by commercial scanning devices. The data could then be used for advertising purposes by retailers, by investigators not entitled to the information, and by bars and other places to limit access or gain credit information. Medical information and genetic information can be used by pharmaceutical companies to sell their products or by insurance companies to charge higher rates to those having a potential health or financial problem which might never develop. Other personal information can be used for advertising, for identity theft and other criminal purposes. Proponents want these intrusive practices stopped and want stiffer penalties for violation.

Opponents argue that sharing of databases has many legitimate purposes and that limiting access to them might be unenforceable.

Opponents of the legislation argue that information legitimately collected should be shared for legitimate purposes. Opponents say that the age data on the driver's license can be used for the legitimate purpose of keeping underage persons out of bars; and that medical data should be legitimately used by insurance companies in rating policies and ferreting out insurance fraud. Many persons believe that information on criminals, such as sex offenders and violent offenders, should be shared with the public so that individuals can protect themselves. Other opponents assert that information on property and violent offenses by juvenile delinquents should be public. Advertisers and businesses argue that information enables them to better serve customers by obtaining information about buying and other habits, thus allowing persons wanting particular products to be targeted by merchants. Opponents of the legislation assert that genetic information should be available for medical insurance and other purposes to allow for better service and pricing for all individuals and perhaps allow for preventative treatments for persons who might otherwise develop a life threatening condition. Opponents also cite the problems with enforcement of any legislation which might be passed since access to the internet and other forms of communication from providers located outside Kentucky borders might make it impossible for the state to prosecute violators of the statute.

LICENSING AND OCCUPATIONS

ALLOWING ELECTRONIC GAMING DEVICES AT RACE TRACKS

Prepared by Jack M. Jones

Question

Should the General Assembly legalize the operation of electronic gaming devices at Kentucky race tracks?

Background

HB 768 was introduced during the 2002 General Assembly to allow electronic gaming devices at race tracks.

For many years, wagering on horse racing was the primary avenue for legal gaming in Kentucky. However, in 1988, voters approved a constitutional amendment to establish a state lottery. In 1992, the Constitution was again amended to legalize charitable gaming. At about the same time, legalized casino gaming, which had been limited to Nevada and Atlantic City, New Jersey, expanded significantly with the introduction of riverboat casinos, Indian Gaming, and electronic gaming devices (EGDs) or video lottery terminals (VLTs) at race tracks in several states. Some industry observers believe that placing EGDs at race tracks has been largely responsible for rescuing financially beleaguered race tracks in other states, notably West Virginia, Delaware, and Iowa. The 2002 General Assembly considered but did not enact HB 768 which would have allowed EGDs at race tracks.

Discussion

The effects of gaming outside Kentucky upon in-state gaming and expanded gaming in the state has been discussed since the early 1990s. Proponents argue that expanded gaming at the race tracks is a way to retain the moneys spent on gambling in other states, bolster Kentucky's economy, and improve the bottom line of the race tracks. Proponents of EGDs further contend that Kentucky race tracks cannot compete with the casino riverboats unless they are given the additional means to compete, in the form of EGDs at race tracks. Opponents contend that expanded gaming at race tracks will increase gambling addiction and create other social problems. Proponents admit there is some truth to these arguments, 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 EGDs at race tracks, proponents contend that the state will at least be able to keep a portion of the money in-state to support the racing industry and social programs. Using some of this money to treat problem gamblers has also been suggested.

Legal opinions differ concerning how video lottery terminals at race tracks may be legalized.

Constitutional Amendment or Legislative Enactment. There is some debate over methods which might be used to legalize VLTs at race tracks. Some experts contend that an amendment to Section 226 of the Kentucky Constitution is the only way any new form of gambling can be approved. The Constitutional amendment approach is supported by an Attorney General's opinion based largely on the supposition that the term "Kentucky state lottery" should be construed narrowly to encompass only instant and on-line games. The opinion (OAG 99-8) further states that it cannot conclude that a court will find that the Kentucky Constitution authorizes the General Assembly to permit the Kentucky Lottery Corporation to operate VLTs.

Other states have legalized video lottery terminals at race tracks under similar constitutional circumstances.

Others believe that new forms of gambling can be legalized under the lottery amendment, if the enabling legislation is drafted appropriately. They assert that the General Assembly may authorize EGDs at race tracks by legislation and that limiting EGDs to licensed race tracks is a reasonable legislative classification and not special legislation. Proponents of the lottery approach contend that the actual language of the lottery amendment is broad enough to permit VLTs at race tracks, if the gambling is conducted by the lottery for the benefit of the state. They point to a specific casino prohibition that was added to the lottery statutes in 1992 as evidence that the lottery has the ability to engage in additional gambling if the General Assembly so chooses. They also reference case law in other states which has upheld the operation by state lotteries of VLTs at race tracks under similar constitutional circumstances. A related issue is whether local approval should be included in enabling legislation if legal gaming is expanded. Those for local approval argue that additional gambling may be offensive to community standards.

Some believe that local approval is also needed.

Fifty-five percent of adult Kentuckian respondents favor slot machines at the state's eight race tracks.

Public Opinion. According to a September 2002 *Courier-Journal* Bluegrass Poll, 55 percent of adult Kentuckians favor slot machines at the state's eight race tracks; 38 percent of the respondents oppose them; and 7 percent had no opinion. Twenty percent of the opponents would change their minds if voters in race track counties approved slot machines at the race tracks. Finally, the poll found that 79 percent of the respondents stated that the voters should decide the issue. Only 17 percent favored leaving it to the legislature.

A Kentucky Lottery Commission report estimated gaming revenues from additional gaming at the state's eight race tracks.

The Kentucky Lottery Corporation (KLC) issued a report in November 2001 that examined, among other gaming expansion scenarios, VLTs or slot machines at race tracks. The KLC found, assuming that 8,000 VLTs are placed at eight race tracks with average weekly net machine income (NMI) per VLT of between \$1,400 and \$1,700, the most likely outcome would be an annual yield of between \$582 and \$707 million in NMI with the state's share being between \$210 and \$255 million. NMI represents gross handle—cash and credits played—less all prizes paid, which is the equivalent of net win for riverboat and casino industries. Following the sales experiences of Delaware and Iowa, if Kentucky were to authorize slot machines at its eight race tracks, it could expect to realize from 8,000 slot machines: a weekly NMI per device range of between $2,000 and $2,300, an annual NMI range of between $832 and $957 million, and an annual state's share between $300 and $344 million.

A number of efforts are underway to increase gaming opportunities in other states.

Other states' efforts to increase gaming opportunities are not abating. Tennessee voters recently approved a constitutional amendment that authorizes the General Assembly to establish a state lottery. There is speculation that placing VLTs at Ohio's seven race tracks will soon be given serious consideration by the legislature. In Delaware and West Virginia, VLTs at race tracks continue to attract both patrons and horse owners. Racinos (race tracks with casino games) are offering large purses, funded by slot machine profits, that have lured some horse owners away from Kentucky. For example, purses at Mountaineer Park race track in West Virginia grew 513 percent from CY 1995—when VLTs were first introduced—to CY 2000. As a result, it is likely that Kentucky will continue to face additional threats from other out-of-state gaming opportunities.

REGULATING CHARITABLE GAMING
Prepared by Vida Murray

Question

Should the General Assembly place much of the responsibility for oversight of charitable gaming with a decision making board?

Background

Legislation was proposed in the 2002 Session to place the responsibility for oversight of charitable gaming in a decision making board.

In the 2002 Legislative Session, House Bill 743 was introduced to provide extensive changes in how charitable gaming is conducted. The proposed changes included:

- Establishing a decision making board;
- Authorizing the implementation of pilot programs for testing innovations relating to the conduct of bingo and other games and recordkeeping, licensing, and accounting procedures;
- Increasing the prize limits for bingo games and pulltabs;
- Establishing a combined bingo game with prizes up to $50,000;
- And authorizing the use of electronic, computer, or other technological aids in the play of bingo and charity game tickets.

This bill was not enacted.

Charitable gaming is a highly regulated industry. The statutes establish detailed guidelines on the conduct of the game, the interrelationships among the affected entities, and the form of recordkeeping.

The General Assembly has established a detailed process by which charitable gaming may be conducted. The framework specifically places an upper cap on prizes, limits the number and types of games played, prohibits manufacturers, distributors, facility owners, and charitable organizations from having a financial interest in one another, provides a system of checks and balances for the accounting of moneys, and prohibits manufacturers, distributors, and facility owners from participating in the conduct of gaming.

In testimony before the Interim Joint Committee on Licensing and Occupations, the Commissioner of the Department of Charitable Gaming recommended that many of the proscriptions on charitable gaming be relaxed and more flexibility be afforded both the Department and charitable organizations by placing much of the responsibility for oversight of charitable gaming with a decision making board. Specifically, the Commissioner noted that the brightline rules in place restrict charitable organizations' ability to remain competitive. The Commissioner indicated that the receipts from charitable gaming are comparable to the receipts from pari-mutuel racing and the lottery, and are jeopardized by the onset of casino gaming and video lottery terminals at racetracks in neighboring states.

Some advocate that changes in the conduct and regulating of charitable gaming will make it more competitive with other forms of gaming.

Proponents advocating greater flexibility, increased prize limits, and mega-games assert that charitable gaming has an older audience and can only sustain itself if it begins to attract younger players. They assert that charitable gaming can be made a more attractive form of entertainment by increasing prize limits, expanding the choice of games, and utilizing technological aids. In addition, the proponents point out that prize limits should be raised to address inflation and enable charitable gaming to compete with other forms of gaming. They stress that the dollars amassed through charitable gaming help organizations provide important community services, and note that without use of these moneys, those services will either go unfunded or will require the expenditure of additional tax dollars. The proponents further point out that the presence of stringent caps in statutes prohibits the Department from responding quickly to changing circumstances. An example offered was the loss of participants some Kentucky charitable organizations experienced when higher prize limits were established in nearby West Virginia.

Some propose that the charitable gaming statutes should be detailed and comprehensive in light of past abuses in such gaming.

Those opposed to placing the regulation of charitable gaming in a decision making board assert that concerns for the integrity of charitable gaming require that it be highly regulated. In supporting the need for a highly regulated industry, opponents point to the history of abuses in the industry, when charitable gaming receipts were diverted to private use.

The language of Section 226 of the Constitution charges the General Assembly to set out in statute standards for conducting the games and ensuring that moneys are expended for charitable purpose.

Opponents also base their support for a highly regulated industry on the specific language in Section 226 of the Constitution and the preamble to the charitable gaming statutes. That language permits charitable gaming only if established by the General Assembly, and specifically charges the General Assembly to set out in any legislation enacted the types of charitable enterprises which may be operated, the standards for the conduct of charitable gaming, the penalties for violations of the statues, and a mechanism to ensure that the moneys raised are expended for charitable purposes. The preamble to the charitable gaming statutes declares the General Assembly’s intent to be (1) preventing the commercialization of charitable gaming; (2) preventing participation in charitable gaming by criminal and other undesirable elements; and (3) preventing the diversion of funds from legitimate charitable purposes.

REGULATING HOME BUILDERS

Prepared by Ann Seppenfield

Question

Should the General Assembly enact legislation to regulate residential and light commercial contractors on a statewide basis?

Background

Contractors of residential and light commercial property are not regulated in Kentucky, but efforts to register or certify them have been made through proposed legislation in years past.

Currently, Kentucky law has no provision to regulate individuals who build or remodel residential or light commercial property. Residential real estate pertains to dwellings for single families or structures to accommodate up to four families. Light commercial real estate is a new or existing building that does not exceed ten thousand square feet. Efforts to certify or register this facet of the construction industry through legislation have been ongoing. HB 391 in 1996, HB 487 in 1998, and HB 606 in 2000 proposed statewide certification of residential contractors but were not enacted.

House Bill 866, introduced during the 2002 General Assembly, would have registered residential and light commercial contractors with the Kentucky Department of Housing, Buildings, and Construction, but this bill was not enacted. The bill would have required all residential and light commercial contractors who work directly with the consumer to show proof of the following for registration renewal:

- Liability, property damage, and workers' compensation insurance;
- A signed contract with the consumer for any job over $2,500;
- Contractor warranty coverage; and
- Successful completion of continuing education.

Only four local governments provide oversight of home builders and only within their respective purviews.

Rationale for statewide regulation of home builders includes making them accountable to the general public and able to produce a quality work product. The cities of Bowling Green and Louisville, the Lexington-Fayette Urban County Government, and Jefferson County have ordinances that establish criteria that home builders must meet in order to be licensed and in order to do business in those regions. Some, but not all, Kentucky cities and counties require a builder to obtain a permit before beginning any construction work. However, for the state-at-large, any person, regardless of qualifications or experience, may conduct business as a home builder.

Surrounding states that license residential and light commercial contractors statewide also license specialty contractors.

Some states surrounding Kentucky have statewide licensure requirements for contractors. Mississippi, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia require residential, light commercial, and specialty contractors to be licensed. A specialty contractor is one with whom a residential or light commercial contractor would subcontract for finishing work such as painting, roofing, siding, window or drywall installation, concrete work, or paving. Illinois requires only roofing contractors to be licensed.

Discussion

Proponents and opponents of regulating residential and light commercial contractors have debated issues for almost a decade.

Proponents assert that the statewide regulation of residential and light commercial building contractors helps ensure public health and safety. They also assert that regulation of home builders will protect the consumer from fraud and will enhance the professionalism of the industry. Another issue proponents cite as a reason for statewide regulation is the licensing requirement in surrounding states. They contend that Kentucky's lack of credentialing restricts the mobility of contractors into other states. The result is lost revenue and wages. Proponents also indicate that through credentialing, consumers have some guarantee that the people with whom they contract to build or remodel a living space or light commercial property have insurance and are accountable to an oversight entity.

Opponents of statewide regulation, in urban areas primarily, believe that current statutes relating to the Kentucky Uniform State Building Code adequately protect the consumer and ensure the public's health and safety. Opponents are also concerned that the three localities already requiring home builders to be licensed would lose revenue and jobs associated with the local credentialing and oversight process.

Opponents particularly concerned about small and rural contractors question the equitable treatment of these groups regarding their representation on boards and organizations at the state level, required continuing education if training is held only in metropolitan areas, and fees paid by contractors who do jobs under $2,500.

At-large opponents of statewide regulation question the state's ability to enforce the provisions and to provide adequate personnel to effectively oversee compliance if statewide regulation is enacted.

LOCAL GOVERNMENT

MANDATED HAZARDOUS DUTY RETIREMENT FOR LAW ENFORCEMENT OFFICERS

Prepared by Donna K. Gaines and Mark Mitchell

Question

Should the General Assembly enact legislation to require that local law enforcement officers and state university police officers be provided hazardous duty retirement benefits?

Background

Retention and recruitment of police officers is a statewide and national problem. Offering hazardous duty retirement benefits to all officers is seen as one incentive to help combat this shortage.

Current law allows for the participation of local law enforcement agencies in hazardous duty retirement if the local government chooses to fund the necessary match.

Regional university police may participate in hazardous duty retirement. UK and UL officers do not have the option.

During the past interim, the Interim Joint Committee on Local Government heard from representatives of Kentucky law enforcement agencies, including representatives of state university police, on how best to recruit and retain officers, especially in small police and sheriff's departments across the state. While various opinions were offered on improving working conditions and benefits for Kentucky's law enforcement officers, providing hazardous duty retirement benefits has been recognized as an important incentive by many law enforcement representatives.

Hazardous duty retirement is a classification within the Kentucky Retirement System that allows police and other emergency employees, such as firefighters, to retire after twenty years of service instead of the regular twenty-seven years. It also includes a higher multiplier factor for calculating final retirement payments, resulting in a higher pension than for nonhazardous retirees with the same service. Currently, cities and counties are authorized, but not required, to provide hazardous duty pension benefits.

Like local police departments, the regional universities participating in a state retirement system currently have the option to classify their police officers as "hazardous duty." However, the Kentucky Revised Statutes currently do not allow the University of Kentucky and the University of Louisville to participate in the Kentucky Employees Retirement System (KERS) hazardous duty retirement. 2002 House Bill 568 as originally drafted would have allowed all state universities to participate in KERS and also would have required universities to place their officers under the "hazardous duty" classification. A House Committee Substitute to that bill removed the hazardous duty requirement but continued to give UK and UL the option to join the KERS like the regional universities. With their participation in KERS, UK and UL could then petition the retirement board for the hazardous duty designation for their police officers. This bill was not enacted.

Hazardous duty retirement is seen as an effective incentive for recruiting officers for local agencies.

Law enforcement officers argue that hazardous duty retirement is an effective incentive to attract, retain, and reward officers for a job often characterized as low-paid, stressful, and dangerous. According to Department of Criminal Justice representatives, the availability of hazardous duty retirement benefits can sometimes be more attractive to an applicant than a significant increase in salary. Currently, 128 police departments out of an estimated 240 city and county police departments offer hazardous duty retirement to officers. In addition, 48 out of 120 sheriff's departments provide hazardous duty retirement to sheriffs and deputies.

Representatives of local governments maintain that participation is cost prohibitive for many and that local government budgets across the state are already stretched too thin. The city and county employer's match on CERS hazardous duty pay is currently 16.28 percent, versus a contribution rate of 6.34 percent for non-hazardous duty retirement benefits. Mandating participation by all local governments in hazardous duty coverage for law enforcement officers could result in further budget woes for smaller communities. Ironically, those are the same communities losing the most officers to higher paying city and county departments. According to figures presented to the Local Government Committee by the Kentucky League of Cities, the average city spends 40 percent of its annual budget on police expenses and public safety. While public safety continues to be a growing concern for most communities, especially in light of current national events, some local governments may not be able or may not choose to spend more of their budgets on police incentives.

State universities opting for participation of their officers would be obligated to budget more for retirement benefits as well. With the exception of the University of Kentucky and the University of Louisville, state colleges and universities participating in KERS have the option to classify their police officers as "hazardous duty" if the state colleges and universities petition to do so under the provisions of KRS 61.592. Morehead State University, Murray State University, and Western Kentucky University, which participate in KERS, have placed their police officers under the hazardous duty classification. Northern Kentucky University, Kentucky State University, and Eastern Kentucky University have not. In 1999, those three universities had a total of 46 police officers. UK and UL had a combined total of 52 police officers in 1999.

Proponents of mandatory application of hazardous duty retirement benefits to all law enforcement agencies across the state believe it may help ease the police shortage some local governments and universities are now facing. Historically, however, the General Assembly has been reluctant to enact legislation that places additional financial stress on local governments. The same applies to the budgets of Kentucky's universities. During the 2003 Session the General Assembly may be asked to consider legislation requiring or at least urging local governments, or universities, or both to provide hazardous duty retirement benefits to all law enforcement officers. The legislature may also be requested to provide additional funding or recommendations on how to fund such a mandate.

SENIORS, VETERANS, MILITARY AFFAIRS, AND PUBLIC PROTECTION

HOMELAND SECURITY

Prepared by Scott Varland

Question

Should the General Assembly enact additional legislation to strengthen Kentucky's Homeland Security?

Background

The 2002 General Assembly passed House Bills 258 and 320 which provide for the development and implementation of a Homeland Security policy.

In the aftermath of September 11, 2001, the Kentucky General Assembly passed Homeland Security legislation. The 2002 General Assembly enacted legislation directing the Adjutant General of Kentucky to head state Homeland Security efforts. One of his major responsibilities will be to file a Homeland Security report with the General Assembly prior to December 31 of 2002, and each year thereafter, regarding the progress made in improving the Commonwealth's ability to prevent and respond to acts of war and terrorism. A part of the report should address whether the Kentucky government units receiving federal Homeland Security assistance have met minimum federal standards. Legislation was also enacted creating the Office for Security Coordination, with its Executive Director to serve as an assistant to the Adjutant General. Under this legislation, the Adjutant General of Kentucky and the Executive Director of the Office for Security Coordination are to develop procedures for detecting terrorist threats, stopping them from becoming attacks, responding to attacks, and recovering from attacks.

The 2002 General Assembly passed other Homeland Security legislation.

The General Assembly also enacted other legislation that may assist the government in its attempt to prevent terrorist acts. House Bills 188, 189, and 190 provide additional safeguards when licensing an operator of a motor vehicle, when licensing an operator of a commercial motor vehicle, and when commercial driver training is involved. House Bill 193 modernizes the Kentucky statutes pertaining to unlawful access to a computer.

Discussion

The 2001 General Assembly established the crimes of use of a weapon of mass destruction and terroristic threatening.

In 2001, the General Assembly passed House Bill 1 which establishes the crimes of use of a weapon of mass destruction in the first, second, and third degrees and terroristic threatening in the first, second, and third degrees. The General Assembly may wish to consider whether further legislation should be enacted to improve the development and implementation of Kentucky's Homeland Security policy.

The following additional homeland security issues might be considered.

Kentucky's current criminal code may obviate the need for the passage of additional anti-terrorism criminal legislation.

Terrorism Crimes and Penalties. Many states have enacted specific anti-terrorism criminal legislation which Kentucky does not have. Some think that the broad application of Kentucky's current criminal code may obviate the need for the adoption of specific anti-terrorism criminal legislation. For example, the Kentucky statutes on murder, conspiracy, use of weapons of mass destruction, and terroristic threatening cover a number of terrorist activities.

Probably the most common anti-terrorism criminal legislation adopted around the country establishes the crime of terrorism.

The most common anti-terrorism criminal legislation adopted around the country establishes the crime of terrorism. These statutes are based on the federal law. Many states have also created terrorism-related offenses. These offenses include soliciting or providing support for an act of terrorism, hindering prosecution of terrorism, and terrorist-sponsored racketeering.

Kentucky has recognized the need to address the risks posed by biological, chemical, and agricultural terrorism.

Biological, Chemical, and Agricultural Terrorism. Various states, including Kentucky, have recognized the need to address the risks posed by biological, chemical, and agricultural terrorism. Under legislation enacted in 2002, the Adjutant General must include in his required annual Homeland Security Report an assessment of the Commonwealth's capacity for responding to acts of terrorism, including nuclear, biological, chemical, agro, eco, electromagnetic pulse, and cyber terrorism. The Adjutant General is also charged with developing and implementing statewide strategies for strengthening the Commonwealth's capacity for responding to acts of terrorism.

The General Assembly has modernized Kentucky law pertaining to unlawful access to a computer without a specific reference to cyberterrorism.

Cyberterrorism. Cyberterrorism occurs when a terrorist attacks critical computer systems in order to damage the infrastructure of a society. The General Assembly has passed legislation which modernizes the Kentucky statutes pertaining to unlawful access to a computer but does not specifically refer to cyberterrorism. The bill is written in terms of conventional white collar crimes.

Kentucky lacks a money laundering statute.

Money Laundering. Kentucky lacks a money laundering law. There is a general federal money laundering law with specific references to terrorists engaged in money laundering.

Several states have money laundering laws. Arizona, Indiana, Michigan, and Missouri have amended their money laundering laws with references to terrorist involvement in money laundering.

Kentucky prohibits the police from engaging in electronic surveillance of a communication without the consent of one party to the communication. Other states permit such surveillance.

Electronic Surveillance. Kentucky law prohibits electronic surveillance of a communication unless at least one party to that communication consents. Therefore, Kentucky law enforcement officers are not permitted to wiretap or engage in other forms of surreptitious electronic surveillance. Federal law enforcement officers operating in Kentucky can wiretap under a federal court order.

Many states permit the police to engage in electronic surveillance of a communication even when no party to the communication consents. Since September 11, 2001, some states have expanded the scope of their statutes to permit surveillance for the purpose of investigating terrorism. These states are Connecticut, Georgia, Louisiana, Ohio, and South Carolina.

The General Assembly has provided for anti-terrorist safeguards when licensing drivers and when commercial driver training is involved.

Driver's Licensing. Like many states, Kentucky has amended its driver's licensing statutes to restrict a terrorist's ability to obtain a commercial or noncommercial driver's license. Kentucky has also extended anti-terrorist safeguards to commercial driver training. The Kentucky legislation was passed in 2002 (House Bills 188, 189, and 190).

FUNDING FOR THE DEPARTMENT OF VETERANS' AFFAIRS

Prepared by Clint Newman

Question

Should legislation be enacted to generate dedicated revenue for the Department of Veterans' Affairs as a first step toward making the Department independent of the Commonwealth's General Fund?

Background

Three revenue producing bills HB 116, HB 114 and HB 200 were introduced in the 2002 Session but were not enacted.

Three bills were introduced during the 2002 Session of the Kentucky General Assembly designed to generate revenue for the Department of Veterans' Affairs. These legislative proposals were not enacted and are likely to be introduced again in 2003 Session.

2002 HB 116 would have imposed a fee of one-tenth of one percent (0.1percent) of the gross receipts from charitable gaming conducted by licensed veterans charitable gaming organizations possessing tax exempt status under 26 U.S.C. 501(c)(19). Moneys would have been remitted to the Kentucky veterans program trust fund established by KRS 40.460.

2002 HB 114 would have created a new Kentucky Lottery instant scratch-off game designated as the Kentucky Veterans' Trust Fund Benefit Game. The Kentucky Lottery would have designed or themed the game so as to be competitive with other scratch-off games offered by the lottery. Tickets would have clearly stated that revenues are to benefit Kentucky veterans' programs. Net revenues would have been used exclusively for programs administered by the Department of Veterans' Affairs.

2002 HB 200 would have created a veterans' personal loan program to lend up to $10,000 to a veteran, a veteran's unremarried spouse, or a deceased veteran's child under regulations promulgated by the Department of Veterans' Affairs. Loans would have been made for purposes specified by statute, and terms for repayment would not have exceeded ten years. Loans could also have been made to a remarried spouse or mother of a deceased veteran's child for the education of the child. Funds received for the loan program not necessary for the operations of the program would have remained with the Department.

Discussion

The Department of Veterans' Affairs would like to raise its own revenues and become less dependent on the General Fund.

The Department of Veterans' Affairs is trying to offer services that it deems essential to its veteran constituents under the current limitations of state revenue shortfalls and limited General Fund dollars. The Department indicates that operating two new veterans' nursing homes and building two new veterans' cemeteries will require more revenue than can be expected from the General Fund. Consequently, the Department proposes generating its own money. The three bills introduced in 2002 would not have produced sufficient funds to make the Department independent of the General Fund but were seen as a first step.

The proposed charitable gaming bill would raise $97,000 a year.

The proposal to designate a small portion of charitable gaming receipts from gaming conducted by veterans' organizations in Kentucky would have generated about $97,000 in the year 2000. The Department feels that veterans' organizations would be supportive since the funds benefit the Veterans' Program Trust Fund.

The veterans' lottery game would raise about $1 million a year.

According to the Department of Veterans' Affairs, the proposed Kentucky Lottery scratch-off game to benefit veterans would generate approximately $1 million per year. The game would be a significant income source for the Department.

The proposed veterans' personal loan program would require a $5 million appropriation which may not be requested at this time.

The legislation proposing a veterans' personal loan program requested a $5 million appropriation in seed money to develop the program and to fund its loan operation. The Department might not seek the appropriation in 2003. In light of the strain on the state budget, however, the Department indicates that it may strongly urge legislators to enact the enabling legislation so that the program can promptly begin as soon as money becomes available. Once the program is funded, the Department estimates that the program will need to operate for four or five years before an income stream will develop. After those first years, the program could begin generating income for agency use.

Legislation to generate dedicated revenue for the Department of Veterans' Affairs might reduce revenue available for other state uses.

A special lottery game to benefit veterans might decrease lottery revenue that is contributed to the General Fund at a time the lottery is expecting decreased revenue due to the enactment of the Tennessee lottery. The more revenue sources are dedicated to a specified use, the less flexibility the General Assembly has in appropriating funds according to emerging priorities.

SELECTIVE SERVICE SYSTEM REGISTRATION

Prepared by Michael D. Bennett

Question

Should the General Assembly link registration for the United States Selective Service System to application for a driver's license, commercial operator's license, or non-driver identification card?

Background

Currently twenty-six states and the District of Columbia have enacted legislation that provides for automatic registration with the Selective Service System (SSS) whenever a male over eighteen and under twenty-six years of age applies for an operator's driver's license. Similar legislation has been previously considered by the Kentucky General Assembly but never enacted.

Registration compliance has eroded approximately one percent per year since 1991, and at the end of 2000, 88 percent of eligible men were registered with SSS.

Federal law (50 U.S.C. App. 451 et seq.) requires virtually all male U.S. citizens, as well as immigrant men residing in the U.S., to register with the SSS when they reach age eighteen. However, many men do not know about this legal requirement. Registration compliance has eroded approximately one percent per year since 1991. At the end of 2000, an estimated eighty-eight percent of U.S. men eighteen through twenty-five years old were registered with SSS.

Men who fail to register with Selective Service are not eligible for certain benefits and programs that Congress and numerous state legislatures have linked to registration, including student loans, grants for college, and most government jobs and job training. Moreover, immigrant men who fail to register with SSS may be denied U.S. citizenship.

Discussion

Proponents of legislation similar to House Bill 117 believe that the key to solving the SSS registration compliance problem is to link SSS registration with the process of applying for an operator's license or state identification card. Proponents say that this form of registration is simple and inexpensive to implement. Transmission of applicant data to the SSS is accomplished electronically through an existing arrangement each state has with the data sharing system of the American Association of Motor Vehicle Administrators. No extra cost to the state is involved.

Some argue that the program will use existing data sharing systems at no extra cost to the state, while others worry about hidden costs and believe that the federal government should not delegate problems to the individual states; nevertheless, more than half of the states have enacted similar legislation.

Opponents of SSS registration tied to operator's license or identification card application argue that SSS registration is a federal requirement that should be enforced by the federal government and not by the individual states.

STATE GOVERNMENT

RETIREE SUBSIDY IN THE STATE HEALTH INSURANCE GROUP

Prepared by Mark L. Roberts and Joseph Pinczewski-Lee

Question

Should the General Assembly require government entities that do not include their active employees in the state medical insurance group either to include those employees in the group or pay the additional cost of having their retired employees in the group?

Background

KERS and CERS retirees are included in the state medical insurance group, but many government employers choose to cover their employees outside of the state medical insurance group.

Since the enactment of the medical insurance benefit for retirees of the Kentucky Employees Retirement System (KERS), County Employees Retirement System (CERS), and State Police Retirement System (SPRS) in 1978, retirees of these plans have been included in the state medical insurance group. From the beginning, it was recognized that rating retirees with the younger active employees would help hold down premiums for retired members.

When employees participating in KERS, CERS, and SPRS retire, they have been included in the health insurance group with state employees. With the exception of state government and local school boards, government entities may choose to cover their employees outside of the state group, often through other group plans. Both the Kentucky Association of Counties (KACo) and the Kentucky League of Cities (KLC) offer group insurance to their members through Anthem.

The inclusion of retirees from employers without the associated younger, healthier employees results in millions of dollars of added cost to the state group.

The Kentucky Group Health Insurance Board estimated that the 8,862 retirees and dependents of employers not participating in the group added $9.9 million to the total cost of health insurance for the state group in calendar year 2000 and more than $15 million in 2001 (*Public Employee Health Insurance Program Annual Report*). The Board recommended that employers who do not participate in the group be required either to include their more than 57,000 active employees in the state group or be required to pay for the added cost of their retirees.

When introduced during the 2002 General Assembly, House Bill 846 would have required employers who do not include their employees in the state group to pay the cost of their retirees. KACo and KLC opposed the legislation on the grounds that it imposed an additional financial burden on local budgets. Also, no consensus was reached as to which agency should be responsible for administering collection of the money. After several hearings, the

2002 General Assembly amended House Bill 846 to authorize an independent study of the issue.

The actuarial firm selected by the Legislative Research Commission confirmed that the retirees of the agencies that covered their employees outside the state group added millions to in costs to the group, although the actuary determined the cost to be $14.1 in calendar year 2001, rather than the $15 million estimated by the Kentucky Group Health Insurance Board. The actuary estimated that monthly premiums for the rest of the state group would have been $5.17 less per person if that cost had not occurred. The actuary's report entitled *The Impact of "Unescourted Retirees"* presented at the October 23, 2002, meeting of the Interim Joint Committee on State Government, offered several recommendations for handling the cost of subsidizing those retirees, including establishing separate premiums for retirees and employees, requiring agencies with retirees in the group to include their employees, charging agencies for the added cost of their retirees, and funding the cost of these retirees during their working careers.

Discussion

Rating retirees separately for insurance would raise premiums for retirees and require higher employer contributions to the retirement systems.

Medical costs generally increase with age. Thus, rating retirees separately from employees would result in higher premiums for retirees. A percentage of the retiree's insurance premium is paid by the retirement system based on the retiree's service. Higher premiums would result in greater liabilities for insurance benefits. Insurance benefits are funded by employer contributions. The employer contributions to the retirement system required to fund the increased liabilities could more than offset the savings in premiums for employees in the state health insurance group.

Mandating local governments to participate in the state group could impact local budgets and disrupt insurance coverage for their employees.

Requiring all employers with retirees in the state group to include their employees would eliminate the subsidy. Those employers who have been able to obtain group rates would likely experience an increase in the cost of providing health insurance to their employees through the state group. According to KACO, counties saw premiums increase an average of 4.7 percent in 2002, while the state group's premiums increased more than 9 percent the previous year. In addition, many of these employers obtain coverage through Anthem, which is offered in only a small number of counties through the state group. A switch to the state coverage could result in disruptions in service for many local government employees.

Assessing a fee on employers to cover the cost of retirees would require new administrative procedures and additional staff.

The proposal most discussed during the 2002 session involves charging employers who do not participate in the state group a fee that would cover the cost of their retirees. This proposal would require new administrative procedures. An agency would have to be designated to calculate the fee each year, collect and account for fees, and remit appropriate amounts to cover retiree premiums.

Any solution will require amendments to statutes governing the group insurance program and possibly those governing the retirement systems. In addition, if a fee is assessed, the agency responsible may need additional staff and funding to implement the new procedures.

COLLECTIVE BARGAINING FOR PUBLIC EMPLOYEES

Prepared by Stewart Willis and Linda Bussell

Question

Should the General Assembly address the issue of collective bargaining for public employees?

Background

Legislative proposals regarding public employee collective bargaining have not been successful during past legislative sessions.

Legislative proposals that would grant comprehensive collective bargaining authority to virtually all groups of public employees have been considered but not enacted by the Kentucky General Assembly in previous legislative sessions. According to a 1975 opinion of the Attorney General, the Governor is prohibited from extending collective bargaining rights to public employees by executive order. Legislation would be required to grant such rights. Since 1996, Governor Patton has actively pursued legislation that would extend collective bargaining rights to virtually all public employees. In 1998 and 2000, public hearings were held on comprehensive legislation that would have extended collective bargaining rights to most public employees, including teachers.

Discussion

The Governor's Employee Advisory Council was established to allow employee groups to select organizations to make recommendations to the Governor on employment policies.

Executive Order 2001-623, issued in May 2001, established the Governor's Employee Advisory Council (the Council). While it does not permit traditional collective bargaining, the Executive Order established a process that allows employee groups to voluntarily select an employee organization to represent them on the Council. The Council consists of representatives of non-supervisory classified (executive branch) employees, excluding employees of Kentucky's constitutional officers and employees of the state's elementary, secondary, and post-secondary educational systems.

For purposes of the Council, all qualified employees have been placed into one of nine different categories based on their job classifications. As of September 14, 2002, seven employee groups have held elections to decide on representation on the Council. Six of those seven groups have elected to be represented on the Council. Those employee categories opting for representation are:

- Clerical, Semi-Technical and Para-Professional—represented by the International United Auto Workers (UAW);
- Labor and Trades—represented by the Teamsters Local 783;
- Employment and Social Services—represented by the American Federation of State, County and Municipal Employees (AFSCME);

- Health Services—represented by the American Federation of State, County and Municipal Employees (AFSCME) and the Service Employees International Union;

- State Police Officers—represented by the Kentucky State Police Professional Association; and

- Corrections, Parole and other Law Enforcement—represented by the American Federation of State, County and Municipal Employees (AFSCME).

The three employee categories that did not elect to be represented on the Council are:

- Administrative;

- Professional, Specialists, Scientific and Related Employees; and

- Regulatory and Inspection Employees.

Some form of public employee collective bargaining legislation exists in thirty-six states, and Congress authorized federal employees to bargain collectively in 1962. In Kentucky, statutory collective bargaining rights currently exist for firefighters in first class cities and police officers in counties with a city of the first class—Louisville and Jefferson County. By virtue of Home Rule, collective bargaining agreements also exist between many public employees and their public employers on the local level.

Proponents of collective bargaining rights believe that public employees should have the same rights as private sector employees to collectively bargain with their employers. In their opinion, collective bargaining is the most efficient form of communication between employers and employees on matters such as wages and hours and other conditions of employment. Opponents of collective bargaining for public employees object to mandatory participation and paying of dues. The current Governor's Employee Advisory Council does not mandate participation. Employees who choose to join an organization may opt to pay dues through payroll deduction by signing a form available from the Personnel Cabinet, but the dues structure has not been determined yet.

TRANSPORTATION

ENFORCEMENT OF THE SEAT BELT LAW
Prepared by John Snyder

Question

Should the General Assembly change the enforcement status for the state's mandatory seat belt law from a secondary offense to a primary offense?

Background

Kentucky's Seat Belt Law currently applies to all passengers in the vehicle.

In 1994, Kentucky enacted the current mandatory seat belt law (KRS 189.125), which applies to all persons riding in a motor vehicle that is designed to carry ten or fewer passengers. The seat belt law exempts persons operating a motorcycle, a motor driven cycle, or a farm truck registered for agricultural use only and having a gross weight of one ton or more. The law also exempts persons who have in their possession a written statement from a physician or chiropractor that they are unable for medical or physical reasons to wear a seat belt. Letter carriers who work for the U.S. Postal Service are also exempt from wearing a seat belt while engaged in the performance of their duties.

Child restraints were added to the seat belt law in 1982.

In 1962, KRS 189.125 was enacted to prohibit the sale of any motor vehicle in Kentucky that was not equipped with seat belts in the front seat. In 1982, the statute was amended to require parents or legal guardians to ensure that their children under forty inches in height were secured in a child restraint system at all times while riding in a motor vehicle. The 1982 law prohibited police officers from either arresting or issuing a driver a ticket for violating the child restraint provisions. Police officers were permitted to issue courtesy warnings to drivers failing to have children under forty inches properly restrained. The statute further prohibited considering failure to have a child in a child restraint system as contributory negligence and prohibited such failure from being admissible as evidence in a civil trial.

Limited exemptions from child restraints were added in 1988.

In 1988, the General Assembly amended the provisions for failure to have a child properly restrained to provide that the child did not have to be in a restraint system if the child was riding in a pickup truck and all seat positions in the truck were occupied by a person other than a child forty inches or less in height. A penalty of $50 was established for persons violating the child restraint provisions.

Violations of Kentucky's law are considered to be a Secondary Offense.

In 1994, KRS 189.125 was amended to require all passengers in both the front and rear seats to use seat belts unless the vehicle or individual is exempt. The provision relating to children's riding in trucks unrestrained was deleted, and child restraint provisions were broadened to require any driver transporting a child under forty inches in height to ensure that the child is properly restrained. The statute expressly prohibits a police officer from stopping a person or issuing a person a citation for failing to wear a seat belt if the officer has no other reason to stop the vehicle. This prohibition makes Kentucky's statute a "secondary offense," meaning a police officer cannot stop a vehicle for the sole reason that the driver or other passengers in the vehicle are not wearing a seat belt. The penalty established for violating the adult seat belt provisions is $25. The $50 penalty for persons violating child restraint provisions was retained.

Discussion

National compliance percentages with seat belt laws indicate a 77percent compliance rate in states with primary seat belt laws and 64percent in states with secondary offense laws.

While the first seat belts were installed by automobile manufacturers in the 1950's, seat belt use remained low, ranging from ten percent to fifteen percent nationwide until the early 1980's. According to the National Highway Traffic Safety Administration (NHTSA), by 1987 seat belt use had increased to forty-two percent as a result of the passage of mandatory laws in thirty-one states. By 1996, seat belt use nationwide was sixty-eight percent and ranged from a high of eighty-seven percent in California, to a low of forty-three percent in North Dakota. In the fall of 2000, use of seat belts by front seat passengers across the United States was estimated at seventy-one percent, according to results obtained from the National Occupant Protection Use Survey conducted by NHTSA. Estimates from the survey, conducted over six weeks during October and November 2000, also show that overall seat belt use in states with primary seat belt laws was seventy-seven percent compared with sixty-four percent in states with secondary seat belt laws.

Variations in seat belt laws make state comparisons difficult.

It is difficult to compare states with primary or secondary seat belt legislation because of the many variables between each state's provisions. Of the fifty states and the District of Columbia, only New Hampshire does not have a mandatory seat belt law. Of the fifty jurisdictions with mandatory laws, nineteen have "primary" laws; that is, a violator could be stopped for a seat belt violation and no other offense. Thirteen "primary" law states apply the law only to persons riding in the front seat while six states apply mandatory seat belt use to all passengers in the vehicle. Some states exempt taxis, commercial buses, school buses, farm vehicles, recreational vehicles, and vehicles greater than a certain weight. Of the thirty states with "secondary" offense laws, twenty apply the law to passengers in the front seat only while eleven states, including Kentucky, apply the law to all passengers in the vehicle.

Federal money is available for states which adopt legislation making violations of seat belt laws a primary offense.

According to a 1997 *Presidential Initiative to Increase Seat Belt Use Nationwide*, survey data showed that fifty-two percent of persons over the age of sixteen support primary enforcement. The support for primary enforcement was highest, sixty-five percent, in states that currently have a primary seat belt law compared to only forty-six percent supporting primary enforcement in states that currently have a secondary seat belt law. Incentive monies are available in the form of federal grants to states as a reward for increasing seat belt usage across the state, regardless if the primary status applies to front seat passengers only or to all passengers in the vehicle.

House Bill 68 was introduced in the 2002 Regular Session to change Kentucky's seat belt law from a secondary offense to a primary offense, while continuing to apply to all occupants of the vehicle. The law would have had a delayed effective date and delayed enforcement, kept the fine at $25, and eliminated court costs if the fine was prepaid. HB 68 passed the House of Representatives but did not receive a hearing in the Senate Transportation Committee. Legislation identical to the 2002 bill that passed the House has been prefiled for the 2003 Regular Session of the General Assembly.

Opponents of primary enforcement raise concerns about increased traffic stops.

Opposition to HB 68 and similar legislation, focused on the potential for overly aggressive enforcement activities by law enforcement agencies. Questions were also raised about whether the penalty would be too harsh when the standard $100 court costs are added to the $25 statutory fine for seat belt violations. This concern was addressed by amendments to HB 68 (which are also in the prefiled bill for 2003) that eliminate court costs if the fine for a seat belt violation is prepaid.

REGULATING DRIVERS' USE OF CELL PHONES

Prepared by John Snyder

Question

Should the General Assembly restrict the use of cell phones by drivers?

Background

There are currently over 100 million wireless telephone subscribers in the United States. The effect of this technology on the safety of the motoring public has become a major topic of discussion in recent years. As the discussion has become more intense, legislation has been filed in over 40 states to regulate the use of wireless phones in automobiles. To date, only one state, New York, has imposed major restrictions on driving while using a wireless phone. However, several localities have banned wireless phone use while driving, as have England, Switzerland, Australia, and Singapore.

In 2001, New York became the first state to ban hand held cell phones while driving.

In June 2001, the New York State Assembly passed the first statewide ban on the use of hand held wireless phones by drivers. Senate Bill 5400 requires that any wireless phone used by the operator of a motor vehicle while driving be equipped with a "hands free" device which allows the caller to engage in a call without holding the phone. New York's law, however, only defines "engaging in a call" as talking and listening on a phone and allows users to pick up the phone to activate and dial it. The law exempts emergency vehicles and personnel, and motorists who are reporting emergency situations. The law took effect November 1, 2001, and delayed fine enforcement for one month. Violators of the new law may be fined up to $100.

In Kentucky, bills to outlaw use of cell phones by drivers were introduced in the last three sessions.

During the last three regular sessions of the Kentucky General Assembly, legislation making operating a wireless phone while driving illegal was introduced but not enacted. Bills in the last two sessions received hearings in the House Transportation Committee. The 2001 legislation was not brought up for a vote; the 2002 legislation was defeated in a committee vote. The bills made exceptions for emergency personnel, citizens reporting dangerous conditions, and users of "hands-free" phones.

Discussion

Kentucky has just begun tracking cell phone use on accident reports.

To date, most of the evidence regarding the safety of cell phone use by drivers is anecdotal. In Kentucky, prior to the year 2000, there was no specific category on the uniform accident report to identify cell phone use as a contributing factor to an accident. The report form was changed beginning January 1, 2000, to include cell phones as a contributing factor. The following Tables show the total number of all accidents, injury accidents, and fatal accidents on Kentucky's highways for the years 2000 and 2001, and the number of each of those types of accidents where cell phone use was cited as a contributing factor:

Statistics show cell phones as a contributing factor in less than 1percent of fatal accidents, injury accidents, and total accidents in each of the last two years.

Comparison of Accidents, Injuries and Deaths

Total Accidents vs. Cell Phone Involved Accidents

Calendar Year 2000

Accident Type:	Total Number	Accidents Where Cell Phone Use is Cited as Contributing Factor:
Total Accidents	137,100	364
Injury Accidents	35,158	124
Fatal Accidents	718	2

Source: Kentucky State Police Highway Accident data for the year 2000

Calendar Year 2001

Accident Type:	Total Number	Accidents Where Cell Phone Use is Cited as Contributing Factor:
Total Accidents	133,429	440
Injury Accidents	33,708	134
Fatal Accidents	780	3

Source: Kentucky State Police Highway Accident data for the year 2001

Most attempts at examining the issue through comprehensive studies of accident reports have been hindered by lack of quality data.

Because the reporting of cell phone use as a contributing factor on traffic accident reports began only very recently in most states, there is little good historical data on the subject. Studies were hindered greatly by a lack of complete data. A recent University of North Carolina study of accidents from 1995 to 1999 sponsored by the AAA Foundation for Highway Safety identified cell phones as the source of distraction in 1.5 percent of accidents. However, the study authors cautioned that because of missing data and small numbers of some types of distractions, the database that was used underestimates driver inattention and distraction in crashes. The study authors also cautioned that "estimating the true percentage of crashes attributable to various distractions was not the goal" of the study.

Some studies have linked cell phones to accidents and slowed reaction times. Other studies have concluded that while there is a risk, it is relatively minor in comparison with other hazards.

A 1997 study in the *New England Journal of Medicine* examined 699 drivers who were involved in accidents resulting in property damage. By analyzing the phone records of these drivers, it was determined that the risk of a collision while using a cell phone was four times greater than when not using a phone. The risk was similar for all levels of driving experience and age groups and did not change significantly for hands-free devices over hand-held units.

Other studies have found that cell phones pose a relatively minor risk. A Harvard School of Public Health study, funded by a cell phone industry provider, found that while cellular phones pose some risk to drivers, other motorists, and pedestrians, the risks appear to be small in comparison with other daily risks. Further, the exact severity of such a risk is uncertain because of the limited research in the area. The authors calculated the risk of a driver's being killed using a cell phone at 6.4 in a million per year, 80 percent less than driving with a blood alcohol content of .10 percent. The study also cited several potential benefits of cell phone use, including decreased emergency response time and more effective apprehension of traffic violators and drunk drivers.

A new study examining the extent and nature of the cell phone distraction problem indicates that any cell phone use causes decreased alertness which may persist even after a call has ended.

A more recent study has identified the source of driver distraction as the cognitive act of engaging in conversation rather than the physical manipulation of the phone. Researchers at the University of Rhode Island and Carnegie Mellon University found that alertness decreased considerably when drivers were asked to conduct cognitive tasks, including having a cell phone conversation. According to the researchers, this distraction is similar whether the subject is using a hand held or hands free phone. Further, this state of decreased alertness continued after the call had ended.

Opponents of a cell phone ban cite myriad distractions that face drivers and say that current laws on reckless driving can address the problem. While proponents of a cell phone ban cite the benefits of eliminating driver distraction, opponents argue that there are many potential distractions to drivers such as eating and drinking, responding to children in the car, engaging in conversation with a passenger, and for some drivers, reading and applying makeup. Further, these distractions are often more common than cell phone distractions. Opponents cite the fact that Kentucky already has laws on the books prohibiting reckless driving, and these laws should be enforced to deal with cases in which a cell phone dramatically distracts a driver.

OPERATOR'S LICENSES FOR NONCITIZENS
Prepared by John Snyder

Question

Should the General Assembly change the criteria for issuing operator's licenses to noncitizens from other North American nations?

Background

Since the events of September 11, 2001, many states have taken steps to ensure that undocumented immigrants do not have access to operator's licenses. Because the state operator's license serves as a de facto identification card, strengthening licensing criteria has been the focus of the state measures to increase national security. Some of these measures have been introduced through executive action, while a few states, including Kentucky have legislated such changes.

The 2002 General Assembly made wholesale changes to the driver licensing statutes, particularly for non-citizens.

In response to both the September 11 attacks and some high profile license fraud cases involving immigrants, particularly in Jefferson County, the 2002 Regular Session of the General Assembly enacted HB 188, a measure designed to strengthen the requirements for issuing operator's licenses and nondriver identification cards, particularly to individuals who are not U.S. citizens. The bill clarified and specified the information required when applying for an operator's license, set out the procedures by which noncitizens of the U.S. who are not permanent residents must comply when applying for a license, and limited the valid period of a license to the length of time the noncitizen is permitted to be in the U.S. The enacted legislation also allows the Transportation Cabinet to suspend or revoke the license of any applicant who presents false or misleading information regarding citizenship, residency, or immigration status. The statute required any noncitizen who was not a permanent resident to present their documentation to one of 12 Transportation Cabinet regional offices where trained personnel could verify the legitimacy of the documentation.

Proposed legislation attempts to allow undocumented immigrants to obtain driver's licenses.

Conversely, there is concern in many quarters over the inability of undocumented immigrants to obtain an operator's license. Also introduced in the 2002 Regular Session, HB 205 would have required a Social Security Number for license application only if the person has one. The bill would have expanded the list of documents that could be submitted by foreign nationals when applying for a Kentucky license to include documents issued by the immigrant's native country. This bill was not enacted.

In addition to HB 205, a study proposal on this issue was also introduced in the 2002 Regular Session. HCR 129 would have established the Immigrant Driver's Licensing Task Force to study problems associated with undocumented foreign nationals driving without obtaining legal operator's licenses. The task force also would have examined Transportation Cabinet procedures and studied the effect of changes in licensing requirements on national security, highway safety, and Kentucky employers. The resolution was not adopted.

A bill (03 BR 81) has been prefiled for the 2003 Regular Session that would replace the category of "special status individual" with the category of "noncitizen" and include in that category the designation of "North American national." This would include anyone who is a citizen of Mexico or Canada. The bill would exclude North American nationals from the requirement to present documentation from the INS that they are authorized to be in the U.S. North American nationals would be required to present photo identification from their country of citizenship.

Discussion

Allowing undocumented immigrants to receive licenses would increase public safety.

The debate over whether undocumented immigrants should be eligible to receive operator's licenses turns on a few major points. Proponents contend that certain aspects of the American economy depend heavily on the labor of undocumented immigrants, and that the immigrants pay federal, state, and local taxes. Proponents also note that such individuals will be driving on U.S. highways out of sheer necessity whether they are licensed or not. Therefore, requiring that undocumented immigrants be licensed makes it possible for them to obtain motor vehicle insurance, assures that all drivers on the road are trained and skilled, and reduces the black market growth of fraudulent documents. Proponents also argue that a bona fide licensing system would improve the ability of authorities to establish identity when necessary.

Allowing immigrants without proper US documentation to obtain licenses could threaten security and would increase the potential for fraud.

The arguments against extension of licensing privileges to undocumented immigrants focuses mainly on national security and keeping the system safe from fraud. The events of September 11 have led to a heightened level of security awareness. It was in this environment that HB 188 was passed during the 2002 Session. Opponents claim that operator's licenses act as a de facto national identification card, so it is vital that licenses be issued only to individuals legally entitled to be in this country. Additionally, the acceptance of documentation from foreign countries would place a great strain on reviewers who are responsible for verifying document authenticity and would increase chances for submission of fraudulent documentation.

Opponents also contend that another potential consequence of easing documentation requirements for aliens is that Kentucky could become a magnet for individuals wishing to obtain licenses, which could then be taken back to another state. Officials in other states might not view this in a favorable light.