

INTERIM JOINT COMMITTEE ON JUDICIARY

Minutes of the 3rd Meeting of the 2020 Interim

August 20, 2020

Call to Order and Roll Call

The 3rd meeting of the Interim Joint Committee on Judiciary was held on Thursday, August 20, 2020, at 10:00 AM, in Room 171 of the Capitol Annex. Senator Whitney Westerfield, Chair, called the meeting to order, and the secretary called the roll.

Present were:

Members: Senator Whitney Westerfield, Co-Chair; Representative Jason Petrie, Co-Chair; Senators Danny Carroll, Alice Forgy Kerr, Michael J. Nemes, John Schickel, Wil Schroder, Robert Stivers II, Robin L. Webb, Stephen West, and Phillip Wheeler; Representatives Kim Banta, John Blanton, Charles Booker, Kevin D. Bratcher, McKenzie Cantrell, Daniel Elliott, Joseph M. Fischer, Chris Harris, Angie Hatton, Samara Heavrin, Nima Kulkarni, Stan Lee, Derek Lewis, Savannah Maddox, C. Ed Massey, Chad McCoy, Patti Minter, Kimberly Poore Moser, Jason Nemes, Brandon Reed, Maria Sorolis, and Rob Wiederstein.

Guests: Laurie Dudgeon, Director, Administrative Office of the Courts; Tara Blair, Executive Officer, Department of Pretrial Services, Administrative Office of the Courts; Angela Darcy, Deputy General Counsel, Office of General Counsel, Administrative Office of the Courts; John McGarvey, Morgan Pottinger McGarvey; Lindsay Beaver, Legislative Counsel, Uniform Law Commission; Ben Carter, Senior Litigation and Advocacy Counsel, Kentucky Equal Justice Center; Josh Crabtree, Executive Director, Legal Aid of the Bluegrass; Amanda Young, Executive Director, Legal Aid of Kentucky; Jesse Brewer, Greater Cincinnati Northern Kentucky Apartment Association; JD Carey, Executive Director, Apartment Association of Kentucky; Michael Wilson, Business Director and Deputy General Counsel, Secretary of State's Office.

LRC Staff: Katie Comstock and Yvonne Beghtol.

Approval of Minutes

Senator Schickel made a motion to approve the July 09, 2020 minutes, seconded by Senator Wheeler, and passed by voice vote.

COVID-19 Pretrial Release Numbers

Laurie Dudgeon, Director of the Administrative Office of the Courts, gave an overview of the pretrial process. A defendant is arrested, booked into a local jail, and a

pretrial officer conducts a risk assessment by evaluating the defendant's criminal history and scoring the risk to reoffend and the risk of danger to the community. The pretrial officer then presents this information to a local district judge who makes the release decision. The defendant may be released on their own recognizance, with non-financial bond conditions or with additional release conditions, or a financial bond may be set. In 2017, the Supreme Court expanded a program statewide that some judges had been piloting since 2014. The Administrative Release Program allows low level non-violent offenders to be released by pretrial services. Arrests have been down statewide during the COVID pandemic, but numbers are returning to pre-COVID levels. However, the Administrative Release Program has brought some uniformity to release practices statewide.

Tara Blair, Executive Office of the Department of Pretrial Services, began by stating that the Supreme Court expanded the existing Administrative Release Order on April 14, 2020, to expedite the release of defendants that judges were already releasing. The program allows for the release of defendants served with a warrant for nonpayment of fines, arrested on a bench warrant for failure to appear on a nonviolent or nonsexual Class D felony, or arrested for contempt on civil matters. On June 1, 2020, an amendment was issued to scale back the eligibility criteria.

Ms. Blair presented statewide pretrial services arrest data comparing 2018, 2019, and 2020. The data indicates a significant drop in arrests during the 2020 COVID period of March 16 to May 31. Ms. Blair stated they saw 500 to 700 defendants daily statewide pre-COVID which dropped to under 200 per day between March and May. The pretrial release rate is typically around 10 percent but went to 39 percent once the Administrative Release Order changed on April 14, 2020. The pretrial release rate then dropped to 29 percent once the amended order was issued on June 1, 2020.

Ms. Blair gave data on the Kentucky jail population, advising that the Administrative Release Program was not the driving factor in lowering the jail population. The data showed a minimal change in the yearly percentage of rearrests (6 percent in 2019 and 7 percent in 2020) and no rearrests (94 percent in 2019 and 93 percent in 2020) of those released in 2019 and 2020. The number of judicial releases were much lower in 2020, compared to 2019, but the percentage of arrests and rearrests are very similar. The number of administrative releases was much higher in 2020 due to the Administrative Release Program, but the percentage of rearrests and no rearrests were similar. When comparing class of offense cases from 2019 to 2020, the percentages are similar with the majority of rearrests being for Class A misdemeanors. The number of those released on a felony who recommitted a felony or committed a misdemeanor and those released on a misdemeanor who committed a felony or recommitted a misdemeanor has remained similar between 2019 and 2020. The largest percentage is those released on misdemeanors who recommit a misdemeanor. Ms. Blair stated that the pretrial data remains consistent from year to year. The rearrests rates from 2009 to present hover between 10 to 12 percent.

In response to Senator Schickel, Ms. Blair stated that the COVID-19 pandemic has allowed them to move from in-person interviews in jails to remote work, and allowed them to have 24/7 pretrial in every jail. The expansion of the Administrative Release Program has been discussed in every session, but its continuation will depend on the Supreme Court. Ms. Blair is not aware of any cases where an Administrative Release has overridden a bond release set by a judge.

In response to Senator Schroder, Ms. Dudgeon is not aware of any cases where a judge held back an arrest warrant out of concern for jail personnel safety.

Chairman Petrie stated that the pretrial data presented should be used by the committee for oversight purposes only. It is the responsibility of the judicial system to determine how pretrial services work and to adjust internal procedures accordingly.

Uniform Deployed Parents Custody and Visitation Act

John McGarvey, Morgan Pottinger McGarvey, began by stating that military families have a high divorce rate and military transfers place parents in separate jurisdictions.

Lindsay Beaver, Legislative Counsel for the Uniform Law Commission, began by stating that HB 428 was introduced in 2020, but the COVID pandemic brought it to a halt. Ms. Beaver stated that notice of a sudden deployment allows little time for parents to address custody issues. The Uniform Deployed Parents Custody and Visitation Act (UDPCVA) helps military families by simplifying conflict resolution, protects and nurtures familial bonds while the parent is away, and ensures that those who serve their country are not penalized for their service. The UDPCVA has been enacted in 14 states.

In response to President Stivers, Ms. Beaver stated that the UDPCVA helps families by laying out a framework, providing expedited court procedures, and allowing electronic testimony. Mr. McGarvey added that the UDPCVA has the support of the Department of Defense, the National Guard Association, and the office of the Fort Campbell JAG. Ms. Beaver stated that the order is temporary and modifiable upon the return of the service member and includes a provision to protect the deployed parent from allowing the courts to use the deployment as a negative factor in determining the best interest of the child.

In response to Representative Sorolis, Ms. Beaver confirmed that the UDPCVA addresses when both parents are enlisted in the military. The UDPCVA also addresses non-parental visitation, allowing the deployed parent to delegate visitation to a step-parent or grandparent.

Evictions

Ben Carter, Senior Litigation and Advocacy Counsel with the Kentucky Equal Justice Center (KEJC), stated that he sees the current renter situation as an eviction

explosion. Mr. Carter stated that if the eviction process did not disproportionately affect those of color, the process would not be allowed to continue. The data presented indicates that higher income jobs are returning but lower income jobs are not. In addition, your rights as a home renter depend on where you live and in what type of dwelling. The Uniform Residential Landlord Tenant Act (URLTA) has not been adopted in all areas, and the definition of a “covered dwelling” may not be known by the renter, which can impact if a renter is subject to late fees or allowed an extended eviction due to nonpayment. Currently, some sheriff departments may place a court order above Governor Beshear’s executive order prohibiting setouts during a pandemic, and renter rules are changing quickly. During the pandemic, a home is shelter from the COVID-19 virus, school for children, and an office for the employed. Mr. Carter gave data showing the percentage of renters who spend more than 50 percent of their income on housing, and the percentage of renters and home owners who made partial or no payment during July 2020. He stated that the Governor and the courts need more time to process and develop a more uniform, safe, and fair process.

Josh Crabtree, Executive Director of Legal Aid of the Bluegrass, stated that Legal Aid provides direct services to constituents in all 120 Kentucky counties and that Legal Aid of the Bluegrass represents 68 counties. Most Kentuckians spend more than 45 percent of their income on housing. Renters are least likely to have emergency funds set aside. Eviction Lab data estimates that 221,000 Kentucky households, or 44 percent of all households that rent their homes, are currently unable to pay rent or are at risk of eviction. The estimated rental shortfall is \$212,000,000. It is likely that 149,000 Kentucky households will have an eviction filed against them in the next few months. Evictions aggravate homelessness and poverty, harm families, imperil health, destabilize neighborhoods, and perpetuate racial inequality. Evicting children from their homes when their homes are also their school, will have lasting impacts on children, families, and communities. Parents need to know that they have the stability of a place to educate their children as long as in-person school options are not available. Evictions operate through the force of a complex and inconsistent legal system. Mr. Crabtree presented slides showing the eviction procedures for URLTA versus non-URLTA jurisdictions as well as pre-pandemic versus pandemic.

In response to Chairman Westerfield, Amanda Young, Executive Director for Legal Aid of Kentucky, stated that up to five jurisdictions in Kentucky have adopted URLTA.

In response to Chairman Westerfield, Mr. Crabtree stated that when he called the 120 counties to ask how they would handle evictions, there was no uniformity, and most did not ask why he was filing for an eviction. Ms. Young responded that most evictions filed for reasons other than non-payment are continuing. Mr. Crabtree added that evictions due to non-payment have tripled in 33 of the counties Legal Aid of the Bluegrass represents. Legal Aid’s extensive case management system gathers data that includes loss of jobs, not receiving unemployment, as well as COVID related reasons for non-payment.

In response to Senator West, Ms. Young stated that the time frame for eviction for non-payment needs to be consistent throughout the state. Tenants without a lease in non-URLTA jurisdictions are entitled to a 30 day notice of eviction if behind on rent. If there is a written lease, it can shorten that period. Mr. Crabtree stated that a URLTA jurisdiction gives a 7 day notice. In reply to a question regarding the economic long-term effects of allowing non-payment of rent, Mr. Carter stated that the appropriate amount of time during a pandemic to allow non-payment of rent should be determined by whether or not it is deemed safe to open schools and whether individuals are still waiting on unemployment insurance. The CARES Act offers assistance such as mortgage forbearance, paycheck protection program, and small business emergency loans for landlords.

In response to Representative Maddox, Mr. Crabtree stated that the Legal Aid of the Bluegrass' main priority is to keep people fed and housed. It is the job of the other powers that be to take on constitutional arguments with the Supreme Court.

JD Carey, Executive Director of the Apartment Association of Kentucky, stated that his association is dedicated to working with legislators on solutions to alleviate the needs of renters and housing providers. Apartment owners and operators also face financial challenges due to the COVID pandemic. The Apartment Association of Kentucky's members are working to assist those who are out of work by offering payment plans, waiving late fees, and other financial arrangements. Some owners cannot sustain even a small loss of rental income, and therefore face potential foreclosure due to the lack of governmental and judicial resources. Owners have expenses beyond mortgages, including federal, state, and local taxes, insurance, maintenance, utilities, payroll, and debt services that must be met regardless of whether or not a tenant pays rent. If an eviction moratorium is in place or extended, some owners will risk bankruptcy and the loss of their property, increasing the shortage of available housing.

Mr. Carey stated that the number of rental units up for eviction have been exaggerated. A study by the Aspen Institute concludes that up to 23,000,000 Americans living in rental housing are at risk of eviction as of September 30, 2020, based on an assumed renter unemployment rate of 25 to 30 percent. But the unemployment rate in July was at 10.2 percent, which casts doubt on the Aspen Institute's prediction. The National Multi-Family Housing Council found that 13.1 percent of renter households across the United States made no payment through the middle of August, which is a 2 percent increase from those who missed payments through mid-August 2019. This information indicates that most tenants are taking advantage of payment arrangement options, possible beneficiaries of the CARES Act, and recipients of the unemployment insurance benefits. These are preventative measures that reduce the likelihood of eviction for non-payment.

Mr. Carey stated that the multi-family apartment industry is the only sector of our economy being asked to giveaway their product for free, while still having to meet their own financial obligations. In addition, not all evictions are for non-payment of rent. Rental

housing providers must be allowed to proceed with evictions for reasons other than non-payment of rent due to COVID-19 or any future state of emergency. For example, if a renter abandons his or her apartment, a rental provider can obtain legal possession only through the eviction process. There are more effective ways than eviction moratoriums to provide relief to those on both sides who have been financially impacted by COVID-19.

Jesse Brewer, Greater Cincinnati Northern Kentucky Apartment Association, stated that the Governor's mandate has created a burden on small business owners that have tenants refusing to pay rent. Mr. Brewer gave a breakdown of the expenditure for each dollar a landlord receives from rent. Mr. Brewer stated that the 44 percent of at-risk evictions cited in a letter to Governor Beshear from the Kentucky Equal Justice Center is grossly inflated and the actual number is closer to four percent. The four month moratorium could conclude that the eviction number is close to that of the pre-pandemic year. An eviction is expensive and a last resort. In response to a previous statement that landlords have access to other resources, if so, then owners would not be evicting, and some renters are on Social Security or unemployment and are exempt from execution. Mr. Brewer stated that some tenants on social security income are refusing to pay rent because the government said they do not have to pay. His association wants to work with those who are in true need, but wants to also address the gross abuse of these mandates.

Senator Nemes asked that Mr. Carter contact his office to work through Mr. Carter's reasons as to why the laws are unfair. Senator Nemes advised that changing the payment plan without changing the lease can make the lease void. Also, if utilities cannot be turned off and the landlord pays for utilities, this is an additional burden on a landlord who is not receiving rent. Landlords often know who is in need of help and who is taking advantage of a situation.

In response to Senator West, Mr. Brewer stated that the lower income areas will be most negatively affected by non-payment of rent. Raising rent on paying tenants to offset the missed revenue of non-paying tenants is another unintended consequence.

Representative Kulkarni stated that this does not need to turn into a reprimand on what the Governor did right or wrong, or into a battle between landlords and tenants. Focus needs to be on how to resolve the eviction conflict. Solutions in the upcoming should come from the point of view that landlords and tenants are both constituents and we need to resolve the issues in light of fairness to both parties.

Regulations

Referred Administrative Regulation Reviewed by the Committee Pursuant to KRS 13A.290:

Secretary of State

030 KAR 008:005. Notary public applications and electronic and online registrations.

There being no further business, the meeting was adjourned at 11:59 AM.