

# CHAPTER 5

## Appellate Jurisdiction

### I. CREATION OF THE KANSAS APPELLATE COURTS

#### § 5.1 Constitutional and Statutory Authority

Article 3, § 1 of the Kansas Constitution provides that the judicial power of the state is vested in one court of justice, which consists of one Supreme Court with general administrative authority over all other courts, district courts, and “such other courts as are provided by law.” K.S.A. 20-3001 provided for the creation of the Kansas Court of Appeals.

Pursuant to Article 3, § 3 of the Kansas Constitution, the Supreme Court has original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus, and “such appellate jurisdiction as may be provided by law.” Pursuant to K.S.A. 20-3001, the Court of Appeals has “such jurisdiction over appeals in civil and criminal cases and from administrative bodies and officers of the state as may be prescribed by law.” In addition, the Court of Appeals has “such original jurisdiction as may be necessary to the complete determination of any cause on review.”

Pursuant to Article 3, § 3, jurisdiction to entertain an appeal is conferred by statute. *State v. Verge*, 272 Kan. 501, 521, 34 P.3d 449 (2001); *In re J.D.B.*, 259 Kan. 872, Syl. ¶ 1, 915 P.2d 69 (1996); *City of Wichita v. Smith*, 31 Kan. App. 2d 837, 839, 75 P.3d 1228 (2003). “The Kansas Constitution gives to the district and appellate courts jurisdiction to hear appeals only as provided by law. The Kansas Constitution gives the legislature the power to grant, limit, and withdraw the appellate jurisdiction to be exercised by the courts.” *State v. Lewis*, 27 Kan. App. 2d

134, Syl. ¶ 3, 998 P.2d 1141, *rev. denied* 269 Kan. 938 (2000). “The right to appeal is entirely statutory...” *State v. Gill*, 287 Kan. 289, 293-94, 196 P.3d 369 (2008); *State v. Legero*, 278 Kan. 109, Syl. ¶ 2, 91 P.3d 1216 (2004); *In re J.D.B.*, 259 Kan. 872, Syl. ¶ 1. Parties cannot create appellate jurisdiction. See *State v. McCarley*, 287 Kan. 167, 175, 195 P.3d 230 (2008); *State v. Asher*, 28 Kan. App. 2d 799, 800, 20 P.3d 1292 (2001). When a record discloses a lack of jurisdiction, the appellate court must dismiss the appeal. *State v. Gill*, 287 Kan. at 294; *In re J.D.B.*, 259 Kan. 872, Syl. ¶ 1.

## II. APPELLATE JURISDICTION OF THE SUPREME COURT IN CRIMINAL CASES

### § 5.2 Direct Appeals

Pursuant to K.S.A. 22-3601(a), any appeal permitted to be taken from a final judgment of the district court in a criminal case is taken to the Court of Appeals, except in those cases reviewable by law in the district court and those cases where direct appeal to the Supreme Court is required. Direct appeal to the Supreme Court is required in the following cases:

- By criminal defendants in the following situations: (1) in any case in which a defendant has been convicted of a class A felony; (2) in which a maximum sentence of life imprisonment has been imposed; or (3) for crimes committed on or after July 1, 1993, any case in which a defendant has been convicted of an off-grid crime. K.S.A. 22-3601(b)(1); and
- In any case in which a statute of this state or of the United States has been held unconstitutional. K.S.A. 22-3601(b)(2).

**PRACTICE NOTE:** The Supreme Court has implied the State may appeal under K.S.A. 22-3601(b). See *State v. Snelling*, 266 Kan. 986, 988-89, 975 P.2d 259 (1999). But see *State v. Verge*, 272 Kan. 501, 521, 34 P.3d 449 (2001) (K.S.A. 22-3601[b][1] only expresses what appeals are to be taken to the Supreme Court and provides no statutory authority for appeal).

A conviction resulting in imposition of a death sentence is subject to automatic review by an appeal to the Kansas Supreme Court. *State v. Hayes*, 258 Kan. 629, 638, 908 P.2d 597 (1995); K.S.A. 21-4627(a); K.S.A. 21-4631(c). The procedure to be followed on appeal following imposition of a death penalty is set out in Supreme Court Rule 10.02.

### III. APPELLATE JURISDICTION OF THE COURT OF APPEALS IN CRIMINAL CASES

#### A. Appeals by the Defendant

##### § 5.3 Generally

All direct appeals from final judgments in criminal cases are taken to the Court of Appeals, except in those cases reviewable by law in the district court and where direct appeal to the Supreme Court is required. K.S.A. 22-3601(a).

Pursuant to K.S.A. 22-3602(a), a defendant may appeal to the court having appellate jurisdiction “from any judgment against the defendant...” There are restrictions following a guilty plea. See K.S.A. 22-3602(a) and § 5.5, *infra*; however, our Supreme Court has stated, “a criminal defendant has a nearly unlimited right of review.” *State v. Boyd*, 268 Kan. 600, 605, 999 P.2d 265 (2000).

Jurisdiction over an appeal of a motion to correct an illegal sentence under K.S.A. 22-3504 lies with the court that had jurisdiction to hear the original appeal. *State v. Thomas*, 239 Kan. 457, Syl. ¶ 2, 720 P.2d 1059 (1986).

##### § 5.4 Following Judgment

Except as otherwise provided, a criminal defendant can appeal from any district court judgment against the defendant and “upon appeal any decision of the district court or intermediate order made in the progress of the case may be reviewed.” K.S.A. 22-3602(a). See also *State v. Mountjoy*, 257 Kan. 163, Syl. ¶ 4, 891 P.2d 376 (1995). Judgment has been rendered when there has been a conviction and sentence. *State v. Donahue*, 25 Kan. App. 2d 480, Syl. ¶ 2, 967 P.2d 335, *rev. denied* 266 Kan. 1111 (1998). Appeals from the sentence imposed for felony offenses committed on

or after July 1, 1993, are limited pursuant to K.S.A. 21-4721. See *State v. Flores*, 268 Kan. 657, 658, 999 P.2d 919 (2000).

K.S.A. 22-3430 gives authority to the trial court to commit a criminal defendant to a state mental institution in lieu of imprisonment. K.S.A. 22-3430(c) states, “The defendant may appeal from any order of commitment made pursuant to this section in the same manner and with like effect as if sentence to a jail, or to the custody of the secretary of corrections had been imposed.” A defendant can appeal from an order of commitment pursuant to K.S.A. 22-3430; however, a trial court’s refusal to commit a defendant to a state mental institution in lieu of imprisonment is not reviewable on appeal. *State v. Lawson*, 25 Kan. App. 2d 138, 144, 959 P.2d 923 (1998).

Sentence is effective when it is pronounced from the bench. *State v. Moses*, 227 Kan. 400, Syl. ¶ 2, 607 P.2d 477 (1980). This is true even under the sentencing guidelines. *State v. Scaife*, 286 Kan. 614, 626, 186 P.3d 755 (2008); *State v. Soto*, 23 Kan. App. 2d 154, Syl. ¶ 1, 928 P.2d 103 (1996).

There is no provision for an interlocutory appeal by a defendant in a criminal case. See *Donahue*, 25 Kan. App. at 483. There is also no statutory procedure for a defendant to appeal a question of law after an acquittal of the crime charged. *Mountjoy*, 257 Kan. 163, Syl. ¶ 4. The prosecution can, however, appeal on a question reserved following judgment. *State v. Hermes*, 229 Kan. 531, Syl. ¶ 4, 625 P.2d 1137 (1981). See § 5.9, *infra*.

**PRACTICE NOTE:** Although a defendant cannot pursue an interlocutory appeal, in very limited circumstances defendants may be able to bring claims to an appellate court by way of original habeas action under K.S.A. 22-2710. *In re Mason*, 245 Kan. 111, Syl. ¶ 1, 775 P.2d 179 (1989) (defendant allowed to bring double jeopardy claim in original action with appellate court because the double jeopardy clause protects against going through second trial, not just being convicted at a second trial). See also Chapter 4, *supra*.

Defendants are allowed to appeal from judgments on post-conviction/post-appeal motions. See, e.g., *State v. Guzman*, 279 Kan. 812, 112 P.3d 120 (2005) (appeal from denial of pro se motion for jail time credit).

## § 5.5 Following Pleas

Despite the general rule that a criminal defendant can appeal following judgment, no appeal can be taken from a judgment of conviction upon a plea of guilty or *nolo contendere*, “except that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in K.S.A. 60-1507 and amendments thereto.” K.S.A. 22-3602(a). See *State v. Edgar*, 281 Kan. 30, 39, 127 P.3d 986 (2006) (discussing a defendant’s waiver of defects or irregularities in the proceedings upon entry of a voluntary plea of guilty).

Following a plea, a criminal defendant can, however, raise a number of issues on appeal unrelated to his conviction. For instance, following a plea, a criminal defendant can appeal from the court’s restitution order. See *State v. Hunziker*, 274 Kan. 655, 56 P.3d 202 (2002); *State v. Beechum*, 251 Kan. 194, 202, 833 P.2d 988 (1992). See also *State v. Scott*, 265 Kan. 1, 961 P.2d 667 (1998) (appeal from an order requiring registration as a sexual offender). Denial of a motion to withdraw a guilty plea pursuant to K.S.A. 22-3210(d) may also be appealed. *State v. Solomon*, 257 Kan. 212, Syl. ¶ 1, 891 P.2d 407 (1995); *State v. McDaniel*, 255 Kan. 756, Syl. ¶ 1, 877 P.2d 961 (1994).

The prohibition against appeals taken by a defendant from a judgment of conviction based upon a plea does not apply to pleas accepted by a district magistrate judge or a municipal court judge. See *State v. Gillen*, 39 Kan. App. 2d 461, 467-69, 181 P.3d 564 (2008).

## B. Appeals by the Prosecution

### § 5.6 Generally

“The right to an appeal by the State in a criminal proceeding is limited by statute.” *State v. Bliss*, 28 Kan. App. 2d 591, Syl. ¶ 1, 18 P.3d 979 (2001). “The prosecution’s ability to appeal a district court’s ruling is substantially limited when compared to the defendant’s right of appeal.” *City of Liberal v. Witherspoon*, 28 Kan. App. 2d 649, Syl. ¶ 1, 20 P.3d 727 (2001).

Pursuant to K.S.A. 22-3602(b), the prosecution can appeal to the Court of Appeals only in specific situations, as set forth in § 5.7 through § 5.11, *infra*.

**PRACTICE NOTE:** In *State v. Vanwey*, 262 Kan. 524, 526-27, 941 P.2d 365 (1997), *State v. Sisk*, 266 Kan. 41, 966 P.2d 671 (1998), and *State v. McCarley*, 287 Kan. 167, 176, 195 P.3d 230 (2008), the court entertained the State’s appeal from an illegal sentence under K.S.A. 22-3504. As a general rule, if the practitioner believes there are multiple bases for the appeal, all should be stated. “Grounds for jurisdiction not identified in a notice of appeal may not be considered by the court.” *State v. Woodling*, 264 Kan. 684, Syl. ¶ 2, 957 P.2d 398 (1998).

### § 5.7 From an Order Dismissing a Complaint, Information or Indictment: K.S.A. 22-3602(b)(1)

“An appeal from an order dismissing a complaint may be taken by the prosecution.” *State v. Bockert*, 257 Kan. 488, 491, 893 P.2d 832 (1995). The right to take a direct appeal under this statutory provision is generally the right to appeal from a pretrial order dismissing a complaint, information or indictment. “A judgment of acquittal entered by the trial court on a motion filed by the defendant at the close of the State’s evidence is final and not appealable by the State, except in those special circumstances when the question reserved by the State is of statewide interest and is vital to a correct and uniform administration of the criminal law.” *State v. Wilson*, 261 Kan. 924, Syl. ¶ 2, 933 P.2d 696 (1997). “Appellate review of [a] decision after acquittal would constitute double jeopardy.” *State v. Gustin*, 212 Kan. 475, 480, 510 P.2d 1290 (1973), citing *Kepner v. United States*, 195 U.S. 100, 49 L. Ed. 114, 24 S. Ct. 797 (1904).

The right to take this appeal belongs to the public prosecutor, not the complaining witness, *State ex rel. Rome v. Fountain*, 234 Kan. 943, Syl. ¶ 2, 678 P.2d 146 (1984), or an attorney hired to assist the public prosecutor pursuant to K.S.A. 19-717. *State v. Berg*, 236 Kan. 562, Syl. ¶ 2, 694 P.2d 427 (1985).

There is no requirement that the prosecutor refile a dismissed complaint before appealing from an order dismissing a complaint, *State v. Zimmerman & Schmidt*, 233 Kan. 151, Syl. ¶ 1, 660 P.2d 960 (1983); however, all counts in a complaint, information, or indictment must be dismissed or otherwise disposed of before an appeal from an order

dismissing a complaint, information, or indictment is properly before the appellate court. *State v. Freeman*, 234 Kan. 278, 282, 670 P.2d 1365 (1983). “There is no statutory authority for the State to appeal from the dismissal in a criminal case of some of the counts of a multiple-count complaint, information, or indictment while the case remains pending before the district court on all or a portion of the remaining counts which have not been dismissed and which have not been finally resolved.” *State v. Nelson*, 263 Kan. 115, Syl. ¶ 3, 946 P.2d 1355 (1997). But see *McPherson v. State*, 38 Kan. App. 2d 276, 287-88, 163 P.3d 1257 (2007) (State’s remedies upon dismissal of a complaint not limited only to appeal or the refile of charges. K.S.A. 22-3602[d] does not foreclose the State from exercising other posttrial procedural motions.)

For a discussion of appeals following the dismissal of a grand jury indictment and the law of the case rule, see *State v. Finical*, 254 Kan. 529, 867 P.2d 322 (1994).

Under K.S.A. 22-3602(b)(1), the State can appeal the dismissal of an indictment as insufficiently charging a crime. See *State v. Wright*, 259 Kan. 117, 911 P.2d 166 (1996).

**PRACTICE NOTE:** A notice of appeal indicating the State was appealing from “the decision of the District Court” on a specified date was deemed sufficient to cover the court’s dismissal of the case immediately after suppressing evidence. See K.S.A. 22-3603 and § 5.11, *infra*, regarding interlocutory appeals following suppression of evidence. “For all practical purposes, the district court’s decision to dismiss and its decision to grant defendants’ suppression motions were one and the same. Thus the State’s citation of the statute authorizing an appeal from the dismissals was sufficient to preserve its right to challenge the basis of the dismissal decisions, *i.e.*, the suppression of the evidence...” *State v. Huff*, 278 Kan. 214, 218-19, 92 P.3d 604 (2004).

## § 5.8 From an Order Arresting Judgment: K.S.A. 22-3602(b)(2)

Pursuant to K.S.A. 22-3502, an order arresting judgment can be entered if a complaint, information, or indictment does not charge a crime or if the court was without jurisdiction of the crime charged. *State v.*

*Unruh*, 259 Kan. 822, Syl. ¶ 2, 915 P.2d 744 (1996). See also *State v. Sims*, 254 Kan. 1, Syl. ¶ 3, 862 P.2d 359 (1993). K.S.A. 22-3503 allows the district court to arrest judgment on its own motion.

If an information or indictment did charge a crime and the court had jurisdiction over the crime charged, there can be no order arresting judgment from which the State can appeal regardless of the State's characterization of the trial court's order. See *Unruh*, 259 Kan. at 824-25.

### **§ 5.9 Upon a Question Reserved by the Prosecution: K.S.A. 22-3602(b)(3)**

An appeal by the State on a question reserved must be taken after judgment has been entered, *State v. Hermes*, 229 Kan. 531, Syl. ¶ 4, 625 P.2d 1137 (1981), and such an appeal will not be entertained merely to demonstrate whether error was committed by the trial court. *State v. Tremble*, 279 Kan. 391, Syl. ¶ 1, 109 P.3d 1188 (2005); *State v. Craig*, 254 Kan. 575, 576, 867 P.2d 1013 (1994). "Questions reserved presuppose that the case at hand has concluded but that an answer to an issue of statewide importance is necessary for proper disposition of future cases. [Citation omitted.]" *Craig*, 254 Kan. at 576. See also *State v. Skolant*, 286 Kan. 219, 225, 182 P.3d 1231 (2008).

An appeal upon a question reserved must involve a question of statewide interest important to the correct and uniform administration of criminal law. *Craig*, 254 Kan. at 576; *State v. Price*, 247 Kan. 100, Syl. ¶ 2, 795 P.2d 57 (1990); *State v. Hodges*, 241 Kan. 183, Syl. ¶ 1, 734 P.2d 1161 (1987). "The purpose of permitting the State to appeal a question reserved is to allow the prosecution to obtain review of an adverse legal ruling on an issue of statewide interest important to the correct and uniform administration of the criminal law which otherwise would not be subject to appellate review." *State v. Mountjoy*, 257 Kan. 163, Syl. ¶ 3, 891 P.2d 376 (1995). There is no statutory authority for answering a defendant's inquiries in a State's appeal upon a question reserved. *Mountjoy*, 257 Kan. 163, Syl. ¶ 5.

New issues and previously uninterpreted statutes are appropriate subjects for appeal on questions reserved. See *State v. Adee*, 241 Kan. 825, 827, 740 P.2d 611 (1987). The appellate courts "uniformly [decline] to entertain questions reserved in which the resolution of the question

would not provide helpful precedent.” *Tremble*, 279 Kan. 391, Syl. ¶ 1. For instance, an order granting probation to a particular defendant is not a question of statewide importance that can be appealed as a question reserved. See *State v. Ruff*, 252 Kan. 625, 630, 847 P.2d 1258 (1993). The sufficiency of the State’s evidence in a particular case is not an issue of statewide importance. *State v. Wilson*, 261 Kan. 924, 933 P.2d 696 (1997). The question of whether a plea agreement may be deemed ambiguous if it is silent as to some issue, condition, or fact known to both sides is not an issue of statewide importance because it is fact specific and of limited precedential value. *State v. Woodling*, 264 Kan. 684, 688, 957 P.2d 398 (1998). Furthermore, as a general rule the validity of a local ordinance is not a matter of statewide importance warranting consideration of a question reserved. See *City of Wichita v. Basgall*, 257 Kan. 631, 633, 894 P.2d 876 (1995) (nevertheless entertaining the appeal because the challenged ordinance was or could be common to other municipalities).

The decision on an appeal pursuant to K.S.A. 22-3602(b)(3) has no effect on a criminal defendant who has been acquitted. *State v. Gustin*, 212 Kan. 475, 479, 510 P.2d 1290 (1973). However, in *State v. Taylor*, 262 Kan. 471, 939 P.2d 904 (1997), and *State v. Hatchel*, 31 Kan. App. 2d 725, 727, 71 P.3d 1191 (2003), the State’s appeal on a question reserved was sustained and the matter was remanded for resentencing. See also *State v. Miller*, 260 Kan. 892, 904, 926 P.2d 652 (1996).

“On a question reserved, the State must furnish a sufficient record to permit review. In so doing, the State must lodge proper and timely objections, advise the trial court of the basis for the objections, and properly perfect the appeal.” *State v. G.W.A.*, 258 Kan. 703, Syl. ¶ 2, 906 P.2d 657 (1995). See also *State v. Hurla*, 274 Kan. 725, 727-28, 56 P.3d 252 (2002); *City of Overland Park v. Cunningham*, 253 Kan. 765, Syl. ¶ 2, 861 P.2d 1316 (1993). No more is required from the State than from a defendant to preserve an issue for appellate review. *State v. Pottoroff*, 32 Kan. App. 2d 1161, Syl. ¶ 2, 96 P.3d 280 (2004). The State must lay the same foundation for appeal that a defendant is required to lay. *Pottoroff*, 32 Kan. App. 2d 1161, Syl. ¶ 1. “Although the better practice to preserve a question for appeal is for the State to object or take exception *after* the court’s ruling, an argument presented by the State *prior* to the ruling may be adequate to preserve the question for jurisdictional purposes.” *Pottoroff*, 32 Kan. App. 2d 1161, Syl. ¶ 3. In the absence of any timely, proper objection or exception, the issue is not properly before the appellate court. See also

*State v. Huff*, 278 Kan. 214, 217-19, 92 P.3d 604 (2004) (discussion of sufficiency of State's notice of appeal to trigger appellate jurisdiction over a question reserved).

**§ 5.10 Upon an Order Granting a New Trial in Any Case Involving an A or B Felony or, for Crimes Committed on or after July 1, 1993, Any Case Involving an Off-Grid Crime: K.S.A. 22-3602(b)(4)**

**§ 5.11 Interlocutory Appeals: K.S.A. 22-3603**

Pursuant to K.S.A. 22-3601(a), all interlocutory appeals that are permitted in criminal cases must be taken to the Court of Appeals. The only interlocutory appeals that are permitted in criminal cases are set out in K.S.A. 22-3603. Under this statute, the prosecution can appeal from a pretrial order quashing a warrant, quashing a search warrant, suppressing evidence, or suppressing a confession or admission. See *State v. Unruh*, 263 Kan. 185, Syl. ¶ 5, 946 P.2d 1369 (1997). A criminal defendant has no right to take an interlocutory appeal. See *State v. Donahue*, 25 Kan. App. 2d 480, 483, 967 P.2d 335 (1998).

A threshold requirement of an appeal from a pretrial order suppressing evidence is that the order appealed from substantially impairs the State's ability to prosecute the case. *State v. Newman*, 235 Kan. 29, 35, 680 P.2d 257 (1984); *State v. Nuessen*, 23 Kan. App. 2d 456, Syl. ¶ 1, 933 P.2d 155 (1997). “ “Suppression rulings which seriously impede, although they do not technically foreclose prosecution can be appealed under K.S.A. 22-3603.” ’ [Citation omitted.]” *State v. Bliss*, 28 Kan. App. 2d 591, 594, 18 P.3d 979 (2001). The State must be prepared to make this showing on order of the appellate court or when appellate jurisdiction is challenged by the defendant-appellee. *Newman*, 235 Kan. at 35. There is, however, no similar threshold requirement in an appeal from a pretrial order suppressing a confession or admission. *State v. Mooney*, 10 Kan. App. 2d 477, 479, 702 P.2d 328, *rev. denied* 238 Kan. 879 (1985). In dicta, the *Mooney* court also indicated there was no such threshold requirement in an appeal from a pretrial order quashing a warrant or search warrant. *Mooney*, 10 Kan. App. 2d at 479.

There is no mechanism whereby the State can appeal from an order denying revocation of a diversion agreement or probation. *State v.*

*McDaniels*, 237 Kan. 767, 772, 703 P.2d 789 (1985). This does not mean, however, that the State can never question an order denying revocation of a diversion agreement. In *McDaniels*, the court stated, “Until the legislature chooses to create a right in the State to appeal from a pretrial order denying the State’s request to revoke diversion, the State may not appeal prior to the completion of the diversion and the dismissal of the case by the district court.” *McDaniels*, 237 Kan. at 772. The State may, however, “appeal after the dismissal, and if the appeal is sustained, the defendant may be tried.” *McDaniels*, 237 Kan. at 771. Likewise, a defendant may not appeal from the court’s decision to terminate pretrial diversion and reinstate criminal prosecution. *State v. Cameron*, 32 Kan. App. 2d 187, 81 P.3d 442 (2003).

## C. Sentencing Guidelines Appeals

### § 5.12 Appeals Under the Kansas Sentencing Guidelines Act

On July 1, 1993, the Kansas Sentencing Guidelines Act went into effect for crimes committed on or after that date. The appeal rights of both the prosecution and defendant from sentences imposed pursuant to the Act are set by statute. See K.S.A. 22-3602(f); K.S.A. 21-4721; *State v. Ware*, 262 Kan. 180, Syl. ¶ 1, 938 P.2d 197 (1997).

For any felony committed on or after July 1, 1993, there is generally no appellate review of a sentence within the presumptive sentence range for the crime. K.S.A. 21-4721(c). But see *State v. Barnes*, 278 Kan. 121, 92 P.3d 578 (2004); *State v. Hodgden*, 29 Kan. App. 2d 36, 38, 25 P.3d 138, *rev. denied* 271 Kan. 1040 (2001).

A sentence of imprisonment or probation in a border box case is a presumptive sentence for purposes of appeal, so it is not subject to appellate review. See *State v. Clark*, 21 Kan. App. 2d 697, 700, 907 P.2d 898 (1995), *rev. denied* 259 Kan. 928 (1996).

“The filing and denial of a motion requesting departure by either the defendant or the State has no effect on the rule that a sentence within the presumptive sentence grid block is not subject to review on appeal.” *State v. Graham*, 27 Kan. App. 2d 603, Syl. ¶ 6, 6 P.3d 928 (2000).

An appellate court's jurisdiction to consider an appeal challenging a sentence imposed pursuant to the Kansas Sentencing Guidelines Act is limited to the grounds set out in K.S.A. 21-4721(a) and (e), and illegal sentences. *State v. McCallum*, 21 Kan. App. 2d 40, Syl. ¶ 4, 895 P.2d 1258 (1995).

K.S.A. 21-4721(a) states that a departure sentence is subject to appeal by the defendant or the prosecution. Accord *State v. Sampsel*, 268 Kan. 264, Syl. ¶ 3, 497 P.2d 664 (2000). "Only if the sentence imposed is inconsistent with the duration and disposition of the appropriate grid block can there be a departure." *State v. McCallum*, 21 Kan. App. 2d at 47. See also K.S.A. 21-4703(f) (defining "departure"); K.S.A. 21-4703(g) (defining "dispositional departure"); and K.S.A. 21-4703(i) (defining "durational departure"). By statute, a sentence may be deemed not to be a departure and thus not subject to appeal. See, e.g., K.S.A. 21-4603d(f).

"In an appeal from a departure sentence, an appellate court must determine pursuant to [K.S.A. 21-4721(d)] whether the sentencing court's findings of fact and reasons justifying departure (1) are supported by substantial competent evidence and (2) constitute substantial and compelling reasons for departure as a matter of law. The applicable standard of review is keyed to the language of the statute: [K.S.A. 21-4721(d)(1)] requires an evidentiary test – are the facts stated by the sentencing court in justification of departure supported by the record? [K.S.A. 21-4721(d)(2)] requires a law test – are the reasons stated on the record for departure adequate to justify a sentence outside the presumptive sentence?" *State v. Richardson*, 20 Kan. App. 2d 932, Syl. ¶ 1, 901 P.2d 1 (1995).

K.S.A. 21-4721(e)(1) states, "In any appeal, the appellate court may review a claim that: a sentence that departs from the presumptive sentence resulted from partiality, prejudice, oppression or corrupt motive." This subsection seemingly gives the appellate courts jurisdiction to consider another issue in departure sentence appeals. *State v. Favela*, 259 Kan. 215, 239, 911 P.2d 792 (1996).

By inference, K.S.A. 21-4719(b)(1) is interpreted to give appellate courts the authority to review the extent of a downward durational departure. Scope of review is limited to an abuse of discretion standard. *Favela*, 259 Kan. at 242. The same standard applies to appellate review of the extent of an upward departure sentence. *State v. Tiffany*, 267 Kan. 495,

506-07, 986 P.2d 1064 (1999). But see *State v. Martin*, 285 Kan. 735, 746-47, 175 P.3d 832 (2008) (issue of whether departure factors relied on by sentencing court are substantial and compelling is reviewed de novo).

K.S.A. 21-4721(e)(2) and (3) allow for appellate review of whether the sentencing court erred in either including or excluding recognition of a prior criminal conviction or juvenile adjudication for criminal history scoring purposes and whether the sentencing court erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes. In *State v. Barnes*, 278 Kan. 121, 124, 92 P.3d 578 (2004), the Court held that it could consider a claim under K.S.A. 21-4721(e)(3) even though the sentence imposed resulted from a plea agreement. See also *State v. Vandervort*, 276 Kan. 164, 72 P.3d 925 (2003) (appellate court could consider criminal history issue under K.S.A. 21-4721(e)(2) even though not raised at trial court). Apparently, both the State and the defendant can appeal these issues. See *State v. Hodgden*, 29 Kan. App. 2d 36, 25 P.3d 138 (2001) (State appealed district court's amendment of defendant's criminal history and court entertained appeal even though defendant had been given presumptive sentence).

It has been held that when a criminal defendant challenges a presumptive sentence on the ground that the running of multiple sentences consecutively constitutes an abuse of discretion, no ground for appeal authorized by K.S.A. 21-4721(a) or (e) is asserted; therefore, there is no appellate jurisdiction to consider the issue. *State v. Ware*, 262 Kan. 180, Syl. ¶ 4, 938 P.2d 197 (1997); *State v. McCallum*, 21 Kan. App. 2d 40, Syl. ¶ 7, 895 P.2d 1258 (1995). See also *State v. Flores*, 268 Kan. 657, Syl. ¶ 2, 999 P.2d 919 (2000) (a consecutive sentence is not a departure sentence).

Irrespective of whether a notice of appeal has been filed, the sentencing court retains jurisdiction for 90 days after the entry of judgment to modify its judgment and sentence to correct any arithmetic or clerical errors. K.S.A. 21-4721(i).

## IV. APPELLATE JURISDICTION IN JUVENILE OFFENDER CASES

### § 5.13 Appeals by the Juvenile Offender

Appeals by a juvenile offender are taken to the appellate court having jurisdiction over the criminal charge. See K.S.A. 38-2380; *State v. Kunellis*, 276 Kan. 461, 78 P.3d 776 (2003) (convicted, in part, of felony murder; appeal including prosecution as an adult to Supreme Court); *In re B.M.B.*, 264 Kan. 417, 955 P.2d 1302 (1998) (appeal from adjudication of rape; case transferred from Court of Appeals to Supreme Court); *State v. Hartpence*, 30 Kan. App. 2d 486, 42 P.3d 1197 (2002) (juvenile pleaded to aggravated indecent liberties with a child; appeal including prosecution as adult to Court of Appeals). Appeals from a district magistrate judge shall be to a district judge. K.S.A. 38-2382(a).

Pursuant to K.S.A. 38-2380, a juvenile offender can appeal from:

- An order of adjudication as a juvenile offender, sentencing, or both. K.S.A. 38-2380(b);
- An order authorizing prosecution as an adult, if the juvenile offender did not consent to the order. K.S.A. 38-2380(a)(1). The juvenile raises the issue on appeal from his or her criminal conviction. A juvenile can also appeal an order authorizing prosecution as an adult following a plea of guilty or nolo contendere if the juvenile did not consent to the order. K.S.A. 38-2380(a)(1). See *State v. Ransom*, 268 Kan. 653, Syl. ¶ 1, 999 P.2d 272 (2000) (interpreting prior, similarly worded statute); and
- A departure sentence, although the sentence review is limited. See K.S.A. 38-2380(b)(3). See also § 5.15, *infra*.

In any appeal, an appellate court may review a claim that:

- An imposed departure sentence resulted from partiality, prejudice, oppression, or corrupt motive. K.S.A. 38-2380(b)(4)(A).
- The sentencing court erred in either including or excluding recognition of prior convictions or adjudications. K.S.A. 38-2380(b)(4)(B).

- The sentencing court erred in ranking the crime severity level or in scoring criminal history. K.S.A. 38-2380(b)(4)(C).

### § 5.14 Appeals by the Prosecution

Appeals by the prosecution are taken to the Court of Appeals. See K.S.A. 22-3602(b) (appeals by prosecution from order dismissing complaint, information or indictment and on question reserved go to the Court of Appeals); *In re J.D.J.*, 266 Kan. 211, 967 P.2d 751 (1998) (appeal from order denying prosecution as adult filed with Court of Appeals and transferred to Supreme Court pursuant to K.S.A. 20-3018[c]).

Under the Revised Kansas Juvenile Justice Code, effective January 1, 2007, the prosecution can appeal:

- From an order dismissing proceedings when jeopardy has not attached. K.S.A. 38-2381(a)(1);
- From an order denying authorization to prosecute a juvenile as an adult. K.S.A. 38-2381(a)(2);
- From an order quashing a warrant or search warrant. K.S.A. 38-2381(a)(3);
- From an order suppressing evidence or suppressing a confession or admission. K.S.A. 38-2381(a)(4); and
- Upon a question reserved by the prosecution. K.S.A. 38-2381(a)(5).

An appeal upon a question reserved must be taken by the prosecution within 10 days after the juvenile has been adjudged to be a juvenile offender. All other appeals by the prosecution must be taken within 10 days of the entry of the order being appealed. K.S.A. 38-2381(b).

### § 5.15 Sentencing Guideline Appeals - Juvenile

In any appeal of a departure sentence, sentence review is limited to whether the sentencing court's findings of fact and reasons justifying the departure are supported by the evidence in the record and constitute "substantial and compelling reasons for departure." K.S.A. 38-2380(b)(3)(A) and (B). In addition, the appellate court may review a claim that the departure sentence was the result of partiality, prejudice

or corrupt motive or that the sentencing court erred in including or excluding recognition of prior adjudications in determining criminal history or erred in ranking the crime severity level of the current crime or in determining the appropriate classification of a prior adjudication. K.S.A. 38-2380(b)(4)(A) and (B).

An appellate court may not review a presumptive sentence or a sentence resulting from an agreement between the State and “the defendant” that the sentencing court approves on the record. K.S.A. 38-2380(b)(2)(A) and (B).

**PRACTICE NOTE:** For a review of amendments to the Kansas Juvenile Justice Code since 1984, see *In re L.M.*, 286 Kan. 460, 186 P.3d 164 (2008) (holding that juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments because the Code has become more akin to adult criminal prosecution).

## V. APPELLATE JURISDICTION IN CIVIL CASES

### § 5.16 Supreme Court

Direct appeal to the Supreme Court is required by law in the following cases. The following list is not intended to be all inclusive; therefore, the statutes should be consulted prior to taking an appeal.

- Appeals from final judgments of the district court in a civil action in which a statute of this state or of the United States has been held unconstitutional. K.S.A. 60-2101(b). This statute specifically requires the order appealed from to be a “final judgment.” See *Flores Rentals v. Flores*, 283 Kan. 476, 481, 153 P.3d 523 (2007); *Plains Petroleum Co. v. First Nat. Bank of Lamar*, 274 Kan. 74, 81, 49 P.3d 432 (2002); *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, Syl. ¶ 1, 941 P.2d 371 (1997);
- Appeals from preliminary or final decisions finding a statute unconstitutional under Article 6 of the Kansas Constitution pursuant to K.S.A. 72-64b03. K.S.A. 60-2102(b)(1);

- Appeals from final decisions in any actions challenging the constitutionality of or arising out of any provision of the Kansas expanded lottery act. K.S.A. 60-2102(b)(2);
- Appeals from final orders under the provisions of the Eminent Domain Procedure Act. K.S.A. 26-504;
- Appeals from any action of the Kansas Corporation Commission under the Kansas Natural Gas Pricing Act. K.S.A. 55-1410;
- Appeals arising from the Mental Health Technician's Licensure Act. K.S.A. 65-4211(b);
- Appeals from any action of the Kansas Corporation Commission regarding site preparation or construction of electric generation facilities. K.S.A. 66-1,164;
- Appeals permitted by statute in election contests. K.S.A. 25-1450;
- Appeals from orders granting or denying an original organization license by the Kansas Racing Commission. K.S.A. 74-8813(v);
- Appeals from orders granting or denying an original facility owner license or facility manager license by the Kansas Racing Commission. K.S.A. 74-8815(n);
- Appeals from orders in the district court by a person or taxpayer aggrieved by airport zoning regulations. K.S.A. 3-709;
- Appeals from judgment or order regarding petitions for drainage. K.S.A. 24-702(f);
- Appeals from any action of the secretary of human resources concerning the regulation of labor and industry are subject to review and enforcement by the Supreme Court in accordance with the act for judicial review and civil enforcement of agency actions. K.S.A. 44-612.

## **§ 5.17 Court of Appeals**

The Court of Appeals has jurisdiction to hear all appeals from district courts in civil proceedings, except in those cases reviewable by

law in the district court and in those cases where direct appeal must be taken to the Supreme Court as required by law. K.S.A. 60-2101(a). In addition, the Court of Appeals has jurisdiction to hear appeals from administrative decisions where a statute specifically authorizes appeals directly to the Court of Appeals. K.S.A. 60-2101(a). See, *e.g.*, K.S.A. 74-2426(c)(2) (appeals from final orders of the Court of Tax Appeals issued after June 30, 2008, in all cases other than no-fund warrant proceedings); K.S.A. 66-118a(b) (orders of the Kansas Corporation Commission arising from a rate hearing requested by a public utility or requested by the State Corporation Commission when a public utility is a necessary party); K.S.A. 65-3008a (permits issued by the Secretary of Health and Environment with regard to air quality under the Kansas Air Quality Control Act, effective April 13, 2006); K.S.A. 44-556(a) (decisions of the Workers Compensation Board entered on or after October 1, 1993).

Court of Appeals jurisdiction includes appeals from all K.S.A. 60-1507 proceedings, regardless of the severity of the underlying criminal offense. *State v. Thomas*, 239 Kan. 457, 459, 720 P.2d 1059 (1986).

Appeals from actions of the district court in proceedings under the Code of Civil Procedure for Limited Actions are taken to the Court of Appeals. K.S.A. 61-3902(b).

## VI. APPEALABLE ORDERS IN CIVIL CASES

### § 5.18 Final Orders

Pursuant to K.S.A. 60-2102(a)(4), a final decision in a civil proceeding can be appealed. In an appeal from a final order, any act or ruling from the beginning of the proceeding is reviewable. However, under K.S.A. 60-2103(h), an appellee must file a cross-appeal before he or she can present adverse rulings for review. *McCracken v. Kohl*, 286 Kan. 1114, 1120, 191 P.3d 313 (2008); *Chavez v. Markham*, 19 Kan. App. 2d 702, Syl. ¶ 4, 875 P.2d 997 (1994), *aff'd* 256 Kan. 859, 889 P.2d 122 (1995). See also *Butler County Water Dist. No. 8 v. Yates*, 275 Kan. 291, 299, 64 P.3d 357 (2003); *In re T.A.*, 30 Kan. App. 2d 30, 35, 38 P.3d 140 (2001).

“A final decision finally decides and disposes of the entire merits of the controversy and reserves no further questions or directions for the future or further action of the court.” *Flores Rentals v. Flores*, 283 Kan. 476,

481-82, 153 P.3d 523 (2007); *Investcorp, L.P. v. Simpson Inv. Co., L.C.*, 277 Kan. 445, Syl. ¶ 3, 85 P.3d 1140 (2003). See also *Plains Petroleum Co. v. First National Bank of Lamar*, 274 Kan. 74, 82, 49 P.3d 432 (2002); *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, Syl. ¶ 2, 941 P.2d 371 (1997); *Honeycutt v. City of Wichita*, 251 Kan. 451, Syl. ¶ 1, 836 P.2d 1128 (1992). A final decision is one that determines all of the issues in the case, not just part of the issues. *Henderson v. Hassur*, 1 Kan. App. 2d 103, Syl. ¶ 2, 562 P.2d 108 (1977). See also *Winters v. GNB Battery Technologies*, 23 Kan. App. 2d 92, 95, 927 P.2d 512 (1996).

“Implicit in the rule that only final decisions are appealable is the requirement that the parties know that the decision is final.” *Historic Preservation Alliance, Inc. v. City of Wichita*, 20 Kan. App. 2d 721, Syl. ¶ 3, 892 P.2d 518 (1995). “The time for appeal from an order or judgment should not run when the decision-making body has created the impression that the determination, albeit issued, was intended to be nonconclusive.” *Historic Preservation Alliance, Inc.*, 20 Kan. App. 2d 721, Syl. ¶ 2.

In a number of cases, the appellate courts have examined whether various rulings are final, appealable orders. The following list, which is certainly not all inclusive, is for the purpose of direction only. The specifics of the cases cited should be considered in determining their applicability to any given situation:

- Collateral Order Doctrine

An order conclusively determining a disputed question that resolves an important issue completely separate from the merits of the action and that will be effectively unreviewable on appeal from a final judgment is reviewable as a final decision under the collateral order doctrine. *Skahan v. Powell*, 8 Kan. App. 2d 204, 653 P.2d 1192 (1982). The collateral order doctrine has come under increasing criticism by the Kansas Supreme Court in recent years, although the court has not absolutely rejected its application. See *Harsch v. Miller*, 288 Kan. 280, 200 P.3d 467 (2009); *Flores Rentals v. Flores*, 283 Kan. 476, 491, 153 P.3d 523 (2007).

- Discovery and Other Pretrial Motions

The denial of a motion to intervene is a final, appealable order. *State ex rel. Stephan v. Kansas Dept. of Revenue*, 253 Kan. 412, Syl. ¶ 1, 415, 856 P.2d 151 (1993); *In re S.C.*, 32 Kan. App. 2d 514, 516, 85 P.3d 224 (2004); *In re Marriage of Osborne*, 21 Kan. App. 2d 374, Syl. ¶ 1, 901 P.2d 12 (1995).

As a general rule, discovery orders and sanctions for violations concerning parties to the proceedings are not final, appealable orders. *Reed v. Hess*, 239 Kan. 46, Syl. ¶ 3, 716 P.2d 555 (1986).

- Dispositive Motions

An order denying a motion to dismiss is not a final, appealable order. *Donaldson v. State Highway Commission*, 189 Kan. 483, Syl. ¶ 2, 485, 370 P.2d 83 (1962).

The denial of a motion for summary judgment is not usually a final, appealable decision. *NEA-Topeka v. U.S.D. No. 501*, 260 Kan. 838, 843, 925 P.2d 835 (1996). “Typically, a party can only appeal from a summary judgment if the trial court has granted the opposing party’s summary judgment motion.” *NEA-Topeka*, 260 Kan. at 843. An order granting summary judgment to one of several defendants is not a final, appealable order. *Fredricks v. Foltz*, 221 Kan. 28, 31, 557 P.2d 1252 (1976).

Trial court’s order granting a motion for voluntary dismissal without prejudice is not a final order and, as such, an appellate court is without jurisdiction to consider an appeal of that order. *Bain v. Artzer*, 271 Kan. 578, Syl. ¶ 2, 25 P.3d 136 (2001). See also *Arnold v. Hewitt*, 32 Kan. App. 2d 500, 85 P.3d 220 (2004) (partial summary judgment was not an appealable “final decision” despite the plaintiff’s voluntary dismissal of the remaining claim).

- Judgment

An order vacating a default judgment is not a final, appealable order. *Bates & Son Construction Co. v. Berry*, 217 Kan. 322, Syl. ¶ 1, 537 P.2d 189 (1975).

Generally, a declaratory judgment has the effect of a final order and would normally be appealable. However, if the judgment does not resolve all of the issues there is no final, appealable decision.

*AMCO Ins. Co. v. Beck*, 258 Kan. 726, 728, 907 P.2d 137 (1995).

“A party is bound by a judgment entered on stipulation or consent and may not appeal from a judgment in which he or she has acquiesced.” *In re Care and Treatment of Saathoff*, 272 Kan. 219, 220, 32 P.3d 1173 (2001). An exception exists “when the party attacks the judgment because of lack of consent or because the judgment deviates from the stipulation or when the party’s attorney had no authority to settle the case and did so without the agreement and consent of his client.” *Reimer v. Davis*, 224 Kan. 225, Syl. ¶ 2, 580 P.2d 81 (1978).

#### ▪ Post-trial Motions

An order granting a new trial is not a final, appealable order. *Oertel v. Phillips*, 197 Kan. 113, 116-17, 415 P.2d 223 (1966). See also *NEA-Topeka v. U.S.D. No. 501*, 260 Kan. at 843; *Donnini v. Ouano*, 15 Kan. App. 2d 517, 526, 810 P.2d 1163 (1991). However, an exception to this rule has been recognized when an order granting a new trial under K.S.A. 60-259(a) or K.S.A. 60-260 is challenged on jurisdictional grounds. *Brown v. Fitzpatrick*, 224 Kan. 636, Syl. ¶¶ 2, 3, 585 P.2d 987 (1978); *Donnini*, 15 Kan. App. 2d at 526.

#### ▪ Post-Judgment

An order overruling a motion to quash an order of garnishment is not a final, appealable order. *Gulf Ins. Co. v. Bovee*, 217 Kan. 586, Syl. ¶ 2, 538 P.2d 724 (1975).

An order amending a sheriff’s return of service on an execution after satisfaction of a judgment in the action is a final, appealable order. *Transport Clearing House, Inc. v. Rostock*, 202 Kan. 72, Syl. ¶ 2, 447 P.2d 1 (1968).

#### ▪ Foreclosure/Redemption

“An order extending a statutory redemption period is a final, appealable order.” *Federal Savings & Loan Ins. Corp. v. Treaster*, 13 Kan. App. 2d 305, Syl. ¶ 1, 770 P.2d 481 (1989). See also *L.P.P. Mortgage, Ltd. v. Hayse*, 32 Kan. App. 2d 579, 87 P.3d 976 (2004).

A judgment of mortgage foreclosure is a final, appealable order if it determines the rights of the parties, the amounts to be paid, and the priority of the claims. *Stauth v. Brown*, 241 Kan. 1, Syl. ¶ 1,

734 P.2d 1063 (1987). See also *L.L.P. Mortgage, Ltd.*, 32 Kan. App. 2d at 583-84.

An order of sale issued in a mortgage foreclosure action is not a final, appealable order; however, an order confirming a sheriff's sale is a final, appealable order. See *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 748 P.2d 905 (1988).

▪ Miscellaneous

In the absence of exceptional circumstances, remand orders are not appealable. *Holton Transport, Inc. v. Kansas Corporation Comm'n*, 10 Kan. App. 2d 12, Syl. ¶ 1, 690 P.2d 399 (1984), *rev. denied* 236 Kan. 875 (1985). See also *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 18, 81 P.3d 425 (2003); *NEA-Topeka*, 260 Kan. at 843; *Williams v. General Elec. Co.*, 27 Kan. App. 2d 792, 793, 9 P.3d 1267 (1999). In *Holton Transport*, the court held that absent exceptional circumstances, an order remanding a proceeding to the Kansas Corporation Commission for further findings is not a final, appealable order. *Holton Transport, Inc.*, 10 Kan. App. 2d at 13.

The denial of a motion to arbitrate is a final, appealable order. If, however, the court grants a motion to compel arbitration, the parties must submit to arbitration and challenge the arbitrator's decision before there is a final, appealable order. *NEA-Topeka*, 260 Kan. at 842-43.

Once there is a decision on the merits of an action, there is a final appealable order. Resolution of a motion or request for attorney fees is unnecessary before there is a final, appealable order. *Snodgrass v. State Farm Mut. Auto. Ins. Co.*, 246 Kan. 371, Syl. ¶ 1, 789 P.2d 211 (1990). Sanctions under K.S.A. 60-211 must be determined, however, before a judgment is final for appeal purposes. *Smith v. Russell*, 274 Kan. 1076, 1081, 58 P.3d 698 (2002).

The denial of a motion to terminate parental rights is a final, appealable order. *In re T.D.W.*, 18 Kan. App. 2d 286, Syl. ¶¶ 5, 6, 850 P.2d 947 (1993). See also *In re C.H.W.*, 26 Kan. App. 2d 413, 416, 988 P.2d 276 (1999).

Trial court's order determining that ERISA did not preempt state regulation of stop-loss insurance policy for self-funded employee benefit plans but that state Insurance Commissioner lacked

statutory authority to regulate such insurance was a final order for purposes of appeal even though subsequent legislative amendment would alter ruling. *American Trust Administrators, Inc. v. Sebelius*, 267 Kan. 480, 981 P.2d 248 (1999).

### § 5.19 Interlocutory Orders that are Appealable as a Matter of Right

In some instances, an appeal from a decision of a district court may be taken as a matter of right to the Court of Appeals even though the order appealed from is interlocutory in nature; *i.e.*, the entire controversy is not ended as a result of the order. Those orders are set out in K.S.A. 60-2102(a)(1)-(3) and include:

- An order that discharges, vacates, or modifies a provisional remedy;
- An order that grants, continues, modifies, refuses, or dissolves an injunction, or an order that grants or refuses relief in the form of mandamus, quo warranto, or habeas corpus; and
- An order that appoints a receiver or refuses to wind up a receivership or to take steps to accomplish the purposes thereof, such as directing sales or other disposal of property, or an order involving the tax or revenue laws, the title to real estate, the constitution of this state or the constitution, laws or treaties of the United States.

Appeals under K.S.A. 60-2102(a) are taken to the Court of Appeals, except where a direct appeal to the Supreme Court is required by law. K.S.A. 60-2102(a)(4). Even though an order may seemingly fall within one of these categories, the order itself must possess some semblance of finality before the appeal will be allowed. For instance, in *Valley State Bank v. Geiger*, 12 Kan. App. 2d 485, 748 P.2d 905 (1988), the court held that an order of sale issued in a mortgage foreclosure action is not an appealable order under K.S.A. 60-2102(a)(3) because it has no semblance of being a final determination of the title to real estate. Similarly, “K.S.A. 60-2102 does not provide for an appeal when a restraining order is granted.” *U.S.D. No. 503 v. McKinney*, 236 Kan. 224, 228, 689 P.2d 860 (1984). This is so because restraining orders are usually in effect for only a brief period pending issuance of a temporary injunction. 236 Kan. at 228.

## § 5.20 Interlocutory Orders that are Appealable in the Court's Discretion

K.S.A. 60-2102(c) and Supreme Court Rule 4.01 provide that some interlocutory orders may be appealed in the discretion of the Court of Appeals. Pursuant to the statute and court rule, a district judge, issuing an order that is not otherwise appealable, may make written findings that the judge is of the opinion the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. See *Duarte v. DeBruce Grain, Inc.*, 276 Kan. 598, 599, 78 P.3d 428 (2003); *Cypress Media Inc. v. City of Overland Park*, 268 Kan. 407, 413-14, 997 P.2d 681 (2000).

If these findings are made, the Court of Appeals may, in its discretion, permit an appeal to be taken from the order if proper application for permission to take an appeal is made to the Court of Appeals, pursuant to Rule 4.01. See *Flores Rentals v. Flores*, 283 Kan. 476, 481, 153 P.3d 523 (2007); *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, 508-09, 941 P.2d 371 (1997). The application must be served within 10 days after filing of the order. K.S.A. 60-2102(c); Rule 4.01.

**PRACTICE NOTE:** Application to take a civil interlocutory appeal must be made to the Court of Appeals even though some, or all, of the issues lie within Supreme Court jurisdiction, *e.g.*, a statute has been declared unconstitutional. If permission to appeal is granted, the case will later be transferred to the Supreme Court.

The required findings are the first step. The district judge must make the findings required by the statute in the order from which the appeal is to be taken. *Anderson v. Beech Aircraft Corp.*, 237 Kan. 336, 337-38, 699 P.2d 1023 (1985). If, however, the order does not contain the findings required by the statute, the order can be amended to include the requisite findings, provided a motion to amend is filed and served within 10 days of the filing of the original order. *Anderson*, 237 Kan. 336, Syl. ¶ 1. In that case, the application for permission to take an appeal may be served within 10 days after filing of the amended order. *Anderson*, 237 Kan. 336, Syl. ¶ 1; Rule 4.01.

Rule 4.01 sets out what an application for permission to take an interlocutory appeal must contain. Further, the rule provides that an adverse party may respond to the application within the time limit set out in the rule. Finally, the rule sets out what procedure must be followed if permission to appeal is granted; *i.e.*, when notice of appeal must be filed and when the appeal is deemed docketed.

**PRACTICE NOTE:** Few applications to take civil interlocutory appeals are granted. Counsel should carefully consider whether their case meets the three statutory requirements: controlling question of law, substantial ground for difference of opinion, and material advancement of termination of litigation. If so, the application should be thorough with particular attention paid to the “substantial ground for difference of opinion.” Citation to authority is critical, but foreign jurisdictions cannot be cited to establish a difference of opinion if the question of law has been answered in Kansas.

An order of a district court granting or denying class action certification under K.S.A. 60-223 may be appealed, in the discretion of the Court of Appeals, if application is made to the court within 10 days after entry of the order. K.S.A. 60-223(f). The proceedings in the district court are not stayed by an appeal unless so ordered by the district court or the Court of Appeals. K.S.A. 60-223(f).

### **§ 5.21 K.S.A. 60-254(b) – Entry of Final Judgment as to One or More but Fewer than all Claims or Parties**

When there is more than one claim for relief in an action or when multiple parties are involved, the court can direct entry of final judgment as to one or more but fewer than all of the claims or parties upon an express determination there is no just reason for delay and upon an express direction for entry of judgment. K.S.A. 60-254(b). The Supreme Court has endorsed the following test for determining whether multiple claims exist: “““The ultimate determination of multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims which could have been separately enforced.’ [Citation omitted].””” *Gillespie v. Seymour*, 263 Kan. 650, 654-55, 952 P.2d

1313 (1998). Different theories involving separate facts do not necessarily involve distinct claims.

The 254(b) findings must affirmatively appear in the record, preferably using the statutory language. *City of Salina v. Star B., Inc.*, 241 Kan. 692, Syl. ¶ 1, 739 P.2d 933 (1987). See also *State ex rel. Board of Healing Arts v. Beyrle*, 262 Kan. 507, 510, 941 P.2d 371 (1977). The appellate court will not assume the court made these findings simply because it used the word “judgment.” *Crockett v. Medicalodges, Inc.*, 247 Kan. 433, 434, 799 P.2d 1022 (1990). Mere reference to K.S.A. 60-254(b) is insufficient. *Star B., Inc.*, 241 Kan. at 694-96. Such deficiency cannot be corrected by an order nunc pro tunc, *Star B., Inc.*, 241 Kan. at 697, nor can an order be amended to include the required findings after an unauthorized appeal has been filed. *Beyrle*, 262 Kan. at 510.

When a trial court makes mere reference to K.S.A. 60-254(b), it has not made “an express determination or an express direction, as required in the statute; these omissions [are] not mere clerical errors which may be corrected nunc pro tunc; and the proposed change would enlarge the judgment as originally rendered and substantially change the effective date of the judgment.” *Star B., Inc.*, 241 Kan. at 697. When appropriate findings are made, there is a final appealable order. *Patterson v. Missouri Valley Steel, Inc.*, 229 Kan. 481, Syl. ¶ 1, 625 P.2d 483 (1981); *Pioneer Operations Co. v. Brandeberry*, 14 Kan. App. 2d 289, Syl. ¶ 2, 789 P.2d 1182 (1990).

““Even if a section 254(b) certificate is issued, it is not binding on appeal; the trial court cannot thereby make an order final and therefore appealable, if it is not in fact final.” [Citation omitted.]” *Plains Petroleum Co. v. First Nat. Bank of Lamar*, 274 Kan. 74, 83, 49 P.3d 432 (2002), quoting *Gillespie*, 263 Kan. at 655. A trial court cannot split a single claim. See *Henderson v. Hassur*, 1 Kan. App. 2d 103, 562 P.2d 108 (1977). However, ““the discretionary judgment of the district court should be given substantial deference, for that court is ‘the one most likely to be familiar with the case and with any justifiable reasons for delay.’ [Citation omitted.] The reviewing court should disturb the trial court’s assessment of the equities only if it can say that the judge’s conclusion was clearly unreasonable.” *St. Paul Surplus Lines Ins. Co. v. International Playtex, Inc.*, 245 Kan. 258, 276, 777 P.2d 1259 (1989), *cert. denied* 493 U.S. 1036 (1990), quoting *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980).

Once a 254(b) certificate has been issued and final judgment has been entered, the time for appeal starts to run. *Pioneer Operations Co.*, 14 Kan. App. 2d at 293. If a timely appeal is not taken, the judgment that is the subject of the certificate cannot later be reviewed as an intermediate ruling when appeal from the final judgment disposing of the entire case is taken pursuant to K.S.A. 60-2102(a)(4). *Pioneer Operations Co.*, 14 Kan. App. 2d at 293. However, a party can attack the propriety of a 254(b) certificate in an appeal that finally disposes of all claims, *Pioneer Operations Co.*, 14 Kan. App. 2d at 292, and if the appellate court finds the district court erred in issuing the certificate, the rulings that were the subject of the 254(b) certificate can be considered in an appeal from the final judgment. *Pioneer Operations Co.*, 14 Kan. App. 2d at 297.

## § 5.22 Probate Proceedings

Effective July 1, 2006, significant statutory changes occurred in the appeal of orders from decisions under the Probate Code.

Pursuant to K.S.A. 59-2401(a), an appeal from a district magistrate judge to a district judge may be taken no later than 30 days from the date of entry of any of the following orders, judgments, or decrees in any case involving a decedent's estate:

- An order admitting or refusing to admit a will to probate;
- An order finding or refusing to find that there is a valid consent to a will;
- An order appointing, refusing to appoint, removing or refusing to remove a fiduciary other than a special administrator;
- An order setting apart or refusing to set apart a homestead or other property, or making or refusing to make an allowance of exempt property to the spouse and minor children;
- An order determining, refusing to determine, transferring or refusing to transfer venue;
- An order allowing or disallowing a demand, in whole or in part, when the amount in controversy exceeds \$5,000;

- An order authorizing, refusing to authorize, confirming or refusing to confirm the sale, lease or mortgage of real estate;
- An order directing or refusing to direct a conveyance or lease of real estate under contract;
- Judgments for waste;
- An order directing or refusing to direct the payment of a legacy or distributive share;
- An order allowing or refusing to allow an account of a fiduciary or any part thereof;
- A judgment or decree of partial or final distribution;
- An order compelling or refusing to compel a legatee or distributee to refund;
- An order compelling or refusing to compel payments or contributions of property required to satisfy the elective share of a surviving spouse pursuant to K.S.A. 59-6a201 *et seq.*, and amendments thereto;
- An order directing or refusing to direct an allowance for the expenses of administration;
- An order vacating or refusing to vacate a previous appealable order, judgment, decree or decision;
- A decree determining or refusing to determine the heirs, devisees and legatees;
- An order adjudging a person in contempt pursuant to K.S.A. 59-6a201 *et seq.*, and amendments thereto;
- An order finding or refusing to find that there is a valid settlement agreement;
- An order granting or denying final discharge of a fiduciary; and
- Any other final order, decision or judgment in a proceeding involving a decedent's estate.

**PRACTICE NOTE:** K.S.A. 59-2402a sets forth circumstances under which an interested party can

request the transfer of a petition from a district magistrate judge to a district judge for hearing.

Any appeal from a district judge to an appellate court in a case involving a decedent's estate is to be taken in the manner provided by chapter 60 of the Kansas Statutes Annotated for other civil cases. K.S.A. 59-2401(b). See § 5.18 through § 5.21, *supra*. The order appealed from continues in force unless modified by temporary orders entered by the appellate court and is not stayed by a supersedeas bond filed pursuant to K.S.A. 60-2103. K.S.A. 59-2401(c). However, the court from which the appeal is taken may require a party, other than the State of Kansas or any subdivision thereof or any city or county in this state, to file a bond of sufficient sum or surety "to ensure that the appeal will be prosecuted without unnecessary delay" and to ensure payment of all judgments, damages or costs. K.S.A. 59-2401(d).

K.S.A. 59-2401a, a new statute effective July 1, 2006, allows an interested party to appeal from a district magistrate judge to a district judge no later than 10 days from any final order, judgment or decree entered in any proceeding pursuant to:

- The Kansas Adoption and Relinquishment Act (K.S.A. 59-2111 *et seq.*);
- The Care and Treatment Act for Mentally Ill Persons (K.S.A. 59-2945 *et seq.*);
- The Care and Treatment Act for Persons With an Alcohol or Substance Abuse Problem (K.S.A. 59-29b45 *et seq.*); and
- The Act for Obtaining a Guardian or Conservator, or Both (K.S.A. 59-3050 *et seq.*). K.S.A. 59-2401a(b).

An interested party may appeal from a decision of a district judge to an appellate court pursuant to article 21 of chapter 60 of the Kansas Statutes Annotated. *In re Guardianship of Sokol*, 40 Kan. App. 57, 61-62, 189 P.3d 526 (2008). With the addition of the sexually violent predator act (K.S.A. 59-29a01 *et seq.*), the acts are the same as those for appeal from a district magistrate judge.

The interested parties who may appeal pursuant to K.S.A. 59-2401a include the following:

- The parent in a proceeding pursuant to the Kansas Adoption and Relinquishment Act (K.S.A. 59-2111 *et seq.*);
- The patient under the Care and Treatment Act for Mentally Ill Persons (K.S.A. 59-2945 *et seq.*);
- The patient under the Care and Treatment Act for Persons With an Alcohol or Substance Abuse Problem (K.S.A. 59-29b45 *et seq.*);
- The person adjudicated a sexually violent predator under the Sexually Violent Predator Act (K.S.A. 59-29a01 *et seq.*);
- The ward or conservatee under the Act for Obtaining a Guardian or Conservator, or Both (K.S.A. 59-3050 *et seq.*).
- The parent of a minor person adjudicated a ward or conservatee under the Act for Obtaining a Guardian or Conservator, or Both (K.S.A. 59-3050 *et seq.*);
- The petitioner in the case on appeal; and
- Any other person granted interested party status by the court from which the appeal is being taken. K.S.A. 59-2401a(e).

As in decedent's estate cases, the order appealed from continues in force unless modified by temporary orders entered by the appellate court and is not stayed by a supersedeas bond filed pursuant to K.S.A. 60-2103. K.S.A. 59-2401a(c). Also, the court from which the appeal is taken may require a party, other than the State of Kansas or any subdivision thereof or any city or county in this state, to file a bond of sufficient sum or surety "to ensure that the appeal will be prosecuted without unnecessary delay" and to ensure payment of all judgments, damages or costs. K.S.A. 59-2401a(d).

## **§ 5.23 Juvenile Proceedings**

Under the Revised Kansas Code for Care of Children, effective January 1, 2007, an appeal can be taken by any party or interested party from any order of temporary custody, adjudication, disposition, finding

of unfitness or termination of parental rights. K.S.A. 38-2273(a). An appeal must be taken within thirty days of the date the order was filed. See *In re D.I.G.*, 34 Kan. App. 2d 34, 36, 114 P.3d 173 (2005). K.S.A. 38-2202(u) defines a party as “the state, the petitioner, the child and any parent of the child.” K.S.A. 38-2202(l) defines an interested party as “the grandparent of the child, a person with whom the child has been living for a significant period of time when the child in need of care petition is filed, and any person made an interested party by the court pursuant to K.S.A. 38-2241 and amendments thereto.”

## VII. TRANSFER OF CASES BETWEEN THE APPELLATE COURTS

### § 5.24 General

In both criminal and civil appellate proceedings, cases can be transferred from the Court of Appeals to the Supreme Court as provided in K.S.A. 20-3016 and 20-3017. See K.S.A. 22-3602(d); K.S.A. 60-2101(b). See also K.S.A. 20-3018 for other transfers.

### § 5.25 Upon Motion of a Party

Within 20 days after notice of appeal has been served on the appellee, any party to the appeal can file a motion (an original and 8 copies) with the clerk of the appellate courts requesting that a case pending in the Court of Appeals be transferred to the Supreme Court for final determination. K.S.A. 20-3017; Rule 8.02. The motion should be captioned in the Supreme Court even though the action is pending in the Court of Appeals. See § 12.22, *infra*.

**PRACTICE NOTE:** If a party misses the 20-day filing deadline, it may still be advisable to file the motion to call the Supreme Court’s attention to the case. The motion of the party may be denied as untimely filed, but the court can then transfer the case on its own motion.

The motion must set forth the nature of the case, demonstrate that the case is within the Supreme Court’s jurisdiction, and establish one or more of the grounds for transfer found in K.S.A. 20-3016(a). Such grounds include: an issue or issues are not within the jurisdiction of the Court of

Appeals (citation must be made to controlling constitutional, statutory, or case authority); the subject matter of the case has significant public interest; the legal questions raised have major public significance; or, the Court of Appeals caseload requires a transfer for the expeditious administration of justice (the motion must contain sufficient data concerning the state of the docket to demonstrate this point). K.S.A. 20-3016(a); Rule 8.02.

**PRACTICE NOTE:** The caseload of the Court of Appeals is not usually persuasive unless combined with another ground.

The opposing party may respond within 5 days of service of the motion. Rule 5.01. The motion will be considered by the Supreme Court and granted or denied in that court's discretion. A party's failure to file a motion to transfer is deemed a waiver of objection to Court of Appeals jurisdiction. K.S.A. 20-3017.

## **§ 5.26 Upon Motion of the Supreme Court**

If a case within the jurisdiction of the Court of Appeals is erroneously docketed in the Supreme Court, the Supreme Court will transfer the case to the Court of Appeals. K.S.A. 20-3018(a). Likewise, if a case within the jurisdiction of the Supreme Court is erroneously docketed in the Court of Appeals, the Supreme Court will transfer the case to the Supreme Court. K.S.A. 20-3018(a). In addition, any case within the jurisdiction of the Court of Appeals and properly docketed with that court can, at any time, be transferred to the Supreme Court for final determination on the Supreme Court's own motion. K.S.A. 20-3018(c).

**PRACTICE NOTE:** Transfer on the Supreme Court's own motion usually indicates the subject matter or legal questions are of public interest or legal significance.

## **§ 5.27 Upon Motion of the Court of Appeals**

Prior to final determination of any case before it, the Court of Appeals can request that a case be transferred to the Supreme Court by certifying the case is "within the jurisdiction of the Supreme Court" and the Court of Appeals has made one or more of the following findings: (1) one or more issues in the case are not within the jurisdiction of the Court of Appeals; (2) the subject matter of the case has significant public interest; (3) the case involves legal questions of major public significance;

or (4) the caseload of the Court of Appeals is such that the expeditious administration of justice requires the transfer. K.S.A. 20-3016(a). The request will be considered by the Supreme Court and granted or denied in the court's discretion. K.S.A. 20-3016(b).

### § 5.28 Appeal of Right from Court of Appeals to Supreme Court

In both criminal and civil appellate proceedings, a party can appeal from the Court of Appeals to the Supreme Court as a matter of right in any case in which a question under the constitution of either the United States or the State of Kansas arises for the first time as a result of the Court of Appeals decision. K.S.A. 22-3602(e); K.S.A. 60-2101(b). See § 7.45, *infra*.

### § 5.29 Petitions for Review by Supreme Court of Court of Appeals Decisions

In both criminal and civil appellate proceedings, a party can petition the Supreme Court to review any decision of the Court of Appeals as provided in K.S.A. 20-3018(b). K.S.A. 22-3602(d); K.S.A. 60-2101(b). See § 7.46, *infra*. “[D]ecision’ means any formal or memorandum opinion, order, or involuntary dismissal pursuant to [Supreme Court] Rule 5.05.” Rule 8.03(a).

A petition for review must be filed and served within 30 days after the date of the Court of Appeals decision. K.S.A. 20-3018(b); Rule 8.03(a)(1). This is a jurisdictional requirement. Rule 8.03(a)(1). Time limits for filing cross-petitions, responses and replies, as well as content and form requirements, are set out in Rule 8.03.

There is no requirement that a motion for rehearing by the Court of Appeals be filed before a petition for review is filed. K.S.A. 20-3018(b). Nor does the filing of a petition for review preclude filing a motion for rehearing or modification in the Court of Appeals. Rule 8.03(a)(3). If a motion for rehearing or modification is filed, the Supreme Court will not take action on the petition for review until the Court of Appeals has made a final determination of all motions for rehearing or modification. Rule 8.03(a)(3).

**PRACTICE NOTE:** A petition for review must be filed and served within 30 days after the date of the Court of Appeals decision even if a motion for rehearing or

modification is filed in the Court of Appeals. A motion for rehearing or modification does not toll the time to file a petition for review.

In cases where review is not granted as a matter of right, whether to grant a petition for review is a decision committed to the discretion of the Supreme Court. Rule 8.03(e)(2). Non-controlling, non-exclusive factors considered by the Supreme Court include: (1) the importance of the question presented; (2) the existence of a conflict between the decision sought to be reviewed and prior decisions of the Supreme Court or another panel of the Court of Appeals; (3) the need for exercising the Supreme Court's supervisory authority; and (4) the final or interlocutory character of the judgment, order, or ruling sought to be reviewed. K.S.A. 20-3018(b).

## **VIII. MULTI-LEVEL APPEALS**

### **§ 5.30 General**

In some instances, appeals involve multiple levels of review. Some examples are identified below. Reference should be made to the above discussion concerning appealable orders.

### **§ 5.31 Appeals from Decisions of District Magistrate Judges in Criminal Cases**

A defendant has the right to appeal any judgment of a district magistrate judge to a district judge. K.S.A. 22-3609a(1). A notice of appeal must be filed with the clerk of the district court within 10 days after the date of the judgment appealed from. K.S.A. 22-3609a(2). Before a defendant can appeal a criminal judgment of a magistrate judge to a district judge for a trial de novo pursuant to 22-3609a, there must be both a conviction of guilt and a sentence imposed by the magistrate judge. *State v. Remlinger*, 266 Kan. 103, 107, 968 P.2d 671 (1998). A defendant who wishes to seek further review can appeal in accordance with the rules governing appeals from the district court to the appellate courts.

A defendant may appeal a conviction before a district magistrate judge even if the conviction was based upon a guilty plea. *State v. Gillen*, 39 Kan. App. 2d 461, 181 P.3d 564 (2008). K.S.A. 22-3609a has been held

not to authorize an appeal to the district court by a defendant from an order of a district magistrate judge revoking the defendant's probation. *State v. Legero*, 278 Kan. 109, Syl. ¶ 5, 91 P.3d 1216 (2004). Additionally, an appeal under 22-3609a conditionally vacates a municipal court conviction, and if the appeal is not dismissed by the defendant, is dismissed with prejudice, or is heard de novo by the district court, then the municipal court convictions are vacated. *City of Salina v. Amador*, 279 Kan. 266, Syl. ¶ 5, 106 P.3d 1139 (2005).

The prosecution can appeal the following decisions of a district magistrate judge to a district judge: (1) an order dismissing a complaint, information, or indictment (see *State v. Kleen*, 257 Kan. 911, 896 P.2d 376 [1995]); (2) an order arresting judgment; (3) upon a question reserved; (4) upon an order granting a new trial in any case involving a class A or B felony or, for crimes committed on or after July 1, 1993, any case involving an off-grid crime; and (5) pretrial orders quashing a warrant or search warrant, suppressing evidence, or suppressing a confession or admission. K.S.A. 22-3602(d); K.S.A. 22-3603. Again, further review by the appellate courts is possible.

For appeals from orders of a district magistrate judge to a district judge in juvenile offender proceedings, see K.S.A. 38-2382. However, an appeal of a magistrate judge's decision to prosecute a juvenile as an adult is properly filed with the appellate courts, not the district court, after a conviction. *State v. Hartpence*, 30 Kan. App. 2d 486, 494, 42 P.3d 1197 (2002).

### **§ 5.32 Appeals from Decisions of District Magistrate Judges in Civil Cases**

In a civil action, an appeal can be taken from an order or final decision of a district magistrate judge to a district judge. A notice of appeal must be filed with the clerk of the district court within 10 days after entry of the order or decision. K.S.A. 60-2103a(a).

In limited actions, an appeal can be taken from "orders, rulings, decisions or judgments" of a district magistrate judge to a district judge. K.S.A. 61-3902(a). A notice of appeal must be filed with the clerk of the district court within 10 days after entry of the order or decision except that notice of appeal by the defendant from that portion of a judgment

in a forcible detainer action granting restitution of the premises must be filed within 5 days after entry of judgment. See K.S.A. 61-3902(a).

Under the Revised Kansas Code for Care of Children, appeals can be taken from an order entered by a district magistrate judge to a district judge in accordance with K.S.A. 38-2273(b).

In all three instances, further review by the appellate courts is permissible in accordance with the rules governing appeals from the district court to the appellate courts.

For appeals from a district magistrate judge to a district judge in probate proceedings, see § 5.22, *supra*.

### **§ 5.33 Appeals from Municipal Court to District Court in Criminal Cases**

A defendant found guilty of violating a municipal ordinance can appeal the judgment to the district court in the county where the municipality is located. K.S.A. 22-3609(1); K.S.A. 12-4601(a). An appealable judgment requires both conviction and sentence. *State v. Remlinger*, 266 Kan. 103, 106, 968 P.2d 671 (1998); *City of Halstead v. Mayfield*, 19 Kan. App. 2d 186, 865 P.2d 222 (1993). A municipal court's judgment is effective when announced. *Paletta v. City of Topeka*, 20 Kan. App. 2d 859, 860, 893 P.2d 280, *rev. denied* 258 Kan. 859 (1995); *City of Lenexa v. Higgins*, 16 Kan. App. 2d 499, Syl. ¶ 1, 825 P.2d 1152, *rev. denied* 250 Kan. 804 (1992).

A defendant in a municipal court proceeding has no right to appeal to the district court a decision of the municipal court revoking his probation. *City of Wichita v. Patterson*, 22 Kan. App. 2d 557, Syl. ¶ 3, 919 P.2d 1047 (1996), *rev. denied* 260 Kan. 992 (1996). See also *State v. Legero*, 278 Kan. 109, 112, 91 P.3d 1216 (2004). "A defendant in municipal court may only appeal a judgment of that court which adjudges him or her guilty of a violation of a municipal ordinance." *Patterson*, 22 Kan. App. 2d 557, Syl. ¶ 2.

The procedural requirements for appeals from municipal court to the district court are set out in K.S.A. 22-3609. The municipal judge may require an appeal bond. K.S.A. 12-4602. While notice of appeal must be filed within 10 days of the date the municipal judgment is entered, K.S.A. 22-3609(2), the filing of a K.S.A. 12-4602 appeal bond within 10 days is not a jurisdictional requirement in perfecting an appeal from a municipal

court conviction. See *City of Newton v. Kirkley*, 28 Kan. App. 2d 144, 146, 12 P.3d 908 (2000); *City of Salina v. Aldridge*, 14 Kan. App. 2d 108, 109, 782 P.2d 1257 (1989).

The city can appeal to the district court “upon questions of law.” K.S.A. 12-4601(b). See also *City of Wichita v. Maddox*, 271 Kan. 445, 449, 24 P.3d 71 (2001). The “question must be one which calls for an answer which will aid in the correct and uniform administration of the criminal law, and the question will not be entertained on appeal merely to demonstrate errors of a trial court.” *City of Overland Park v. Travis*, 253 Kan. 149, Syl. ¶ 4, 853 P.2d 47 (1993).

### **§ 5.34 Appeals from Municipal Court to District Court in Civil Cases**

Pursuant to K.S.A. 60-2101(d), a “judgment rendered or final order made by a political or taxing subdivision, or any agency thereof, exercising judicial or quasi-judicial functions may be reversed, vacated or modified by the district court on appeal.” See *Kansas Board of Education v. Marsh*, 274 Kan. 245, 255, 50 P.3d 9 (2002). The appeal is taken in the county where the order was entered. For procedural requirements, see K.S.A. 60-2101(d).

### **§ 5.35 Appeals from Decisions in Small Claims Court**

An appeal may be taken from any judgment under the Small Claims Procedure Act. Judgments under the Small Claims Procedure Act are first appealed to a district judge other than the one who entered the disputed order for a trial de novo. K.S.A. 61-2709(a). A notice of appeal must be filed with the clerk of the district court within 10 days after entry of judgment. K.S.A. 61-2709(a). Further appeal may be taken as from any other decision of the district court. K.S.A. 61-2709(b). Procedural requirements are identified in K.S.A. 61-2709.

### **§ 5.36 Certified Questions**

Pursuant to the Uniform Certification of Questions of Law Act, K.S.A. 60-3201 *et seq.*, the Kansas Supreme Court can answer questions of law certified to it by the United States Supreme Court, a United States Court of Appeals, a United States District Court, or the highest appellate court, or the intermediate appellate court of any other state when requested, if

in any proceeding before the certifying court there is involved a question of law of this state that may be determinative of the cause pending in the certifying court and it appears to the certifying court there is no controlling precedent in the decisions of the Kansas Supreme Court or the Kansas Court of Appeals. K.S.A. 60-3201.

The courts mentioned above may seek an answer to a question of law on their own motion or upon motion of a party to the cause. K.S.A. 60-3202. The certification order must set forth the question to be answered and a statement of all facts relevant to the question certified that fully shows the nature of the controversy in which the question arose. K.S.A. 60-3203. “If either party to a certified question from a federal court wants to add facts to those the certifying federal court furnishes [the Supreme Court], any changes must be made in the federal court. The same rule applies to evidentiary rulings made by the federal court.” *Ortega v. IBP*, 255 Kan. 513, Syl. ¶ 1, 874 P.2d 1188 (1994). The Supreme Court can obtain portions of the record from the certifying court if necessary. K.S.A. 60-3204.

Briefs addressing the question and arguments on the briefs are considered by the Supreme Court. K.S.A. 60-3206. A written opinion is issued. K.S.A. 60-3207.

**PRACTICE NOTE:** Upon receipt of the certification order, the Kansas Supreme Court sets a briefing schedule, allowing 30 days per side for briefing. That schedule is subject to motions for extension of time by the parties, unless the order setting the briefing schedule provides otherwise.

Likewise, the Kansas Supreme Court or the Kansas Court of Appeals can, *sua sponte* or upon motion of a party, order certification of questions of law to the highest court of any state under the same circumstances. K.S.A. 60-3208.