

Among all the objects sought to be secured by government, none is more important than the preservation of the public health; and, an imperative obligation rests upon the state through its proper instrumentalities or agencies to take all necessary steps to accomplish this objective.¹

**Anthrax,
Smallpox,
and Flu, Oh My!**

**The
Law
of Infectious Disease
Control in Kansas**

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I. Introduction

Traditionally, the primary means of protecting public health was through preventing the spread of infectious diseases.² Although the modern practice of public health extends far beyond infectious disease control, controlling the spread of infectious diseases remains one of the core functions of public health.³ This article will review the statutory and regulatory scheme in Kansas for preventing, controlling, and responding to infectious diseases that infect humans. The goal of the article is to provide readers with sufficient understanding of public health law so that they know:

- Who can exercise public health powers;
- What responsibilities, and rights, do individuals have when subjected to public health statutes or regulations; and
- What are the key statutes and regulations that address public health laws regarding infectious diseases.

While the primary audience for whom this topic is of relevance will be those attorneys working in the field of public health, as counsel to public health or other related governmental entities or to health care practitioners who diagnose and treat infectious diseases; attorneys who advise and represent persons directly affected by the exercise of governmental public health powers should also be aware of the source and scope of those powers, *e.g.*, those persons subject to mandated reporting laws, or those clients who interact with other aspects of governmental public health authority. Many businesses and organizations are also subject to some form of regulation of infectious diseases, ranging from barbers to tattoo artists, so attorneys representing those clients may benefit from this article as well. Finally, all practitioners should at least have a basic understanding of this area of law because any client, whether an individual, business or organization, may be subject to the exercise of the government's public health power if necessary to prevent or control the spread of an infectious disease.

This article will focus on the control of infectious diseases that have been determined by the Kansas Legislature or the secretary of the Kansas Department of Health and Environment (KDHE) to require particular attention.⁴ There is the general class of designated infectious diseases that includes tuberculosis (in both its active or communicable form, as well as its latent or noncommunicable form), but excludes Acquired Immune Deficiency Syndrome (AIDS). Because tuberculosis, in its active form is subject to a specific act,⁵ as is AIDS, the

specific laws regarding those diseases will be also reviewed. This article will also address a variety of laws regarding infectious disease control, as well as penalties for violating infectious disease laws.

The current state of the law of infectious disease control in Kansas is statutory and regulatory. There have been no reported Kansas court opinions regarding infectious disease control since the late 1940s, well before significant amendments and additions to the statutes and regulations regarding infectious disease control, as well as the increased protection for due process rights developed since the 1960s.⁶ Certain Kansas Supreme Court cases involving infectious disease and public health powers will be noted to the extent they may still provide persuasive authority.

II. Federal Authority

The full federal role in public health is beyond the scope of this article, but a brief overview of that role provides context. Any powers not enumerated for exercise by the federal government are reserved to the states by the 10th Amendment of the U.S. Constitution. The power to preserve the public health is part of the police power,⁷ which has not been given to the federal government, and is therefore reserved to the states.⁸ However, the federal government does have the power to address public health issues, including control of infectious disease, through its international and interstate powers, as well as by its spending power related to the general welfare.⁹

The primary federal entities with public health powers regarding infectious disease control are the Department of Health and Human Services (DHHS), the Centers for Disease Control and Prevention (CDC)¹⁰ and the U.S. Public Health Service (PHS), which is headed by the surgeon general of the United States.¹¹ In response to an infectious disease situation, the secretary of DHHS has the authority to declare a state of public health emergency exists.¹² Once such an emergency is declared, the secretary may then provide funding to assist in the response to the situation.¹³ The declaration also triggers the ability of the Food and Drug Administration to issue Emergency Use Authorizations that allow unapproved use of products for response to the infectious disease.¹⁴ The secretary is also authorized to waive certain regulatory requirements, such as penalties for violations of the Emergency Medical Treatment and Active Labor Act, once a state of public health emergency has been declared.¹⁵

The CDC and the PHS are agencies of DHHS.¹⁶ The CDC's responsibilities "include population-based initiatives,

FOOTNOTES

1. *State ex rel. Anderson v. Fadely*, 180 Kan. 652, 665, 308 P.2d 537 (1957).

2. Lawrence O. Gostin, Scott Burris & Zita Lazzarini, *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 63 (1999).

3. *Id.*

4. The diseases are listed in K.A.R. 28-1-2.

5. K.S.A. 65-116a *et seq.*

6. A similar observation is made regarding public health statutes. Gostin, 99 COLUM. L. REV. at 101-118.

7. This power is defined as "the inherent power of government to take action, which promotes the public health, safety, welfare, or morals."

Small v. Kemp, 240 Kan. 113, Syl. ¶ 2, 727 P.2d 904 (1986).

8. Frank P. Grad, *The Public Health Law Manual* 3d ed., 11 (2005).

9. *Id.*, 11-12; 15.

10. The Centers for Disease Control and Prevention were previously known as the Center for Disease Control, hence the acronym CDC; after the agency was renamed it retained the use of CDC as its acronym.

11. 42 U.S.C.A. § 202; § 203.

12. 42 U.S.C.A. § 247d *et seq.*

13. *Id.*

14. 21 U.S.C.A. § 360bbb-3.

15. 42 U.S.C.A. § 1395dd; § 1320-b.5.

16. Grad, at 15.

such as childhood vaccination, prevention of chronic diseases and injuries, and emergency response to infectious diseases.”¹⁷ If the CDC determines state or local public health authorities are not taking appropriate actions to prevent the interstate or international spread of disease, the director can take such measures he or she determines necessary to prevent the spread of disease.¹⁸ The surgeon general can issue and enforce quarantine regulations to prevent the introduction or spread of infectious disease into the United States from a foreign country, or between states.¹⁹

III. Kansas State Government Authority

The Kansas Constitution assigns the responsibility of the exercise of the powers reserved to the states by the federal constitution to the Kansas Legislature.²⁰ The Legislature has placed the general authority for protecting the public health with the secretary of the KDHE.²¹ The department is divided into two divisions, the division of environment and the division of health.²² The division of health is administered by a director who must be a licensed physician with experience and education in public health.²³ The secretary of KDHE exercises “general supervision of the health of the people of the state” and has the authority to investigate diseases and prevent the spread of infectious disease.²⁴ The secretary also has authority to issue regulations to carry out public health responsibilities.²⁵ As discussed below, the frontline responsibility rests with the local board of health and local health officer; however, if local authorities fail to properly respond to infectious disease outbreaks, the secretary has the power to quarantine²⁶ the area.²⁷

The secretary has identified specific diseases for mandated reporting, and requirements for isolation²⁸ or quarantine conditions.²⁹ These diseases include, but are not limited to, anthrax, cholera, leprosy, malaria, plague, and tetanus.³⁰ In addition to the specific diseases listed in K.A.R. 28-1-2, the secretary has also designated for reporting “any exotic or newly recognized disease, and any disease unusual in incidence or behavior, known or suspected to be infectious or contagious and constituting a risk to the public health.”³¹ An example of a specified condition for isolation, regarding plague, is that persons infected with the plague have to remain in respira-

tory isolation until they have completed 48 hours of antibiotic therapy.³² If the secretary has not specified the conditions for isolation or quarantine, the local health officer must order quarantine and isolation under appropriate conditions in light of the disease’s incubation period, the communicable period, and the usual mode of transmission.³³

A. Mandated reporting of designated infectious diseases

The Kansas Legislature has mandated reporting of suspected or known cases of infectious disease by:

- Persons licensed to practice the healing arts or engaged in a postgraduate training program approved by the state board of healing arts,
- licensed dentists,
- licensed professional nurses,
- licensed practical nurses,³⁴
- administrators of hospitals,³⁵
- licensed adult care home administrators,³⁶
- licensed physician assistants,
- licensed social workers,
- teachers,
- school administrators, and
- laboratories certified under the federal clinical laboratories improvement act pursuant to 42 C.F.R. Part 493.³⁷

If any of these individuals suspect or know that any person has contracted or has died from an infectious disease, the information, including the person’s name and address, is to be immediately reported to the local board of health or the local health officer.³⁸

Child care facilities, attendant care facilities for children and youths, and detention centers and secure treatment centers for children and youth must also report infectious disease cases to the local health department.³⁹ The operator of any infant-toddler Individuals with Disabilities Education Act (IDEA)⁴⁰ program must report any case of infectious disease, involving the operator, staff member, child, or youth in the program, to the local health department.⁴¹ Child care facilities and preschools must inform other parents of the nature of the disease if a child is absent due to an infectious disease.⁴²

17. Lawrence O. Gostin, PUBLIC HEALTH LAW POWER, DUTY, RESTRAINT, 157 (2008).

18. 42 C.F.R. § 70.2.

19. 42 U.S.C.A. § 264.

20. KAN. CONST. art. 2, § 1.

21. K.S.A. 65-101 *et seq.*

22. K.S.A. 2008 Supp. 75-5601(a).

23. K.S.A. 2008 Supp. 75-5603.

24. K.S.A. 65-101.

25. K.S.A. 65-101(b); 65-128.

26. Quarantine is defined as “the limitation of freedom of movement of well persons or domestic animals that have been exposed to a communicable disease.” K.A.R. 28-1-1(q).

27. K.S.A. 65-126.

28. Isolation is the separation of a person, who has an infectious disease, from others during the period of communicability, in order to prevent the spread of the disease. K.A.R. 28-1-1(n).

29. K.A.R. 28-1-2; 28-1-5 and 28-1-6.

30. K.A.R. 28-1-2.

31. K.A.R. 28-1-2(a)(52).

32. K.A.R. 28-1-6(c)(11).

33. K.A.R. 28-1-5(a).

34. Note: The statute reads “licensed practical nurse administrator of a hospital.” A review of the legislative history indicates that when the statute was amended in 2000, a comma was incorrectly deleted. L. 2000, Ch. 162, § 7; L. 1998, Ch. 35, § 1.

35. In the case of a licensed hospital or adult care home, the administrator may designate an individual to receive and make such reports.” *Id.*

36. *Id.*

37. K.S.A. 65-118(a).

38. *Id.*

39. K.A.R. 28-4-127; 28-4-291; 28-4-341; and 28-4-356.

40. 20 U.S.C.A. § 1400 *et seq.*

41. K.A.R. 28-4-807.

42. K.A.R. 28-4-430(c)(1).

Some of these mandated reporters may be subject to federal confidentiality requirements, such as health care providers who are covered entities under the Health Information Portability and Accountability Act Privacy Rule (HIPAA), or teachers and school administrators subject to the Federal Educational Rights and Privacy Act (FERPA). Both HIPAA and FERPA contain exceptions that allow persons subject to those acts to disclose information as required to protect the public health.⁴³

B. Kansas confidentiality and privacy statutory requirements

There are specific confidentiality requirements regarding infectious disease reporting information imposed by Kansas statute. The information must be kept confidential and can only be disclosed in the following limited circumstances:

- (1) If no person can be identified in the information to be disclosed and the disclosure is for statistical purposes;
- (2) if all persons who are identifiable in the information to be disclosed consent in writing to its disclosure;
- (3) if the disclosure is necessary, and only to the extent necessary, to protect the public health;
- (4) if a medical emergency exists and the disclosure is to medical personnel qualified to treat infectious or contagious diseases (any information disclosed pursuant to this paragraph shall be disclosed only to the extent necessary to protect the health or life of a named party); or
- (5) if the information to be disclosed is required in a court proceeding involving child abuse and the information is disclosed *in camera*.⁴⁴

The information also can, and must, be disclosed to the KDHE.⁴⁵ Mandated reporters are shielded from civil or criminal liability for disclosure of the information, when the information is reported in good faith and without malice.⁴⁶

C. Kansas local government authority

The board of county commissioners serves as the local board of health, except for those counties that have a joint city-county board of health, or that may have otherwise used home rule authority to adopt alternative provisions.⁴⁷ Each board appoints a local health officer, who must be “a person licensed to practice medicine and surgery, preference being given to persons who have training in public health.”⁴⁸ In counties with less than 100,000 residents, the local health officer can be a qualified local health program administrator,

as long as a licensed physician or dentist is designated as a consultant.⁴⁹ The local health officer serves at the pleasure of, and as an advisor to, the local board of health.⁵⁰ The Kansas Supreme Court has noted that local boards of health may not necessarily have the legal capacity to sue or be sued, but that the board of county commissioners, as the governing body, is subject to suit.⁵¹

The local health officer must investigate, or have investigated, any case of smallpox, diphtheria, typhoid fever, scarlet fever, acute anterior poliomyelitis (infantile paralysis), epidemic cerebro-spinal meningitis, and such other acute infectious, contagious, or communicable diseases as may be required.⁵² The local health officer can use “all known measures” necessary to prevent the spread of infectious disease.⁵³

Any local board of health or local health officer, once informed of a case of infectious disease, or of a death resulting from such disease, must immediately take supervision over the case to ensure the patient is properly cared for, and that any isolation, restriction of communication, quarantine, or disinfection requirements are complied with.⁵⁴ The local board of health or local health officer must immediately communicate the information regarding existing conditions to the secretary of the KDHE.⁵⁵ The local board of health or local health officer may close public gatherings if needed to control the spread of any infectious disease.⁵⁶

D. The 2005 act

In 2005, the Kansas Legislature adopted a new infectious disease control act regarding the authority of the secretary of KDHE and the local health officer to respond to cases of infectious disease,⁵⁷ notwithstanding the authority granted in K.S.A. 65-119 (general supervision of infectious disease cases), 65-122 (control of infectious disease in schools and licensed child care facilities), 65-123 (funerals of persons suffering from an infectious disease), 65-126 (KDHE authority to quarantine local areas where appropriate measures to control the spread of infectious disease are not being achieved), 65-128 (authority of KDHE to issue regulations regarding infectious diseases), and any regulations adopted under those statutes.⁵⁸ This act applies when the secretary or a local health officer is “investigating actual or potential exposure to an infectious or contagious disease that is potentially life-threatening.”⁵⁹

In those cases, the local health officer, or the secretary of KDHE, may issue the following orders under the stated conditions:

43. For the HIPAA Privacy Rule, the exception is found at 45 C.F.R. § 164.512(b). The Centers for Disease Control and Prevention have issued a guidance document concerning public health and HIPAA. MMWR (Morbidity and Mortality Weekly Report), May 2, 2003, available online at <http://www.cdc.gov/mmwr/preview/mmwrhtml/m2e411a1.htm> (last checked June 29, 2009). The Federal Educational Rights and Privacy Act exception is found at 34 C.F.R. § 99.36, but is to be “strictly construed.”

44. K.S.A. 65-118(c).

45. K.S.A. 65-119(a).

46. K.S.A. 65-118(b).

47. K.S.A. 65-201 *et seq.* The act is nonuniform, and therefore counties can charter out under their home rule power and adopt alternatives to the local board of health act. Att’y Gen. Op. No. 99-63.

48. K.S.A. 65-201.

49. *Id.*

50. *Id.*

51. *Lindenman v. Umscheid*, 255 Kan. 610, 631, 875 P.2d 964 (1994).

52. K.S.A. 65-202.

53. *Id.*

54. K.S.A. 65-119.

55. *Id.*

56. *Id.*

57. K.S.A. 2008 Supp. 65-129a *et seq.*

58. K.S.A. 2008 Supp. 65-129b(a).

59. *Id.*

60. K.S.A. 2008 Supp. 65-129b(a)(1)(A)-(C).

- an order requiring a person to be evaluated or treated, if appropriate and necessary, if the local health officer or the secretary has reason to believe the person has been exposed to an infectious or contagious disease;
- an order requiring a person exposed to an infectious disease to be isolated or quarantined, if the local health officer or the secretary determines it is medically necessary and reasonable to prevent or reduce the spread of the disease until the person “no longer poses a substantial risk of transmitting the disease or condition to the public”; and
- an order requiring a person to be isolated or quarantined if the person refuses vaccination, medical examination, treatment or testing under this act, until the person “no longer poses a substantial risk of transmitting the disease or condition to the public.”⁶⁰

If a parent or guardian refuses to allow a minor child or ward to be vaccinated, medically examined, treated, or tested, the secretary or local health officer may order the child or ward to be isolated or quarantined, but must allow the parent or guardian to accompany the child or ward.⁶¹ The order will remain effective until the local health officer or the secretary determines that the child or ward “no longer poses a substantial risk of transmitting the disease or condition to the public.”⁶²

An order for isolation and quarantine must be issued to the person or persons subject to the order.⁶³ The order must state:

- (1) The identity of the individual or group of individuals subject to isolation or quarantine;
- (2) the premises subject to isolation or quarantine;
- (3) the date and time at which isolation or quarantine commences;
- (4) the suspected infectious or contagious disease causing the outbreak or disease, if known;
- (5) the basis upon which isolation or quarantine is justified; and
- (6) the availability of a hearing to contest the order.⁶⁴

Except as provided below, the order must be written and served on the person or persons before they are placed in isolation or quarantine.⁶⁵ If the notice required under the act is impractical because of the number of persons or the areas involved, the local health officer or the secretary must fully inform the person or persons subject to the order using the best possible means available.⁶⁶

Any person or group isolated or quarantined under this law may request a hearing in district court, as provided by K.S.A. 60-1501 *et seq.* (the habeas corpus act), but the provisions of K.S.A. 65-129a *et seq.* apply to any order issued under the 2005 act to the extent there is any conflict between the 2005 act and the habeas corpus act.⁶⁷ The request for a hearing cannot stay the isolation or quarantine order, and a court cannot enjoin enforcement of the order.⁶⁸ The court is required to hold the hearing no more than 72 hours after receiving the request.⁶⁹ However, the court may extend the time for the hearing upon request and a sufficient showing by the local health officer or the secretary that extraordinary circumstances justify the extension.⁷⁰ The court should take into consideration, in reviewing the request for extension, the rights of the person seeking release, protection of the public, the health emergency severity and the availability of witnesses and evidence, if appropriate.⁷¹

Any person whose freedom is restrained by a public health order, or a parent, guardian, or next friend of the person restrained, may seek a writ of habeas corpus.⁷² No docket fee is required, if the petitioner files a poverty affidavit.⁷³ The petition must be verified and state:

- (1) The place where the person is restrained and by whom;
- (2) the cause or pretense of the restraint to the best of plaintiff’s knowledge and belief; and
- (3) why the restraint is wrongful.⁷⁴

In the event that an individual cannot personally appear before the court, proceedings may be conducted by the person’s authorized representative and by any means that allows anyone else to fully participate.⁷⁵ In any proceedings brought under this section, the court may order the consolidation of individual claims into group claims where:

- (1) The number of individuals involved or affected is so large as to render individual participation impractical;
- (2) there are questions of law or fact common to the individual claims or rights to be determined;
- (3) the group’s claims or rights to be determined are typical of the affected individual’s claims or rights; and
- (4) the entire group will be adequately represented in the consolidation.⁷⁶

The court must appoint counsel to represent petitioners not otherwise represented by counsel.⁷⁷

61. K.S.A. 2008 Supp. 65-129b(a)(1)(D).

62. *Id.*

63. K.S.A. 2008 Supp. 65-129c(a).

64. K.S.A. 2008 Supp. 65-129c(b). Draft orders may be viewed online at <http://www.kansascounties.org/documentcenterii.aspx> (Last viewed Aug. 10, 2009).

65. K.S.A. 2008 Supp. 65-129c(c)(1).

66. K.S.A. 2008 Supp. 65-129c(c)(2)(A). “If the order applies to a group of individuals and it is impractical to provide written individual copies under paragraph (1) of subsection (c), the written order may be posted in a conspicuous place in the isolation or quarantine premises.” K.S.A. 2008 Supp. 65-129c(c)(2)(B).

67. K.S.A. 2008 Supp. 65-129c(d)(1).

68. K.S.A. 2008 Supp. 65-129c(d)(2).

69. K.S.A. 2008 Supp. 65-129c(d)(3).

70. K.S.A. 2008 Supp. 65-129c(d)(4)(A).

71. K.S.A. 2008 Supp. 65-129c(d)(4)(B).

72. K.S.A. 60-1501(a).

73. *Id.*; K.S.A. 2008 Supp. 60-2001(b).

74. K.S.A. 60-1502.

75. K.S.A. 2008 Supp. 65-129c(d)(8).

76. K.S.A. 2008 Supp. 65-129c(d)(9).

77. K.S.A. 2008 Supp. 65-129c(d)(10).

78. K.S.A. 60-1503.

The petition must be presented promptly to a district court judge and handled in the same manner as any other assignment of court business.⁷⁸ The assigned judge must promptly examine the petition.⁷⁹ If the examination plainly shows that the petitioner is not entitled to relief, the petition may be dismissed with costs assessed to the plaintiff.⁸⁰ Otherwise, the judge should issue the writ with directions that the local health officer or secretary of the KDHE file their answer by the time fixed by the court.⁸¹ Although ordinarily the writ would require production of the person, because the quarantine or isolation order is not stayed during the pendency of the hearing, the court cannot order the person be allowed to attend the hearing.⁸² The writ may be served at anytime (i.e., on weekends or holidays) by the sheriff or any other person designated by the court.⁸³

The answer by the secretary of local health officer must be verified and shall contain:

- (1) A statement of the authority or reasons for the restraint,
- (2) a copy of the written authority for the restraint, if any,
- (3) a statement as to whom, the time, place, and reason for the transfer, if the custody of the party has been transferred, and
- (4) a statement as to the reasons why the party cannot be produced, if it is claimed that the party cannot be produced for any reason.⁸⁴

The contents of the answer, unless controverted by the petitioner or by the evidence presented, should be accepted as true.⁸⁵ The court may appoint one or more competent physicians to examine the person, and report any findings to the court.⁸⁶

The court should order release of the person from quarantine or isolation unless the court determines the order is “necessary and reasonable to prevent or reduce the spread of the disease or outbreak believed to have been caused by the exposure to an infectious or contagious disease.”⁸⁷ In making the court’s determination, the judge may consider the means of transmission, degree of contagion, and the degree of public exposure to the disease.⁸⁸ An order of the court authorizing the isolation or quarantine issued under this section shall:

- (1) Identify the isolated or quarantined individual or group of individuals by name or shared characteristics;
- (2) specify factual findings warranting isolation or quarantine; and

- (3) except as provided in [K.S.A. 65-129c(c)(2)], be in writing and given to the individual or group of individuals.⁸⁹

If the court finds the notice is impractical due to the number of individuals, or geographical area involved, the court, “using the best possible means available,” must ensure the persons subject to the order are fully informed.⁹⁰ The court’s order authorizing continued isolation or quarantine is only effective for a maximum of 30 days.⁹¹ If the court upholds the order, the writ is dissolved with costs charged to the petitioner.⁹² Otherwise, the court must order the person be released or “make such other orders as justice and equity” require.⁹³

If an appeal is filed, the court’s order releasing the person from quarantine or isolation may be stayed on such terms as provided for by the court,⁹⁴ but an order upholding the quarantine and isolation, as noted previously, is not subject to stay under the 2005 act. The appellate court can order alternative scheduling deadlines for filing the record on appeal, “if there is a reasonable explanation for the need for such action.”⁹⁵ Once the record is received in the appellate court, the appellate court can set any remaining scheduling, e.g., briefing or when the case is considered submitted.⁹⁶ These cases, however, must “be heard at the earliest practicable time.”⁹⁷ As in the district court, the petitioner-appellant is not required to attend and the matter is considered on the “law and the facts arising upon record.”⁹⁸ The appellate court issues its judgment, including any orders that “the law and the nature of the case may require,” as well as any orders regarding the costs, including “allowing costs and fixing the amount, or allowing no cost at all.”⁹⁹

E. The Active Tuberculosis Act¹⁰⁰

This act authorizes the secretary of the KDHE, the secretary’s designee, and local health officers (all who are considered, for the purposes of the act, a “health officer”), to take certain actions when the health officer has a reasonable belief a person has active tuberculosis.¹⁰¹ The person may voluntarily consent to be examined; however if the person refuses, the health officer can order the person to be examined by a qualified physician.¹⁰² If, after examination, it is determined the person has active tuberculosis, the person must either be admitted to a treatment facility, or if the health officer determines “there is no danger to the public or other individuals,” the person may be treated on an outpatient basis.¹⁰³ If the person is being treated as an outpatient, the health officer must inform the person what precautions must be taken to prevent the spread

79. *Id.*

80. *Id.*

81. *Id.*

82. K.S.A. 2008 Supp. 65-129c(d)(2).

83. K.S.A. 60-1503(c), (d).

84. K.S.A. 60-1504(c).

85. K.S.A. 60-1504(d).

86. K.S.A. 60-1505(b), as amended L. 2009, Ch. 103, § 13.

87. K.S.A. 2008 Supp. 65-129c(d)(4)(C)(i).

88. K.S.A. 2008 Supp. 65-129c(d)(4)(C)(ii).

89. K.S.A. 2008 Supp. 65-129c(d)(5).

90. K.S.A. 2008 Supp. 65-129c(d)(6).

91. K.S.A. 2008 Supp. 65-129c(d)(7).

92. K.S.A. 60-1505(d).

93. *Id.*

94. *Id.*

95. *Id.*, K.S.A. 60-1505(e)(1).

96. *Id.*

97. K.S.A. 60-1505(e)(2).

98. *Id.*

99. K.S.A. 60-1505(e)(3).

100. K.S.A. 65-116a *et seq.*

101. K.S.A. 65-116a; 65-116b.

102. *Id.*

103. *Id.*

104. K.S.A. 65-116c.

of the disease to others.¹⁰⁴ The health officer must supervise the case to ensure the precautions are being followed.¹⁰⁵

If the person has either refused or failed to:

- be examined,
- be admitted to a treatment facility if necessary,
- follow precautions for outpatient treatment, or
- follow directions of his or her private physician,

the health officer may notify the county or district attorney to institute proceedings to enforce the requirements of the act.¹⁰⁶ The act preserves a person's right to choose the mode of treatment.¹⁰⁷ If, however, in choosing a mode of treatment, the person continues to present a threat of infection to others, the local health officer can require the person be isolated at a treatment facility, or if isolated at home, the officer can order the person to follow any necessary precautions to prevent the spread of disease.

After proceedings are instituted in district court, the person may either plead guilty or not guilty. If he or she pleads guilty, or is convicted by the court of failing to comply, the court must commit the person to a qualified treatment facility.¹⁰⁸ Upon commitment, if necessary, the person may be isolated from other patients, and may be restrained to prevent the person from leaving the facility.¹⁰⁹ The person must remain at the facility until the director of the facility certifies the person no longer is a danger to others.¹¹⁰ The director must notify the state health officer that the person is being discharged.¹¹¹ There is nothing in the act that precludes repeating the process where a person so discharged has become actively contagious again.

F. Acquired Immune Deficiency Syndrome Act

The Kansas Legislature has excluded AIDS and "any causative agent" of AIDS from the general class of reportable infectious diseases.¹¹² The term "infectious disease" under the AIDS act is limited to AIDS.¹¹³ Any physician, administrator of a medical care facility, or lab director knowing a person has contracted AIDS, or has died from it, or that the person is infected with the Human Immunodeficiency Virus (HIV), must report the information directly to the secretary of the KDHE.¹¹⁴ Reports made in good faith are provided immunity from civil or criminal liability.¹¹⁵ After reporting, the information must be kept confidential and cannot be disclosed, even if subpoenaed except as otherwise authorized by law.¹¹⁶ Physicians are allowed to disclose information to corrections

employees who may be placed in contact with the infected person's bodily fluids, but the corrections employees are limited to using that information solely as necessary in providing treatment to the person.¹¹⁷ The act does not provide any quarantine or isolation authority, and expressly states the act does not create any duty to warn others.¹¹⁸

G. Miscellaneous infectious disease statutes and regulations

No person with an infectious disease, that is dangerous to the public health, may attend any public, parochial, or private school, or licensed child care facility.¹¹⁹ The parent or guardian, the principal or other person in charge of the school or licensed child care facility all have a duty to exclude any child or other person having a known or suspected case of infectious disease until the prescribed period of isolation or quarantine for the particular disease has ended.¹²⁰ An attending health care provider or local health officer, if they find after examination that the person is no longer infectious, may provide written certification to the person in charge of the school or licensed child care facility, at which time the person can be readmitted to the school or child care facility.¹²¹ As an additional measure against the spread of certain infectious diseases, children must be immunized before attending school.¹²² Exceptions to this requirement are allowed if a physician certifies the child's health would be compromised if immunized, or a parent files a religion based objection to the required immunization.¹²³

The Legislature has also regulated the conduct of funeral services for persons who died with an infectious disease: the funeral must be conducted in compliance with any applicable KDHE regulations, if the disease required quarantine of contacts, the public funeral service must be a closed casket, and the contacts subject to quarantine who attend the funeral must be adequately isolated from the public.¹²⁴ Ordinarily, funerals and burials are supervised by a licensed funeral director, but Kansas law allows a family or religious group to conduct burials, unless the death resulted from an infectious disease.¹²⁵ Whenever a person dies from an infectious disease, the person transporting the body must be informed of the infectious disease cause of death, and in turn, when delivering the body, that person must inform the person to whom he or she is delivering the body to of the same information.¹²⁶ Failing to properly guard against the spread of infectious disease is grounds

105. *Id.*

106. K.S.A. 65-116d.

107. K.S.A. 65-116h.

108. K.S.A. 65-116e.

109. *Id.*

110. *Id.*

111. *Id.*

112. K.S.A. 65-128(b).

113. K.S.A. 2008 Supp. 65-6001(m).

114. K.S.A. 65-6002(a); (b).

115. K.S.A. 65-6002(c); 65-6016(c).

116. K.S.A. 65-6002(d). The information can be disclosed if de-identified and is for statistical purposes, if the persons involved have consented to disclosure in writing, if necessary to protect the public health, in a medical emergency where necessary to protect someone's health, or if disclosed *in camera* for any proceeding involving a minor. *Id.*

117. K.S.A. 65-6016(a).

118. K.S.A. 65-6016(b).

119. K.S.A. 65-122.

120. *Id.* The prescribed period for any particular disease can be found in K.S.A. 28-1-6, *e.g.*, chickenpox cases require isolation for the lesser of either six days following the first crop of vesicles, or until the lesions have crusted.

121. K.S.A. 65-122.

122. K.S.A. 72-5209(a).

123. K.S.A. 72-5209(b).

124. K.S.A. 65-123.

125. K.S.A. 65-1713b.

126. K.S.A. 65-2438. The information regarding the infectious disease must be kept confidential and only disclosed as provided for in this statute. *Id.*

127. K.S.A. 2008 Supp. 65-1751(a)(6).

for disciplinary proceedings regarding mortuary licenses.¹²⁷ Before a body can be cremated, the crematory must have a written authorization that includes a statement whether the death resulted from an infectious disease.¹²⁸ Persons applying for an embalming license must show a reasonable knowledge of sanitation and disinfection procedures where death results from an infectious disease.¹²⁹

Before an out-of-state association can place a child from out of state into a family home in Kansas, it must certify that the child does not have an infectious disease.¹³⁰ When applying to register a private residence as an adult family home, the applicant must certify no resident has an infectious disease, and to provide a written statement from a physician, nurse practitioner or physician's assistant that the applicant and any family members are free from infectious diseases.¹³¹ No person may maintain a child care facility or maintain a family day care home if they know therein resides, works, or regularly volunteers any person with an infectious disease.¹³² Adult care homes cannot admit residents with communicable diseases.¹³³

Food care workers who have an infectious disease cannot work until they are no longer infectious.¹³⁴ Operators of assisted living facilities, residential health care facilities, home plus facilities, adult day care facilities, or boarding homes must prohibit employees with infectious disease from coming into direct contact with a resident, the resident's food, or the resident's care equipment.¹³⁵ Visitors to maternity centers must be screened for infectious diseases.¹³⁶ Persons working or volunteering at any Infant-Toddler Services IDEA program must be free from any infectious disease.¹³⁷ No employer can allow any person to work, nor can the employee work, in any building or vehicle used for producing, preparing, manufacturing, packing, storing, selling, distributing, or transporting food or drugs, if the employee has "any venereal disease, smallpox, diphtheria, scarlet fever, tuberculosis or consumption, trachoma, typhoid fever, epidemic dysentery, measles, mumps, German measles (Rothein), whooping cough, chicken pox, or other contagious disease."¹³⁸ Anyone handling, preparing, or manufacturing "soda water beverages" cannot have any infectious disease.¹³⁹ Employees at lodging facilities must be free of infectious diseases that can be transmitted to other employees or guests in the course of employment, or who are carriers of organisms that can cause a communicable disease.¹⁴⁰ Employees at nonmedical resident care facilities cannot work when they have an infectious disease.¹⁴¹

The state board regulating barbers can refuse to issue or re-

new, or can revoke or suspend a barber's license if he or she has an infectious disease.¹⁴² Persons screening newborns for hearing concerns, who are not licensed to screen infants for hearing problems, must be free from infectious diseases that are transmissible to newborns and infants.¹⁴³ Before a person may be qualified as a driving school instructor, he or she must have a doctor's certificate that they do not have any contagious disease.¹⁴⁴ No licensee or apprentice at a school or training establishment for the practice of cosmetology can have an infectious disease, nor can a person be provided services if the person is known to have an infectious disease.¹⁴⁵ The same rule applies to barber schools or shops, as well as tattoo or body piercing establishments.¹⁴⁶ Any member of the board of barber examiners, or a health officer, may require a barber to submit to a physical examination if the barber is suspected to have an infectious disease.¹⁴⁷

H. Enforcement of infectious disease law and penalties for noncompliance

The local health officer, or the secretary of the KDHE, under the 2005 act, "may order any sheriff, deputy sheriff or other law enforcement officer of the state or any subdivision to assist in the execution or enforcement of any order issued under" that act.¹⁴⁸ If a person or the person's immediate family member is under an isolation or quarantine order issued by the secretary of the KDHE or the local health officer, the employer, public or private, cannot discharge the employee where the sole basis for the discharge is the order of isolation or quarantine.¹⁴⁹ It is also a crime to knowingly expose someone to a life threatening communicable disease through use of hypodermic needles or sexual intercourse.¹⁵⁰

Violating any provision of the tuberculosis act, or of any rules or regulations of a tuberculosis treatment facility, or if a patient is disorderly, is a misdemeanor.¹⁵¹ Violating, refusing or neglecting to obey any AIDS act provision, including KDHE regulations adopted under that act, is a class C misdemeanor.¹⁵² For the general statutes regarding infectious disease control, violations of K.S.A. 65-118 (mandated reporting of infectious disease and keeping reported information confidential), K.S.A. 65-119 (duties and powers of local boards of health and local health officers), K.S.A. 65-122 (restriction of admittance to schools and childcare facilities), K.S.A. 65-123 (funeral conditions for infectious disease caused deaths), and K.S.A. 65-126 (KDHE enforcement of local quarantine) are punishable by fines of between \$25

128. K.S.A. 2008 Supp. 65-1762(b)(1)(C).

129. K.S.A. 65-1701.

130. K.S.A. 38-315.

131. K.S.A. 39-1503(a); 2008 Supp. 39-1504(c)(1).

132. K.S.A. 2008 Supp. 65-516(a)(7).

133. K.A.R. 28-39-401.

134. K.A.R. 28-1-7.

135. K.A.R. 26-41-207; 26-42-207; 26-43-207; and 28-39-161.

136. K.A.R. 28-4-376.

137. K.A.R. 28-4-819.

138. K.A.R. 28-23-12.

139. K.A.R. 28-23-55.

140. K.A.R. 28-36-75.

141. K.A.R. 30-42-13.

142. K.S.A. 65-1820a(b)(2).

143. K.A.R. 28-4-608(a)(3).

144. K.S.A. 8-276(d).

145. K.A.R. 28-24-3.

146. K.A.R. 28-25-3; 61-1-19; 61-3-10; and 69-15-15.

147. K.A.R. 61-1-20.

148. K.S.A. 2008 Supp. 65-129b(a)(2).

149. K.S.A. 65-129d.

150. K.S.A. 21-3435. This is a class 7 person felony.

151. K.S.A. 65-116g.

152. K.S.A. 65-6005. Disclosure of confidential AIDS-related information is a misdemeanor punishable by a fine between \$500 and \$1,000, and up to six months in jail. *Id.*

153. K.S.A. 65-127.

and \$100 for each offense.¹⁵³ Any person who violates, refuses, or neglects to comply with any regulation adopted by the KDHE regarding the “prevention, suppression, and control of infectious” diseases; who leaves an isolation or quarantine area while subject to a quarantine or isolation order; or who knowingly conceals any case of infectious disease may be guilty of a Class C misdemeanor.¹⁵⁴

I. Kansas case law involving infectious disease control

The Kansas cases essentially can be divided into two main categories: those involving who is responsible for paying for costs associated with infectious disease control and those involving the permissible scope of the government’s power to quarantine or isolate persons known or suspected to have an infectious disease. There are two other cases on the issue of injunctive relief and public health powers. Before the two classes of cases are discussed, the singular case of *Moody v. Wickersham*,¹⁵⁵ presents itself.

Elizabeth Moody was a hotel housekeeper in Independence, Kan., who on Feb. 14, 1918, was diagnosed with smallpox. These first facts are as testified to by Moody. Later that day, the Montgomery County health officer, Dr. E.C. Wickersham, responded, and gave her only 15 minutes to get ready before he escorted her to the isolation facility (referred to in the vernacular of the times as a “pesthouse”). “[I]n an open car on a very cold day,” they rode out to the pesthouse, and on the way passed a cemetery, where the doctor allegedly said:

You had better pick you a headstone, cause here’s where I’m going to take you next.

The conditions at the one-room pesthouse were described as “dirty and nasty,” with bedding so dirty it was blue. There was a box for a table, nothing in the way of cleaning tools or supplies, and two beds, one for the patient and one for the caretaker (described as “[a] very unkempt man”). The walls were not papered, with cracks that let the wind in, the floor was bare wood, the windows were small, and instead of a toilet there was a “slop jar.” There were no screens or curtains between the beds, and when the night nurse arrived, the nurse slept in the same bed as the patient.

Dr. Wickersham testified that on the drive to the pesthouse, the patient was dressed warmly, and his remark at the cemetery was jocular, which elicited a laugh from the patient. He agreed the pesthouse was crude and unsanitary but he knew of no other place to isolate the patient to protect the public. The jury returned a verdict, including \$1,162.50 in punitive damages. The Kansas Supreme Court affirmed, noting:

A health officer, while required to obey his lawful orders and perform his official duty, it never excused for wanton conduct and inhumane treatment to patients suffering from serious illness. ... [P]ersons who act in [a governmental] capacity are required to treat other


human beings in a reasonably humane and considerate manner. The law, no less than humanity, requires humane and decent treatment of those who must be segregated from their usual conveniences and friends, and whoever acts with utter disregard of this requirement renders himself liable.

There are three key cases involving the scope of the government’s power to quarantine persons with infectious disease: *Welch v. Shepherd*,¹⁵⁶ *In re Irby*,¹⁵⁷ and *In re McGee*.¹⁵⁸ All involved sexually transmitted diseases. All show significant deference by the Court to the local health officer. In particular, the *McGee* case involved a challenge to the decision of the local health officer as to where the patients should be isolated, to which the Court replied:

The [C]ourt knows of no law or rule of public policy or private right which requires a person who, for the protection of the public, must be isolated and treated for loathsome communicable disease, to be interned in the locality in which he may reside.

The petitioners also asserted they could be responsible for their own treatment, and the Court replied: “The answer is, the public health authorities are not obligated to take chances.”

The other category of cases, with varying results based on the facts and laws involved, addressed whether the county was responsible for the cost of the prevention of the spread of infectious diseases. In *City of Wichita v. Sedgwick County*,¹⁵⁹ the city sought reimbursement from the county for costs involved in response to a smallpox epidemic in 1917 and 1918. At the time, a statute authorized the city to take action to control the spread of smallpox, and then allowed the city to present the county commission with an itemized statement of expenses to be paid out of the county general fund. In light of the statute, the Court ordered



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154. K.S.A. 65-129.

155. 111 Kan. 770, 207 P. 847 (1922).

156. 165 Kan. 394, 196 P.2d 235 (1948).

157. 113 Kan. 565, 215 P. 449 (1923).

158. 105 Kan. 574, 185 P. 14 (1919).

159. 110 Kan. 471, 204 P. 693 (1922).

160. These statutes, as far as first-class cit-

the county to pay the expenses.¹⁶⁰ A township trustee, however in an earlier case, seeking reimbursement from the county for expenses related to a smallpox outbreak, was denied compensation because there was no statute in 1874 that authorized the township to act and then bill the county.¹⁶¹

In *Hawthorne v. Cherokee County*,¹⁶² the local health officer ordered several family members suffering from smallpox to be isolated, and without waiting to consult with the county commission (acting as the board of health), the health officer hired a nurse to provide care for the family. The nurse submitted the bill to the county, who refused to pay, but on appeal to the Kansas Supreme Court, the Court noted that waiting for the board to convene and consider the matter would have been an unnecessary delay. The health officer, as an officer of the county, had the authority to bind the county for the services of the nurse.

A dissimilar result, under different facts, was reached in *Dykes v. Stafford County*.¹⁶³ There a private physician consulted with the local health officer on a case, but the local health officer disagreed regarding the diagnosis of diphtheria. The private physician consulted another private physician, who agreed it was diphtheria, so the private physician provided care and treatment, and then billed the county for his services. Because the local health officer had not authorized the treatment, the county was not bound, and was not required to pay for the services.

In *Hessin v. Manhattan*,¹⁶⁴ an attempt was made to enjoin the city from using a park building for a temporary isolation facility during a smallpox outbreak in 1909. The Court noted that the city, in providing an isolation facility, was required to provide a suitable location and the "best care possible under the circumstances." Due to the emergency nature of the matter, the city could not wait to locate and construct a suitable building away from everyone else, and therefore the Court dissolved the temporary injunction. Although not an infectious disease case, in *Dougan v. Shawnee County*,¹⁶⁵ the Court refused to vacate an injunction directed towards an imminent public health threat, finding public health authorities can take action before a public health threat actually materializes.

IV. Conclusion

One of the great success stories in public health over the last century is the progress toward eliminating some infectious diseases (smallpox), significantly reducing the impact of others (polio), and in general reducing the spread of infectious diseases through immunization programs, effective reporting and surveillance, and appropriate use of public health powers, such as quarantine and isolation. But new diseases (severe acute respiratory syndrome – SARS), old diseases that evolve (multi-drug resistant tuberculosis), and diseases that seem innocuous (seasonal influenza) pose the threat of mutating into something very serious (pandemic influenza).¹⁶⁶ Public health, while it remains a significant governmental obligation, is not something the government can do by itself. Simple steps, such as washing your hands and staying healthy by eating right and getting exercise, can benefit the individual and society as a whole by reducing the transmission of infectious diseases. ■

About the Author

Robert W. Parnacott graduated with dean's honors from the Washburn University School of Law in 1991. Following law school, he was a research attorney on the Central Staff for the Kansas Court of Appeals and, subsequently, for Justice Tyler C. Lockett of the Kansas Supreme Court. He then served as a staff attorney for the Kansas Corporation Commission and later for the Kansas Department of Health and Environment. Prior to joining the Sedgwick County Counselor's Office, he was in private practice with Woodard, Hernandez, Roth & Day LLC, Wichita. He has represented the Sedgwick County Local Board of Health, the Local Health Officer, and the local health department since 2002. He also serves as the Sedgwick County HIPAA Privacy Officer. He has spoken on numerous occasions at professional conferences, classes and seminars on Kansas public health law. He has also previously published several articles in the Journal of the Kansas Bar Association on topics including appellate standards of review, civil procedure, and annexation.



ies are concerned, were repealed after constitutional home rule for cities was adopted in the 1960s, but similar statutes remains on the books for second- and third-class cities. K.S.A. 65-301 and 65-302.

161. *Smith v. Shawnee County*, 21 Kan. 669 (1879).

162. 79 Kan. 295, 99 P. 598 (1909).

163. 86 Kan. 697, 121 P. 1112 (1912).

164. 81 Kan. 153, 105 P. 44 (1909).

165. 141 Kan. 554, 43 P.2d 223 (1935).

166. The Kansas experience in the 1918-19 influenza pandemic is covered in Judith R. Johnson, *Kansas in the Grippe: The Spanish Influenza Epidemic of 1918*, 15 KANSAS HISTORY: A JOURNAL OF THE CENTRAL PLAINS 44 (1992).



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