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How a (Sewer) Bill Becomes a (Pension) Law: Kentucky Legislative History in Difficult Times (July 2018)

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How a (Sewer) Bill Becomes a (Pension) Law: Kentucky Legislative History in Difficult Times

Kurt Metzmeier

In the April *Bar Briefs*, I wrote about researching federal legislation in difficult times where the classic “how-a-bill-becomes-a-law” method fails to capture the secretive, makeshift law-making of a politically fractured legislature. Recently this malady spread to the Kentucky General Assembly, which has struggled with conflicts engendered by a divisive governor, a legislative leadership with growing pains as a relatively new majority Republican body, and a membership facing upcoming 2018 elections in an unsettled political environment.

This was reflected dramatically in the battle over funding and reforming the state pension system for state workers and teachers—both articulate, well-organized and politically active constituencies with members spread throughout House districts in all 120 counties. (There are actually eight pension funds in Kentucky, the two largest being the Kentucky Teachers Retirement System (KTRS), representing teachers and the Kentucky Employees Retirement System-Non Hazardous (KERS), representing most state workers but excluding police and firefighters.) For simplicity, I will focus only on those two plans below.

From his election in 2015, Governor Matt Bevin has proclaimed his desire to “fix” the pension system, which ranks among the worse funded in the country due to years of underfunding by the state legislature (and perhaps due to poor management of its reserves).

For example, while the legislature has fully funded its own pension system, the KTRS has been only 54 percent funded and the KERS has only 14 percent of the funds it will need.

The blame is largely bipartisan, having occurred over years when the Senate was controlled by Republicans, the House by Democrats, and the governor’s mansion occupied by Democrats (Paul Patton and Steven Beshear) and Republican Ernie Fletcher. Some critics argue that lack of funding was largely a byproduct of the political class’s refusal to reform a state tax system that takes in less revenue than Kentuckians want spent on education, roads and health care.

Rather than merely plan to properly fund the pension fund at promised levels, Bevin expressed an interest in redesigning the current combined-benefit system by converting it to a “401k-like” pension for new employees and by reducing some benefits to retirees and current employees. Commentators pointed out that this would be a complex conversion because teachers are not eligible for social security benefits, so any new system involving them would have to meet the requirements of a “social-security replacement” plan. Moreover, simultaneously maintaining defined-benefits plans for current workers and 401k like plans for new employees could cost more annually during a transition period than properly funding the current system.

In September 2017 consultants hired by Bevin released a report on pensions that foreshadowed a drastically altered system which alarmed teachers and state workers. Bevin’s final plan was announced that October. Its thrust was to put new and current employees hired after 2014 into a 401k-style plan, transition current workers into the plan after they reached 27 years of service (capping but preserving the defined pension), and impose a three percent tax on salaries to fund a retirement healthcare fund. In addition, the plan changed the way that teachers calculated their retirement date and eliminated cost-of-living adjustments (COLAs) for retirees.

Teachers and state workers cried foul, claiming the plan violated the “inviolable contract” with them by changing benefits promised to them when they were hired and that they had paid into during their years of employment. The inviolable contract doctrine is enshrined in statute law as Chapter 161 of the KRS and bolstered by the contract clause of the state and federal constitutions.

(The state contract-clause has played a lively role in Kentucky’s history from the 1820s debt-relief controversy which split the state high court into “new” and “old” courts—which I discuss in my book *Writing the Legal Record: Law Reporters in Nineteenth-Century Kentucky*—to the struggle to free Eastern Kentucky landowners from the unfair terms

of “broad form deeds” that allowed companies to destroy their houses to strip-mine the coal underneath them). Attorney General Andy Beshear declared the plan unconstitutional, promising legal action if it passed.

While Bevin had begun the year by promising a special-session of the legislature to fix the pension system, 2017 ended without action (except for the establishment of a website touting the governor’s plan). The inaction was partially due to a summer sexual harassment scandal that toppled House Speaker Jeff Hoover. Bevin pushed hard to push out Hoover, who he also thought was too soft on pension-reform, but that left hard feelings in the GOP caucus. The 2018 regular session of the legislature opened early January without a leadership-sponsored pension-bill and Bevin’s plan seemingly dead on arrival.

Finally, on February 21, the legislative leadership released their bill. It proposed a hybrid, part defined-pension, part 401k-style plan for newly hired teachers and state workers, and scaled back some benefits for current and retired employees—but not nearly as much as Bevin’s plan had. Teachers were still angry because the plan cut benefits and retiree COLAs and because they believed the hybrid plan would hurt recruitment of future teachers. They began intense lobbying of legislators—to which the governor responded by accusing them of being “selfish” and “acting thuggish.”

On February 28, Beshear issued a letter to state lawmakers advising that the bill violated the inviolable contract in several provisions by reducing COLAs, adding a 1 percent tax on teacher salaries for retirement healthcare, changing rules calculating service (eliminating unused sick-days from the formula) and altering the final compensation rate for some retirees.

Teachers rallied in the capital on March 9, chanting “A Pension Is a Promise” while Senate leaders tried to find votes to move the bill on the floor. Later that day the leadership decided to send the bill back to committee. Teachers cheered and Bevin fumed. During the last week of March, with only a few days left in the session, the press declared that “the pension bill is stalled in the face of vigorous opposition from teachers.”

Then, at 2 p.m. on March 29, the House Committee on State and Local Government hijacked a wastewater bill, gutted it, and inserted a new pension plan. Because the sewer bill had already passed the Senate and had two readings, the House was able to take it up immediately. News of the surprise move spread through school houses around the state, outraging teachers. By the time that the House quickly passed the pension-bill (mostly unread), teachers were streaming into the capitol.



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2019 Change in the Treatment of Alimony May Drive Many Divorce Clients to Further Estate or Business Planning

C. Shawn Fox

The Tax Cuts and Jobs Act (TCJA) signed into law on December 22, 2017 may have a significant impact on divorce clients—creating opportunity or chaos. Under current law, which has been in place for the past 75 years, Section 215 of the Internal Revenue Code allows a divorcing spouse paying alimony or separate maintenance to deduct such payments for income tax purposes. Section 71 of the Internal Revenue Code requires the recipient of such alimony or maintenance to include such payments in income.

Under TCJA, effective January 1, 2019, a payor of alimony or separate maintenance will no longer be able to deduct such payments and the recipient of such payments will no longer have to include such payments as income. Current law will continue to apply to divorce or separation instruments executed on or before December 31, 2018, unless such instruments are modified after such date and the modification expressly provides that the amendments made by the TCJA, specifically Section 11051 of PL 115-97, apply to such modification.

Most commentators and practitioners recognize the problems this will create. First, spouses anticipating having to pay alimony or separate maintenance have a significant incentive to hurry to complete settlement or court-ordered resolution of alimony or separate maintenance by the end of 2018 to preserve the deductibility of such payments. The tax savings to such paying spouse may be significant for years to come. As the end of the year approaches, those expecting to pay alimony or separate maintenance will likely push to complete settlement agreements, or push courts to issue orders on such issues, to preserve their ability to deduct such alimony or maintenance payments.

Further, while one spouse may have an incentive to settle this year, the other spouse may have a corresponding incentive to delay any settlement or resolution until next year. The opposing incentives may result in fewer settlements and more divorce cases going to trial, thus requiring greater court involvement.

Second, the loss of the deduction for alimony or separate maintenance reduces the aggregate funds available to the family unit. Current law effectively shifts the tax burden from the paying spouse, who typically has the higher tax rate, to the recipient spouse, who typically has the lower rate, thus reducing the tax paid by the overall family unit. By shifting the tax burden to the paying spouse, the TCJA effectively increases the income tax paid by the overall family unit.

For households being divided and facing duplicate expenses for items such as rent, utilities, insurance, etc., preserving funds can be essential. Families facing this situation will have less funds, especially the paying spouse. With less funds available, the paying spouse may be less willing to negotiate on other items, thus making settlement more difficult and resulting in fewer settlements and more divorce cases going to trial, thus requiring greater court involvement.

Most commentators and practitioners recognize the obvious chaos that may arise through the need for greater court involvement and rushing to complete settlement agreements or court orders by the end of the year (including client disappointment when courts are too busy to render a decision before January 1, 2019). Most likewise recognize both the chaos and opportunity for divorce attorneys through the increased work and attendant fees in dealing with this rush of activity.

The opportunity few recognize falls outside the scope of divorce law. For alimony or separate maintenance beginning in 2019 and beyond, payors of alimony or separate maintenance will take a significant hit. Without a deduction from income for alimony or separate maintenance, a payor will have higher taxable income and more income tax to pay. Even more, because child support payments are determined based on income and the income of the receiving spouse will now be less without the inclusion of the alimony or separate maintenance payments, the child support obligations of the payor may increase.

Paying spouses will want to look for ways to save money after his/her pocketbook is hit with such a double-whammy. Opportunities abound for estate planning and business attorneys to consult with divorce clients to discuss ways to reduce income or taxes. While there is no one sure fix for all clients, estate plans and business structures should be reviewed for opportunities to shift income or reduce taxes.

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searcher still needs to start with the traditional legislative history but must also be prepared to conduct non-traditional research into extra-legislative resources.

To track the “how-a-bill-becomes-a-law” background, use the Legislative Research Commission website, www.lrc.ky.gov. (See *Listening to the Laws: Finding the Legislative History of Recent Kentucky Statutes Online* in the November 2016 *Bar Briefs*, available on the LBA website, www.loubar.org). Savvy researchers will not only track the bill that became law but also failed legislation on the same topic whose provisions may have made it into the final law. The legislative record should be filled out by related material released by the governor, the attorney-general, consultants and nongovernment organizations, and press coverage.

Applying this method to the pension bill, a researcher would collect documents of the governor's plan from pension.ky.gov, the attorney-general's opinion on that plan, OAG 17-031, the legislative history of the stalled pension bill, SB-1 (including the text of the filed bill and committee substitute), the attorney-general's letter to legislature of February 28, 2018, the video recorded debates of the House and Senate on KET (www.ket.org/legislature) and the final law, the sewer-to-pension bill, SB 151.

Any of these documents could shed light on individual provisions on the law and together they reveal a public debate driving the private moves. Because of this, it is impossible to ignore press coverage. I have covered this topic before (*Bar Briefs*, June 2016) but since then the UofL University Libraries has acquired access to full *Courier-Journal* database, available to walk-in patrons of any UofL library. And, before they disappear into archives, newspaper and broadcast news stories on the pension are widely available on the Internet.

In Kentucky difficult laws matter because frequently the most important laws have the most circuitous and secretive paths to the governor's desk. Probing the history of these texts test the skills of the legal researcher, requiring them to look beyond traditional legislative history. But when a client's retirement or taxes are on the line, they expect the effort.

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As the Senate passed the revised bill that Thursday evening, reports of a statewide “sick-out” circulated and school boards began to announce school-closings for the next day in 29 districts all over the state, including Jefferson County. On Friday, hundreds filled Frankfort in protest; thousands more rallied on Monday, promising to “remember in November.”

The new law did not reduce retiree COLAs, but it required current teachers to work to 65 before retirement and limited the use of unused sick days to calculate pension to those days accrued before 2018. A death benefit for some current teachers was also eliminated. New teachers and state workers would be placed into a hybrid plan that would not be protected by the inviolable contract—meaning that the legislature could change or take away their benefits at any time. Since they remain ineligible for social security, new teachers in Kentucky would face no firm expectation of a certain retirement.

After Bevin signed the bill into law into April 10, Beshear filed suit in Franklin Circuit Court next day, claiming that the bill violated the inviolable-contract and that its unusual legislative path violated the legislation clauses of the Kentucky Constitution.

The pension bill was not the only legislation that was enacted in such an unusual manner in 2018. A new tax reform bill that adds several new sales taxes and changes to the state income tax was passed with almost as much secrecy, as was the biennial budget. The haste in the drafting of these bills required “cleanup legislation” to be passed on the last day of the session to fix some of the errors.

Legislation like the pension bill present legal researchers with a challenge as they try to interpret large, complex and quickly devised laws that may have vaguely worded provisions or sections that clash with existing law.

For example, assume for a moment that the pension law is upheld by courts and a future legal researcher is trying to interpret the language of a provision. They would get little help from traditional legislative history. Tracking the filed bill as it made it through the Senate, a researcher would only find language about wastewater. The same with committee minutes and recordings. During the 11-minute hearing of the House committee where the sewer bill was transformed into a pension bill, the members only argued about procedure. The House and Senate floor debates video recordings have more dialogue about the substance of the pension bill but there is also much discussion of the unusual procedure the Republicans were using to pass it.

When researching difficult legislation like the 2018 pension, tax, and budget bills, a re-