Approved: March 26, 1996
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Michael R. O'Neal at 3:30 p.m. on March 4, 1996 in Room 313-S of the Capitol.

All members were present except:
Representative Gary Merritt - Excused
Representative Dee Yoh - Excused

Committee staff present: Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes
Cindy Wulfkuhle, Committee Secretary

Conferees appearing before the committee:
Matt Lynch, Judicial Council
Randy Hearrell, Judicial Council
John House, Judicial Council Care and Treatment Committee
Sherry Diel, Kansas Advocacy & Protective Services
John Peterson, Kansas Association of Professors of Psychologists
Eunice Ruttinger, Executive Director Shawnee County Mental Health Center
Ron Hein, Kansas Association of Marriage and Family Therapy

Others attending: See attached list

Hearings on **SB 467** - municipal court dispositions; conditions of probation or suspended sentence, were opened.

Matt Lynch, Judicial Council, appeared before the committee as a proponent of the bill. He explained that this bill would authorize municipal courts to order defendants to reimburse cities for costs of appointed counsel in municipal courts. (Attachment 1)

Chairman O'Neal requested that staff research if juveniles are being charged fines and/or court costs under the municipal codes.

Hearings on **SB 467** were closed.

Hearings on **SB 468** - payment of demands for medical assistance by conservators, were opened.

Randy Hearrell, Judicial Council, appeared before the committee as a proponent of the bill. He stated that this bill would authorize the payment of any claim for medical assistance paid under K.S.A. 39-709 (e) and K.S.A. 59-3026 which now authorizes the court to order a conservator of a deceased consevatee to pay appropriate funeral expenses and expenses of last illness. If payment of those expenses depletes the assets of the estate the court can discharge the conservator and the surety and close the case. (Attachment 2)

Hearings on **SB 468** were closed.

Hearings on **SB 138** - divorce, time for hearings, emergency, were opened.

Matt Lynch, Judicial Council, appeared before the committee as a proponent of the bill. He explained that this bill would provide that a request for an order declaring the existence of an emergency may be contained in a pleading or made by a motion. Unless otherwise agreed by the parties, a request for the declaration of an emergency shall not be heard prior to the expiration of the time permitted for the filing of an answer. (Attachment 3)

Hearings on **SB 138** were closed.

Hearings on **SB 469** - enacting the care and treatment act for mentally ill persons, were opened.

John House, Judicial Council Care and Treatment Committee, appeared before the committee in support of the bill. He stated that the Care & Treatment Committee was given the charge to review the Kansas Care & Treatment Act for Mentally Ill Persons. The major changes included: amending the definition of a mentally ill person; allows the head of a treatment facility to determine that a person seeking voluntary admission as a patient has the capacity to make that decision; allows a legal guardian to obtain continuing authority so they may admit the ward to a treatment facility without the necessity of repeated legal proceedings; allows law enforcement officer to take a person suspected of being mentally ill into custody upon "reasonable belief" after

an investigation; deletes the provision allowing the court to order an investigation into the character of a proposed patient's family relationship and past conduct; allows for the extension of time within which a trial must be held; a mandatory due process hearing upon revocation is added; transfer of venue is limited; the conditional release provision is deleted; and a change was made in the length of time a patient may be left in restraint or seclusion without monitoring the patient's condition. (Attachment 4)

Chairman O'Neal thought that it was odd that schizophrenic's are committed not because they can be treated but because it serves the goal of protecting themselves and others; yet this was the same goal of the Sex Predator Act and it was struck down. The only difference is that schizophrenic's are treated as having a mental illness and pedophile's are not.

Sherry Diel, Kansas Advocacy & Protective Services, appeared before the committee as a proponent of the bill and suggested amendments to the bill. (Attachment 5)

John Peterson, Kansas Association of Professors of Psychologists, appeared before the committee with an amendment that would add "designee of the head of a treatment facility". (Attachment 6)

Committee members were concerned with who the "designee" would be other than a qualified mental health professional. Mr. Peterson suggested anyone who would be a physician or psychologist.

Eunice Ruttinger, Executive Director Shawnee County Mental Health Center, stated that having qualified mental health professionals in the bill makes it clear to the court as to who they would hear testimony from.

Ron Hein, Kansas Association of Marriage and Family Therapy, appeared before the committee as an opponent to the amendment.

Meg Henson, Kansas Psychiatric Society & Jim Clark, Kansas County & District Attorneys Association, did not appear before the committee but requested that their written testimony be included in the minutes. (Attachments 7 & 8)

Hearings on **SB 469** were closed.

The meeting adjourned at 5:15 p.m. Sub committee meetings are scheduled for March 5 & 6, 1996. The next committee meeting as a whole will be March 7, 1996.

HOUSE JUDICIARY COMMITTEE GUEST LIST

DATE: March 4, 96

NAME	REPRESENTING
Connie Rattley	Care & treatment Subcommittee Shawnee County Mental Health Center
Ellen Piekalkiewicz	Assoc. of Community Mental Health Centers of Kansas
JOHN HOUSE	Judicial Council
Judy M. Harrell	Judicial Council
Matt Lynch	Judicial Council
Brian Vazquez	SRS
Jim Clark	KCDAA
Melissa Wangemann	Hein, Ebert & Hein
Meg Henson	KS Psychiatric Society
Mike Brown	Peterson Public Affairs
Teresa Johnson	TILRC
Charles Hamm	MHA
Kelly Kultala	KTLA
Karen Francis	KAR
John Peterson	Ks Assn. of Psychologists
Sherry Diel	KAPS
Jan Kerbs	KS G-ship Program

JUDICIAL COUNCIL TESTIMONY ON
1996 SB 467
HOUSE JUDICIARY COMMITTEE
MARCH 4, 1996

Senate Bill 467 was requested by the Judicial Council and would authorize municipal courts to order defendants to reimburse cities for costs of appointed counsel in municipal courts, after making appropriate inquiry into a defendant's ability to pay. Municipal courts would also be authorized to make reimbursement of such costs of appointed counsel a condition of probation.

In supplementing the Municipal Court Manual, the Municipal Court Committee discussed the decision in City of Dodge City v. Anderson, 20 Kan.App. 2d 272 (1994). In Dodge City, the Court of Appeals held there is no statutory authority to require a convicted, indigent defendant to repay the city for expenditures for appointed counsel in municipal court. The court also noted that the code of procedure for municipal courts, unlike K.S.A. 21-4610 relating to district courts, does not authorize the court to require repayment of attorney fees as a condition of probation. The court suggested that this matter needs to be addressed by the Legislature and a presiding court should be able to require the repayment of attorney fees as a condition of probation on a municipal conviction.

SB 467 amends K.S.A. 12-4509, part of the code of procedure for municipal courts, by adding new subsections (e) and (f). Proposed subsection (f) would authorize the court to order repayment of attorney fees whether the defendant is placed on probation or incarcerated. Proposed subsection (e) elaborates on the conditions of probation or suspension of sentence that the municipal court may impose and is patterned after, although somewhat modified, the language in K.S.A. 21-4610(c).

No. 70,623

CITY OF DODGE CITY, *Appellee*, v. MARK ANDERSON, *Appellant*.

SYLLABUS BY THE COURT

1. JUDGES—*Appeal from Municipal Court—District Judge Hearing Appeal Has No More Authority to Impose Sanctions Than Does Municipal Judge.* A district court judge hearing a case on appeal from a municipal court sits as a municipal court judge and has no more authority to impose sanctions than does a municipal court judge.

2. SAME—*Appeal from Municipal Court—Municipal Court Judge without Authority to Order Defendant to Reimburse City for Appointed Counsel.* A municipal court judge has no authority on a municipal conviction to order a defendant to reimburse the city for attorney fees, incurred on behalf of the defendant, as costs of the action.

3. COURTS—*Municipal Court—Fine Imposed on Indigent Defendant—Determination of Amount and Method of Payment.* In determining the amount and method of payment of a fine, a municipal court must take into consideration the financial resources of a defendant and the nature of the burden the fine imposes.

Appeal from Ford District Court; DANIEL L. LOVE, judge. Opinion filed December 16, 1994. Affirmed in part, vacated in part, and remanded.

Barry K. Gunderson, of Dodge City, for the appellant.

Terry J. Malone, city attorney, for the appellee.

Before LEWIS, P.J., PIERRON, J., and WILLIAM F. LYLE, JR., District Judge, assigned.

LYLE, J.: Mark Anderson appeals from a decision of the district court finding him guilty of driving while under the influence. He argues that the district court abused its discretion in fining him more than the minimum amount, ordering him to reimburse the City of Dodge City and the State of Kansas for money spent in his defense, and denying his motion for a new trial.

The facts of this case are irrelevant to the issues presented and will not be repeated in this opinion.

The first issue Anderson raises is whether the district court abused its discretion in assessing more than the minimum fines for his offenses. According to Anderson, the district court failed

to take into account Anderson's financial resources or the burden that the fines would place on him.

Generally, a sentence imposed within the statutory guidelines will not be disturbed on appeal if it is within the trial court's discretion and not a result of partiality, prejudice, oppression, or corrupt motive. *State v. Turner*, 252 Kan. 666, 668, 847 P.2d 1256 (1993). However, K.S.A. 21-4607(3) provides that in determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden the fine imposes. In *State v. Scherer*, 11 Kan. App. 2d 362, 370-372, 721 P.2d 743, *rev. denied* 240 Kan. 806 (1986), this court found an abuse of discretion when the district court did not consider the ability of the defendant to pay when levying a fine. See *State v. Shuster*, 17 Kan. App. 2d 8, 10, 829 P.2d 925 (1992).

The State argues that 21-4607 is inapplicable to this case because Anderson was convicted of a violation of a municipal ordinance rather than a state statute. However, in *Scherer*, the fine was also levied for a violation of a municipal ordinance. 11 Kan. App. 2d at 368. Furthermore, the municipal ordinance in question mirrors K.S.A. 1990 Supp. 8-1567. Therefore, this argument is without merit.

The question thus becomes whether the district court considered Anderson's financial resources and the burden the fine would impose. The district court did ask if Anderson was employed. However, the court made no further inquiry into Anderson's financial status but instead simply imposed the same fine the municipal court had earlier handed down. The court's failure to consider the factors mandated by K.S.A. 21-4607 constitutes an abuse of discretion, the fine is vacated, and the matter is remanded for reconsideration of the issue in light of Anderson's financial status.

Anderson, an indigent defendant, was represented by a court-appointed attorney. He argues that the district court erred in ordering him to repay the City and the State of Kansas for money spent on his defense. He argues that the court had no jurisdiction to impose such a sentence and, therefore, the sentence is illegal.

This question involves the interpretation of several statutes. The interpretation of a statute is a question of law. *State v. Donlay*, 253 Kan. 132, Syl. ¶ 1, 853 P.2d 680 (1993).

K.S.A. 1993 Supp. 21-4610(c) authorizes the district court to require a defendant to reimburse the state general fund for expenditures by the State Board of Indigents' Defense Services on a defendant's behalf *as a condition of probation*. However, K.S.A. 12-4509 does not provide such an authorization for a municipal court. Further, the district court in this case did not require the repayment of attorney fees as a condition of probation but rather simply ordered Anderson to pay the fees in addition to the fine.

It has been stated that a district court judge hearing a case on appeal from a municipal court sits as a municipal court judge. *City of Overland Park v. Estell & McDiffett*, 225 Kan. 599, 603, 592 P.2d 909 (1979). If a municipal court has no authority to order the repayment of the attorney fees, neither does the district court on an appeal of this nature.

The State argues that the attorney fees were properly awarded as an element of costs. K.S.A. 22-3611 provides that if on appeal to the district court the defendant is convicted, the district court shall impose sentence and render judgment against the defendant for all costs in the case, both in the district court and the court appealed from. However, there is a question whether attorney fees for indigent defendants qualify as costs.

Criminal statutes are required to be construed strictly against the State. *State v. JC Sports Bar, Inc.*, 253 Kan. 815, 818, 861 P.2d 1334 (1993). Generally, when attorney fees are to be included as part of costs, the statute authorizing recovery of costs explicitly includes them. See, *e.g.*, K.S.A. 1993 Supp. 61-2709(a) (stating that if an appeal is taken to the district court from the small claims court and is determined adversely to the appellant, "the court shall award to the appellee, as part of the costs, reasonable attorney fees incurred by the appellee on appeal"); K.S.A. 1993 Supp. 60-1610(b)(4) (providing that costs and attorney fees may be awarded in a divorce action); K.S.A. 1993 Supp. 60-2006(a) (providing that in actions brought for the recovery of damages as a result of negligent operation of a motor vehicle, the

prevailing party "shall be allowed reasonable attorneys' fees which shall be taxed as part of the costs of the action". The fact that the legislature chose not to specifically include attorney fees when referring to costs of the action is an indication that the costs which the defendant is obliged to pay do not include repayment of his attorney fees. This is a matter that needs to be addressed by the legislature. The presiding court *should* be able to assess attorney fees as part of the costs in this action after making the appropriate inquiry into the defendant's ability to pay. The repayment of fees should then become a condition of probation.

Because K.S.A. 22-3611 does not explicitly authorize the recovery of attorney fees as part of the costs of the action, the district court was without statutory authority to require Anderson to pay them.

Finally, Anderson argues that the district court erred in denying his motion for a new trial. He contends that he presented new evidence which showed that Officer Bates could not have had his car in sight at all times and could have missed the real perpetrator getting out of the car.

The granting of a new trial is within the discretion of the district court, and appellate review is limited to whether the district court abused its discretion. See *Taylor v. State*, 251 Kan. 272, 277, 834 P.2d 1325 (1992).

Anderson contends that because the distance between the place where the dumpster was hit and the place where his car ran up onto the curb was actually less than a third of a mile rather than the half-mile as testified to by the State and adopted by the court, Officer Bates could not have turned around and followed the car without losing sight of it briefly. However, Anderson does not explain how that distance relates to the inability of Officer Bates to keep the car in sight. Anderson testified at the trial the patrol car began following his car. Furthermore, the court heard testimony by the officer that he never lost sight of Anderson's car, saw the car run up on the curb, and saw Anderson, and no one else, get out of the car. Based on these facts, the district court did not abuse its discretion in denying the motion for new trial.

Anderson's convictions for driving while under the influence and driving while suspended are affirmed. Those portions of the sentence fining Anderson more than the minimum and requiring him to reimburse the City of Dodge City and the State of Kansas for his attorney fees are vacated, and the case is remanded for the court to appropriately consider Anderson's ability to pay.

Affirmed in part, vacated in part, and remanded.

Sec. 2. K.S.A. 1994 Supp. 21-4610 is hereby amended to read as follows: 21-4610.

(a) Except as required by subsection (d), nothing in this section shall be construed to limit the authority of the court to impose or modify any general or specific conditions of probation, suspension of sentence or assignment to a community correctional services program, except that the court shall condition any order granting probation, suspension of sentence or assignment to a community correctional services program on the defendant's obedience of the laws of the United States, the state of Kansas and any other jurisdiction to the laws of which the defendant may be subject.

(b) The court services officer or community correctional services officer may recommend, and the court may order, the imposition of any conditions of probation, suspension of sentence or assignment to a community correctional services program. For crimes committed on or after July 1, 1993, in presumptive nonprison cases, the court services officer or community correctional services officer may recommend, and the court may order, the imposition of any conditions of probation or assignment to a community correctional services program. The court may at any time order the modification of such conditions, after notice to the court services officer or community correctional services officer and an opportunity for such officer to be heard thereon. The court shall cause a copy of any such order to be delivered to the court services officer and the probationer or to the community correctional services officer and the community corrections participant, as the case may be.

(c) The court may impose any conditions of probation, suspension of sentence or assignment to a community correctional services program that the court deems proper, including but not limited to requiring that the defendant:

(1) Avoid such injurious or vicious habits, as directed by the court, court services officer or community correctional services officer;

(2) avoid such persons or places of disreputable or harmful character, as directed by the court, court services officer or community correctional services officer;

(3) report to the court services officer or community correctional services officer as directed;

(4) permit the court services officer or community correctional services officer to visit the defendant at home or elsewhere;

(5) work faithfully at suitable employment insofar as possible;

(6) remain within the state unless the court grants permission to leave;

(7) pay a fine or costs, applicable to the offense, in one or several sums and in the manner as directed by the court;

(8) support the defendant's dependents;

(9) reside in a residential facility located in the community and participate in educational, counseling, work and other correctional or rehabilitative programs;

(10) perform community or public service work for local governmental agencies, private corporations organized not for profit, or charitable or social service organizations performing services for the community;

(11) perform services under a system of day fines whereby the defendant is required to satisfy fines, costs or reparation or restitution obligations by performing services for a period of days determined by the court on the basis of ability to pay, standard of living, support obligations and other factors;

(12) participate in a house arrest program pursuant to K.S.A. 21-4603b, and amendments thereto; or

(13) in felony cases, except for violations of K.S.A. 8-1567 and amendments thereto, be confined in a county jail not to exceed 30 days, which need not be served consecutively.

(d) In addition to any other conditions of probation, suspension of sentence or assignment to a community correctional services program, the court shall order the defendant to comply with each of the following conditions:

(1) Make reparation or restitution to the aggrieved party for the damage or loss caused by the defendant's crime, in an amount and manner determined by the court and to the person specified by the court, unless the court finds compelling circumstances which would render a plan of restitution unworkable. If the court finds a plan of restitution unworkable, the court shall state on the record in detail the reasons therefor;

(2) pay the probation or community correctional services fee pursuant to K.S.A. 21-4610a, and amendments thereto; and

(3) reimburse the state general fund for all or a part of the expenditures by the state board of indigents' defense services to provide counsel and other defense services to the defendant. In determining the amount and method of payment of such sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose. A defendant who has been required to pay such sum and who is not willfully in default in the payment thereof may at any time petition the court which sentenced the defendant to waive payment of such sum or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court may waive payment of all or part of the amount due or modify the method of payment.

JUDICIAL COUNCIL TESTIMONY
ON 1996 SB 468
HOUSE JUDICIARY COMMITTEE
MARCH 4, 1996

K.S.A. 59-3026 authorizes the court to order the conservator of a deceased conservatee to pay appropriate funeral expenses and expenses of last illness. If payment of those expenses deplete the assets of the estate, the court can discharge the conservator and the surety and close the case.

K.S.A. 39-709 (e) authorizes SRS to file a claim against a conservatorship estate of a decedent for medical assistance provided after June 30, 1992. This claim will usually include some expenses of last illness and some expenses for long-term nursing home care.

It is not unusual to have a conservatee die intestate with no known heirs, a very modest estate and no unpaid claims except that of SRS. It is a common interpretation of the present statute by judges of the district court that because SRS claims are not specifically named in the statute that SRS must petition to administer the estate before it can recover. Some estates are not large enough to justify the costs of administration and they remain open. By amending the statute as proposed by the Judicial Council a number of these conservatorships could be closed.

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(Revised 02/96)

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(Revised 12/95)

Judicial Council Testimony
on
1995 SB 138
House Judiciary Committee
March 4, 1996

SB 138 concerns emergency divorces and contains amendments to K.S.A. 60-1608 (a) recommended by the Family Law Advisory Committee of the Judicial Council.

Under K.S.A. 60-1608, a divorce action cannot be heard until 60 days after the filing of the petition unless the judge determines an emergency exists. Typically, the parties are in agreement as to the desirability of an emergency divorce and have worked out a settlement of the issues in the action. A 1991 amendment to K.S.A. 60-1608 (the stricken language in lines 18 through 22 of the bill) was apparently aimed at the situation in which only one party is seeking an emergency divorce. Prior to the 1991 amendment, the statute did not explicitly address notice to the opposing party.

Judge Solomon, Administrative Judge of the 30th Judicial District, wrote the Judicial Council suggesting clarification of the 1991 amendment to K.S.A. 60-1608. Judge Solomon viewed the 1991 amendment as providing for an ex parte hearing to declare the existence of an emergency followed by notice of a later hearing concerning the granting of the divorce. He suggested the notice should precede the hearing to determine whether an emergency exists. Presumably, if the court determines the existence of an emergency at such hearing, the court could grant the divorce and determine, or defer determination, of other issues in the action.

Under SB 138, an emergency divorce could not be heard prior to expiration of the answer time, unless otherwise agreed by the parties. The advisory committee believed it would be confusing for the summons to indicate a party had 20 days to answer before being held in default and also have a provision which would allow the action to be heard before such time. If at the hearing, the court determines an emergency does exist, the court would have the discretion at that time to grant the divorce and determine other issues in the action or to defer some issues for a later, separate hearing.

6/25/93

State of Kansas
Thirtieth Judicial District

Larry T. Solomon
District Judge
Courthouse

Box 495
Kingman, Ks. 67068-0495
Phone 316-532-5151

May 13, 1993

Kansas Judicial Council
Kansas Judicial Center
301 S.W. 10th Street
Topeka, KS 66612-1507

Re: K.S.A. 1992 Supp. 60-1608 §(a)

Dear Council Members:

I am writing this letter to request the Judicial Council's assistance in obtaining a clarifying amendment of the above referenced statute. The portion of the above referenced statute, which I believe needs clarification, currently reads as follows:

> "In such an emergency case, unless waived by both parties, the action for divorce shall not be heard until 10 days after the filing of the petition or 10 days after personal service upon the respondent of the petition and order declaring the existence of the emergency, whichever is later." (Emphasis added.)

The above referenced underlined language has caused a great deal of confusion among the Bar and the Bench (at least in the 30th Judicial District). Quite frankly, the underlined language makes no sense. It does not seem appropriate to have an ex parte hearing to "declare the existence of an emergency" and then defer granting the emergency divorce for 10 days, pending notice to the opposing side. This would require, in essence, a bifurcated hearing which is not an efficient or economic use of the court's time, counsel's time or the client's time and money. It seems much more logical to merely require a 10 day waiting period between the time the request for an order declaring the existence of an emergency is filed and served, and the date the request is heard and ruled upon by the court. Notice to the opposing party of the time and date of the hearing of the request could be given at the same time the request was filed.

It has been my experience that many members of the Bar and a few members of the Bench are not even aware that the above referenced language was included when the statute was amended in 1991. I suspect the above referenced language is being honored more in the

breach than the enforcement thereof. Under any set of circumstances, I do not believe the language used in the statute achieves the intended result. I would respectfully request that the Council study the above referenced language and determine if it would be appropriate to submit a clarifying amendment to the 1994 Legislature.

For whatever it is worth, I have taken the liberty of drafting an suggested amendment for consideration by the Council:

> "In such an emergency case, unless waived by both parties, the action for divorce shall not be heard until 10 days after the filing of the pleading requesting an order declaring the existence of the emergency and service thereof on the opposing party. The pleading requesting an order declaring the existence of an emergency shall contain a notice of hearing of the date the request for an order declaring the existence of an emergency will be heard."

Thank you for your consideration of this request.

Very truly yours,

Larry T. Solomon
Administrative/District Judge

LTS:mh

GENERAL COMMENT TO THE REVISED ACT

The Care and Treatment Advisory Committee of the Judicial Council was given the charge to review the care and treatment act for mentally ill persons (Article 29 of K.S.A. Chapter 59). The objectives were to: (1) reorganize the act in a more logical order, making it easier to understand and use; (2) make recommendations for revisions necessary as a result of the implementation of mental health reform brought on by the passage of K.S.A. 39-1601 et seq. in 1990; and (3) suggest such substantive amendments to the act as the committee deemed advisable. The members of the committee contributed many hours to this project. The committee met 16 times and carefully reviewed, considered and re-considered each section of the act. The result of the committee's work is the following proposed draft.

The proposal is to completely replace the current code with this revision rather than to attempt to make all the individual amendments to the current act which would be required to achieve this same result. This proposed draft does not significantly deport from the main themes of the current law, and many parts of a majority of the sections of this draft are verbatim or nearly verbatim copied from the current law; however, <u>every</u> section of the current act would have to be amended in, at least, some fashion in order to come to this same result. Many sections of the current act have been moved within the order of the act to follow in sequence of how mental illness cases actually proceed through the court system. Other sections were broken up into two or more separate sections in order to group related matters into their own sections. Because of all these changes from the current format, the committee, upon recommendation from the revisor of statutes, has proposed to simply substitute this new "clean" draft for the current code. It is hoped this will avoid confusion, both in considering the proposal, and, if enacted,

in assisting persons who must use the law to be able to follow all of the changed language.

Most of the amendments this draft makes to the current code are technical in nature. They are intended to clarify the existing act's meaning and intent, or to expand the current act's procedures to also apply to outpatient as well as inpatient proceedings. The committee has proposed a few substantive changes which the committee believes strengthen the act in ways beneficial to patients. Specific comments explaining the committee's intent follow each section and call attention to the changes made from the current act.

Among the changes that have been made within this proposal are that cross references have been included so related sections can be easily reviewed when using a particular section. The committee has attempted to eliminate the "legalese" and relabeled the pleadings to use more commonly understood terms. The sections that require computation of time have also been clarified.

Due to the completion of the phased implementation of mental health reform, several repeated technical changes were necessary. For example, the phrase ". . . if there are one or more participating mental health centers located in the catchment area . . ." has been deleted because every county is now within the service area of a participating mental health center. The required screenings and statements mandated in phase by the reform act are now universally required. The language restricting admissions to a state psychiatric hospital that reads ". . . unless a written statement from a qualified mental health professional authorizing . . . has been filed with the court" has been standardized wherever possible.

The committee placed great emphasis on making the act consistent with the intent of mental health reform, which emphasizes community-based care and outpatient oriented treatment

whenever feasible. The committee is convinced that as resources are diverted to community treatment providers rather than to state hospitals, courts will more often be presented with cases in which a person with a known history of mental illness will be brought before the court in circumstances in which an outpatient treatment order is appropriate. Specific language has been added to guide proceedings through circumstances in which a patient is treated as an outpatient, subject to court orders, where previously the patient would have been admitted to a state hospital.

Finally, several substantive changes to the act are recommended by the committee:

1. Amendment of the current definition of "mental illness" with a distinction made between a "mentally ill person" and a "mentally ill person subject to involuntary commitment for care and treatment" (59-2902a);

2. The requirement that the head of a treatment facility make a determination that a person seeking voluntary admission has the capacity to do so (59-2905);

3. Allowance for a guardian who has obtained prior authority to admit his or her ward as a "voluntary" patient to a psychiatric treatment facility and to do so without an additional court hearing, subject to the authority of the head of the treatment facility to divert that patient to another less restrictive treatment, if appropriate (59-2905);

4. Authority of law enforcement officers to take a person suspected of being a mentally ill person into custody upon "reasonable belief" after investigation, rather than requiring personal observation. Language was also added to allow law enforcement officers to return the person to the place where they were taken into custody or to some other appropriate place if the medical professionals determine it not appropriate to detain the person further at a treatment facility (59-2908);

5. The deletion of the provision allowing a court to order an investigation into the "character" of a proposed patient (59-2914);

6. Provisions are added to allow for continuance of the trial in order that a jury may be assembled when the patient requests a jury trial (59-2914, 59-2916, 59-2916b and 59-2917);

7. A provision is added for a mandatory due process hearing upon the revocation of a previously issued order for outpatient treatment which requires that the patient be moved to inpatient status (59-2918a);

8. A limitation is placed upon the court's authority to transfer venue from the county in which involuntary commitment proceedings began (59-2922);

9. The deletion of the provision for "conditional release" from treatment (59-2924);

10. A provision is added for the sheriff of the county in which a treatment facility is located to be notified of an involuntary patient's unauthorized absence from a facility (59-2926); and

11. Amended the requirement that patients placed in restraint or seclusion must be checked every 15 minutes, as opposed to once per hour (59-2928).

The committee's rationale for each of these proposed changes is explained in the comment following that section.

ARTICLE 29 - CARE AND TREATMENT FOR MENTALLY ILL PERSONS

New Sec. 1. (previously 59-2901)

COMMENT

The inclusionary references to 59-2943 and 59-2944 have been deleted since those sections as separate sections are eliminated and have been incorporated into the main body of the act. The title of the act is amended to include the term "care and treatment", which the committee finds is commonly used by persons referring to this act. This, however, should not be interpreted to mean that any less emphasis is intended upon the "treatment" purpose of commitment under the act.

New Sec. 2. (previously 59-2902)

COMMENT

The definitions section is rewritten to alphabetize definitions to aid the reader in finding specific definitions. Definitions of terms or phrases used within a definition are "stacked" following that term to facilitate quick and easy reference.

Definitions containing substantive changes are:

(1) "Conditional release", found currently at 59-2902(a) is deleted since provisions for conditional release were deleted from the act. See the comment to section 28;

(2) "Mentally ill person", found currently at 59-2902(h) is rewritten and is separate from the new term "mentally ill person subject to involuntary commitment for care and treatment." The changes require that there are certain mentally ill persons who should not be subject to involuntary proceedings to restrict their liberty;

(3) "Mentally ill person subject to involuntary commitment for care and treatment" has been added. The intent is to separate the criteria that must be met before a person who is suffering from a mental illness may be involuntarily forced to accept treatment. In the current definition of "severe mental disorder", found at 59-2902(o), conditions caused by the use of chemical substances and antisocial personality are excluded from the legal definition. The committee expanded upon that list by naming disorders which are generally professionally recognized as unresponsive to psychiatric treatment. The "lacks capacity to make an informed decision concerning treatment" element is basically unchanged from current law, found at 59-2902(e). The "likely to cause harm to self or others" element is essentially the same as currently found at 59-2902(g) with the addition of the balancing of interests test set out by Suzuki v. Yuen, 617 F.2d 173 (9th Cir.) (1980). The committee believes that inclusion of the test in the

act is required under due process;

(4) "Qualified mental health professional" is clarified to refer to professionals employed by or under contract with a participating mental health center. Current language does not make this restriction clear. Also clarified is the provision that professionals of less than an M.D., D.O. or Ph.D. psychologist, who are functioning as a qualified mental health professional ("QMHP"), are supervised in this function by an M.D., D.O. or Ph.D. psychologist employed by or under contract to a participating mental health center. The committee notes that some participating mental health centers may contract with a psychiatrist only for medical consultations;

(5) "Restraints" and "seclusion", currently found at 59-2902(m) and (n) respectively, are deleted from this section and moved to the section concerning that subject matter (section 33) for ease in reference; and

(6) The statutory definitions of the various state hospitals' catchment areas, currently found at 59-2902(bb), (cc), (dd) and generically at (ee), are deleted. These definitions were added to the act at the time mental health reform was enacted and were necessitated because of the phased-in manner of reform. Since that process has now been accomplished, these references and the phrases associated with phased reform appearing throughout the act have been deleted as no longer necessary. The committee is also aware that the catchment areas for each hospital may need to change over time as populations and resources shift and the committee believes that the ability to make these changes should be left to the secretary of social and rehabilitation services.

New Sec. 3.

COMMENT

This new section is added because the committee became aware of inconsistent interpretations of statutory time periods as calculated under the existing act. This section is intended to make such calculations consistent with K.S.A. 60-206 in the Kansas code of civil procedure.

New Sec. 4. (previously 59-2903, 59-2930, 59-2933 and 59-2938)

COMMENT

The committee understands that the last three of those sections, which are presently located at the end of the act, in conjunction are intended to provide that mentally ill persons do not automatically, by that fact alone, lose their civil rights. K.S.A. 59-2903 simply provides that persons held in custody at a treatment facility under authority of the act can legally be detained from their liberty.

The section is rewritten to clarify the general retention by patients of their civil rights and places that section near the beginning of the act as a policy statement, rather than leaving them at the end of the act which might make them seem as only an afterthought. The section is divided into two subsections: (a) the general statement of retained rights (taken from existing sections 59-2930, 2933 and 2938), but which provides that those persons held in custody under provisions of the act shall be subject in the exercise of their civil rights by the reasonable rules imposed by the treatment facility to maintain orderly operation (taken from existing section 59-2930); and (b) which provides that there is no implication or presumption that a patient under this act is a disabled person within the meaning of the guardianship and conservatorship act (taken from existing section 59-2933).

New Sec. 5. (previously 59-2905)

COMMENT

This section is rewritten to clarify the different circumstances under which a person may be admitted to a treatment facility as a voluntary patient. In addition, language is added in subsection (a) and as a part of new subsection (d) which requires the head of a treatment facility to determine that a person seeking voluntary admission as a patient has the capacity to make that decision. The committee notes that since lack of capacity to make decisions concerning the need for treatment is a specific element of our law with regard to commitment, the retention of such capacity must necessarily be an element of consenting to voluntary treatment. While the committee does not intend to discourage conversion of involuntary proceedings to voluntary care where the patient truly makes that decision, and hence adds subsection (d) to emphasize that point, the committee feels compelled to make provision for specific consideration of this element, particularly once it has been raised by the institution of involuntary proceedings.

A substantive change is intended in subsection (b), paragraph (3) concerning admissions made by a legal guardian. Current law requires that before a guardian may authorize the admission of his or her ward to a treatment facility, he or she must obtain specific additional authority from the court which has jurisdiction over the guardianship. This requirement is satisfied by holding what amounts to a mental illness trial within the guardianship case each time the ward needs to be admitted. While this procedure is undoubtedly intended to protect wards from being improperly confined to a mental hospital upon the signature of their guardian alone, the committee believes that harm is adequately guarded against by the responsibility of the head of the treatment facility to discharge a patient when maximum benefit has been obtained (see

section 6), and by the right of any patient to file for a writ of habeas corpus (see section 4). The committee also notes the pre-admission mental health center screening requirements which are required before admission to a state hospital and also notes the existence of the protection and advocacy agency, one of whose purposes is to guard against violations of patients' rights (see K.S.A. 74-5515 and P.L. 99-319, and amendments thereto. [42 U.S.C. 10801 et seq.]) With all these safeguards in place, the committee believes the current provisions act as more of a hinderance than a help. The concept behind guardianship is to provide for a substitute decision-maker who is able to quickly act in the best interests of his or her ward. It is in the context of chronically mentally ill persons, whose pattern is that at some point they stop taking their medications, begin to deteriorate, and eventually fall to a level of illness requiring hospitalization, commitment to a hospital and all the legal proceedings attendant thereto, re-establishment of the taking of their medication, followed by rapid progress and re-stabilization allowing the patient to be released, that the committee believes the current legal process that requires a full trial cycle to be repeated each time deterioration sets in before assistance can be provided to be both inefficient and arguably hurtful to the patient, the patient's family and his or her community. The committee intends that a legal guardian should be able to show to the court with jurisdiction over the guardianship that this has been and is likely to be the future pattern the ward will follow, based upon both past experience and medical testimony, obtain continuing authority noted on their Letters of Guardianship to allow the guardian to admit the ward to a treatment facility without the necessity of repeated legal proceedings. The committee also notes that the guardian would always have the option of filing a petition within the guardianship case and having a judicial determination of the need for admission made, and would also construe the provisions of K.S.A. 59-3018a to require the periodic review required

by section 25.

Here, and throughout the act, the term "in loco parentis" is deleted and substituted by the phrase "other person known to the head of the treatment facility to be interested in the care and welfare of a minor patient." The committee believes this will clarify the meaning. The term "legal guardian" has also been substituted throughout the act to clarify the intent to refer to court-appointed guardians.

New Sec. 6. (previously 59-2906)

COMMENT

The phrase "reached maximum benefit" is substituted for the existing phrase "no longer advisable" because it is regularly used by clinical professionals.

New Sec. 7. (previously 59-2907)

COMMENT

This section is deleted in its entirety and rewritten. The content of subsection (a) remains the same. Current subsection (b) has been rewritten as new section 8. See the comment to that section.

Subsection (a) retains the option for a treatment facility to hold a voluntary patient, who has requested to be discharged, up to 3 working days to allow for consideration of whether or not to pursue involuntary commitment. The provision for input from a participating mental health center to a state psychiatric hospital's decision-making process has been enhanced by the requirement that oral or facsimile notice must immediately be given to that center so that more time is allowed for the center to make a recommendation.

Subsection (b) addresses the circumstances in which a "voluntary" patient is admitted upon the signature of some other person and the unique case of a 14- to 18-year-old minor acting on his or her own behalf. It is the intent of the committee that the person who signed the application for admission be the same person who makes the request for discharge.

New Sec. 8.

COMMENT

This new section is a rewrite of current subsection (b) of 59-2907. See the comment to section 7. Added is a provision which makes clear that the QMHP statement normally required whenever admission to a state psychiatric hospital is sought is not required in this instance. The committee's reasoning is that previously a QMHP statement would have had to have been obtained for a voluntary admission and because the commitment action is being sought by staff from the state hospital where the patient already is located pursuant to that QMHP statement, another statement is unnecessary. Furthermore, section 7 mandates the hospital to contact the participating mental health center and consider its recommendations if the patient requests discharge.

In what the committee expects will be a very rare case, when a participating center recommends discharge but the professional staff at the hospital believes so strongly that the patient should remain hospitalized that they wish to proceed in spite of the center's recommendation, the committee believes that the hospital's liability would not be relieved by the center's refusal to provide a statement. Accordingly, provision must be made for hospital staff to proceed without such a statement.

Similarly, in a case where a voluntary patient is not requesting discharge, but is refusing treatment, the committee believes the hospital's professional staff must be allowed to proceed. Because the center would previously have had to have provided a QMHP statement in order for the patient to have been admitted, the committee presumes the center intended for the patient to be provided treatment at that hospital and not just a place to stay. Requiring a second statement would therefore be duplicative.

New Sec. 9. (previously 59-2908)

COMMENT

This section is updated to reflect the changes of mental health reform. See the general comment. Minor changes are made for clarification. Three substantive changes are made:

(1) The term "observation" is replaced with the term "investigation." The committee believes this is a more accurate description of what actually occurs in most cases. Law enforcement officers seldom actually have the opportunity to observe a person over an extended period of time so as to be able to say that what they personally saw causes them to believe someone is mentally ill. Rather, in the usual case the law enforcement officers are called to a scene, provided information by relatives, friends, members of the community, or professionals, and then draw their conclusions from a combination of their own observation and from these reports. However, the committee has heard stories of law enforcement officers believing their hands were tied under the present law because of a lack of personal observation and this fact leading to the necessity for repeated call-backs before action could be taken. The committee intends to authorize law enforcement officers to take action upon probable cause rather than requiring strict personal observation;

(2) In the case of a person having been taken into custody by a law enforcement officer and transported to a treatment facility for the physician's or psychologist's examination, and then found not likely to be a "mentally ill person subject to involuntary commitment for care and treatment," provision has been made to allow the law enforcement officer to return the person to where they were originally picked up or to another appropriate place. The committee has heard of persons taken into custody, transported many miles in the middle of the night, and then

officers being put in the position, because they believed that the law does not authorize them to transport the person back to where they were picked up, of having to abandon these persons in a hospital emergency room or clinic without resources of their own to get back home. In those instances the committee understands the officers did go ahead and transport the person back to his or her home, but that they were concerned about their liability during that drive back across town or across several counties. This amendment is intended to protect the officer in that circumstance, and allows the officer the option to release the person in some other appropriate place if it would not be in the person's or some other person's best interests to have that person returned to their home, for example, in a domestic disturbance case; and

(3) In subsection (b), the burden to provide a place of detention until the law enforcement officer can make other arrangements is placed on the treatment facility which has determined the person in custody likely to be a "mentally ill person subject to involuntary commitment for care and treatment" but which declines to accept the person as a patient. The committee notes that treatment facilities are far more likely to have resources to detain such patients than are law enforcement officers in these circumstances, and that the period of time involved will be very short. The committee also understands the scenario addressed will occur only rarely. Generally, the place law enforcement officers will take a person will be the locally designated community hospital emergency room, and arrangements to cover just these types of cases will have been made in advance by and between the mental health centers, the local hospitals and the local law enforcement agencies. In those few cases where that is not the case the committee notes that section 37 provides for the assessment of the expenses of a treatment facility as costs. Accordingly, the committee believes the burden this change places upon the treatment facility is not undue.

New Sec. 10. (previously 59-2909)

COMMENT

This section is updated to reflect the changes of mental health reform. See the general comments. Minor changes are made for clarification. Four significant amendments are made:

(1) In subsection (a) the term "order of protective custody" is stricken and replaced with the new term "ex parte emergency custody order." See the comments to sections 13, 14 and 15 for the reasons for this change;

(2) The word "presented" has been added in the first lines of subsections (b) and (c), to make clear that a treatment facility may admit and detain only persons who are physically at the facility. The language currently found in subsection (d) [moved by the committee to subsection (c) and renumbered as (7)] which authorizes the head of a treatment facility to issue what could be termed a "citizens arrest warrant" is deleted. The committee understands this authority has rarely if every been used. The committee believes that such authority is not desirable. Law enforcement officers already have the authority under section 9, as amended, to take persons in the community into custody, after investigation, and so no need exists for this type of non-judicial order to be issued in order to get someone into protective custody. The committee has also heard that law enforcement officers are extremely wary of what their liability might be in executing such an order. Accordingly, the committee restricts the circumstances under which a treatment facility may detain someone to the situations of a court order having been issued or the proposed patient being presented at the facility and the person who brought the person to the facility being willing to sign that he or she will file the commitment petition the "next" day;

(3) In addition to the information already required by current law to be contained in the

application for an emergency admission, anything known about pending criminal charges is added. The requirement is added here in order to capture that information before it becomes "lost in the shuffle" and as an additional piece of information that may be helpful to the staff of the treatment facility which has just admitted this person in understanding what they are dealing with. This information has also been added to the required contents of the commitment petition (see section 13); and

(4) In subparagraph (c)(7), a QMHP has been added as a person who may sign the statement confirming that the person is likely to be a "mentally ill person subject to involuntary commitment for care and treatment". The committee notes that mental health reform was enacted to encourage people to seek assistance from their local mental health center. If they go there, they will likely be seen by a QMHP and screened. In the scenario presented by this subparagraph, if they have done so, they will have been diverted from a state psychiatric hospital to the private facility at which they now are present. The screening will have performed the function sought by the required statement and the committee intends not to require persons who have gone to a mental health center to be required to obtain a duplicate statement from some other physician or psychologist.

New Sec. 11. (previously 59-9210)

COMMENT

This section as presently written is deleted in its entirety and rewritten. Subsection (a) is organized to clearly delineate the three things the treatment facility must immediately do upon an emergency admission to protect the rights of the patient. These three things come from the existing section. Provision for the patient's right to contact their personal physician, psychologist or minister of religion is not specifically cited, but is intended by the committee to be included in the reference to the rights provided for in section 34.

Subsection (b) is added to define who is included in the term "immediate family."

New Sec. 12. (previously 59-2911)

COMMENT

Only minor changes are made for clarification. The term "order of protective custody" is stricken and replaced with the new term "ex parte emergency custody order." See the comments to sections 13, 14b and 15c for the reasons for this change. The phrase "of the county where the person is present" is deleted to avoid confusion when the court in which the petition is filed is not in the county where the treatment facility is located, but is in the county of the patient's residence, and to encourage thinking not in terms of such venue change, but in terms of filing in the patient's home community. The committee believes this to be consistent with mental health reform.

New Sec. 13. (previously 59-2912 and 59-2913)

COMMENT

The existing sections' language calling the pleading filed an "application" and the person filing the pleading the "applicant" is changed to the commonly used and understood terms "petition" and "petitioner".

Subsection (a) specifies the contents of a petition to determine whether or not someone is a "mentally ill person subject to involuntary commitment" as that phrase is used throughout the act. The section includes all the current requirements, some of which are rephrased and expanded to make the intent clearer. Added to those requirements, and specifically enumerated to make clearer that they are also required to be attached to the petition, are subparagraphs (8), (9) and (10). Subparagraph (8) is drawn from the unnumbered second paragraph of current section 59-2913. Subparagraph (9) is intended as a reminder and drawn from other provisions in the act regarding the attachment of a statement authorizing admission to a state psychiatric hospital from a qualified mental health professional if that is the proposed place of hospitalization. Subparagraph (10) is new, but drawn from sections 7 and 8 and is intended to make clearer to the court the exact circumstances under which the petition is filed in the case in which a voluntary patient is being proposed to be changed to involuntary status.

Subsection (b) specifies the additional information required if an ex parte emergency custody order is sought. The material is placed in its own subsection to make it easier to understand that the request is optional and distinct from the main function of the petition, which is solely to request a trial upon the merits of the claim that the person is a "mentally ill person subject to involuntary commitment for care and treatment." It is intended by the committee that

this additional request and the required additional information may be combined into a single pleading. The material may also be placed in a separate pleading should the petitioner deem that more desirable.

Subsection (c) is added to clarify that the petitioner may also request a temporary custody order to provide for the holding of the proposed patient at a treatment facility until the trial of the case. It, too, is placed in its own subsection to make it clear that this request is optional and distinct from both the main function of the petition and any request for an ex parte emergency custody order.

It is expected that currently in most cases all three requests (the petition for a trial, the request for an ex parte emergency custody order, and a request for a temporary custody order -- which can only be issued after a probable cause hearing has been held) will be made at the time of the filing of the case. However, through the provisions of sections 14b, 15c and 16b, it is intended to be clear that custody orders do not have to be sought in every case, and should not be sought if not appropriate, but if not sought at the time the petition is filed, may be sought later should a change of circumstances warrant.

New Sec. 14. (previously 59-2912)

COMMENT

This section, along with section 15, is a rewrite of existing section 59-2912 which has been deleted. In the existing section 59-2912, the term "protective custody order" (and provisions with regard thereto) is used in two separate contexts. Those contexts are more accurately described by the commonly used terms "ex parte emergency custody order" and "temporary custody order", and the rewrite uses these commonly understood terms. The two different contexts have been separately addressed by sections 14b and 15.

This section concerns ex parte emergency custody orders. Consistent with current law, this section provides for the court-ordered detention of persons alleged to be mentally ill subject to involuntary commitment for "two" days, subject to the same provisions set out in current section 59-2912, to allow for a probable cause hearing to be scheduled, noticed and held.

New Sec. 15.

COMMENT

This is a new section and companion to new section 14. See the comment to section 14. This section concerns temporary custody orders. Consistent with current law, this section provides for the court-ordered detention of persons alleged to be mentally ill subject to involuntary commitment between, and after, the probable cause hearing and the trial of the case, subject to the same provisions concerning the probable cause hearing and detention set out in current section 59-2912.

Subsection (d) clarifies the options the court has following the probable cause hearing depending upon the evidence presented and the facts determined.

The committee expects that in a typical case there will be an immediate progression from investigation and emergency detention by law enforcement as provided for in sections 9 and 10, to filing of the petition provided for in section 13 (accompanied by a request for an ex parte emergency custody order and a request for a temporary custody order) the issuance of an ex parte emergency custody order valid for "two" days as provided for in section 14, and the holding of a probable cause hearing, followed by the issuance of a temporary custody order as provided for in section 15; however, the sections are worded to provide for and allow other scenarios as may occur.

New Sec. 16. (previously 59-2914)

COMMENT

This section is amended for clarity. Subsection (a) lists the preliminary orders and arrangements that must be made upon the filing of a petition to determine whether or not someone is a "mentally ill person subject to involuntary commitment for care and treatment". In current subparagraph (a)(1), the language with regard to continuances necessary because of the absence of the proposed patient is moved to subsection (b), which relates to continuances. Provision is added to allow for the extension of the time within which the trial must be held when a demand has been made for a jury trial. Since the time frame in these cases is so short to begin with, for the benefit of the patient, a request for a jury trial in most instances makes it impossible to stay within that time frame. Rather than extending the time frame for all cases, since jury requests are rare, the committee elected to extend out the time frame only in this circumstance. However, wanting to keep that extension as short as possible, the committee later added a provision in section 21 allowing the clerk to expedite the assembly of a jury panel by negating the requirement otherwise applicable that prospective jurors be given 20 days notice of the date they are to appear at the courthouse. This allowed the committee to provide that the trial must proceed within, at most, 30 days after the date the patient requests a jury trial. (See also the comment to section 21.) In current subparagraph (a)(2), the language with regard to the court recording why a proposed patient's presence is excused is deleted because it appears in, and the committee believes should more properly be found in, the sections setting out hearing procedures. See sections 15(c), 21(b), 23(g) and 25(e).

A substantive change is made by deleting entirely the language currently found in

subparagraph (a)(6) providing for a court-ordered investigation and report concerning a proposed patient's character, family relationships and past conduct. No member of the committee could recall that this provision has ever been used. It seems unnecessary since section 17 provides for a mental evaluation, which is the real issue before the court, and K.S.A. 59-3011, in the guardianship act, provides for this character, family relationships and past conduct investigation if that seems relevant to an issue in a guardianship proceeding. Since subparagraph (a)(7) allows for a mental illness petition and guardianship petition to be combined and heard at once, no need for an independent character investigation could be determined by the committee.

New Sec. 17. (previously 59-2914a)

COMMENT

This section is amended for clarity. The language in current subsection (b) pertaining to the holding of a probable cause hearing in the circumstance of a proposed patient being at liberty (not subject to a temporary custody order) is moved to a new section, section 18, immediately following. See the comment to that new section.

New Sec. 18. (previously 59-2914a(b))

COMMENT

Material is moved to this new section to allow section 17 to deal with the mental evaluation itself and to reemphasize that custodial proceedings are not automatically required; and that alternative procedures are provided for and should be utilized where appropriate. The material in this new section provides for a probable cause hearing similar to the one which would otherwise have been held pursuant to section 15 had the petitioner requested that the proposed patient be held in custody pending the trial. This section allows for a proposed patient not in custody to request and have a hearing to determine whether or not sufficient evidence exists to suggest the person is a "mentally ill person subject to involuntary commitment for care and treatment" before the person is required to submit to a psychiatric evaluation.

New Sec. 19. (previously 59-2916)

COMMENT

This section is amended for clarity. Subsection (b)(5) has been added to give the proposed patient notice that his or her trial may be delayed if he or she chooses to demand a jury trial, but that there is a limit on the length of the delay.

New Sec. 20. (previously 59-2918)

COMMENT

Material is moved to this location in the act because it more logically fits here. Though a patient's request for a continuance and order of referral could come at any time in the course of a case, it most logically and most often occurs after the probable cause hearing and before the trial. The committee relocates this section between the sections providing for the filing of the petition and the actions occurring at about that same time (sections 13, 14, 15, 16, 17, 18 and 19) and the section providing for the trial (21) for ease of reference and of locating it by persons using the act.

Three significant changes are made from the current language, though the committee does not consider them to be substantive changes to the current law:

(1) Provision is currently made in subsection 59-2918(a) for the patient's request for a continuance and order of referral to be made in writing. Added is the requirement that this written request be acknowledged before a notary public or judge. The committee believes this added protection is desirable because of the due process rights the patient is, in effect, waiving, and as additional protection for the attorney appointed to represent the patient against a later claim by the patient that he or she had not desired to sign the request.

(2) A new subparagraph (b) is added to clarify that an order for referral for short-term treatment waives a probable cause hearing if one has not already been held. The committee believes it makes no sense and would be a waste of time to allow a person to request and receive a continuance for short-term treatment, but then 90 days or more later come back into court and demand a hearing to determine if there is probable cause to hold them while a mental evaluation

is conducted. By this point, any mental evaluation would already have been completed and the case would have to be ready for trial.

(3) Provision is added in subparagraph (c) that the court shall specifically set a new date and time for the hearing and trial that is being continued in order to allow for the referral, and that notice of that confirmed date and time be given to all interested parties. The committee believes this is probably already being done in most cases, but has heard that often the exact date and time were not being communicated, particularly to the treating facility, and that has led to confusion about when the facility's report is due.

(4) Language similar to that in subsection 17(b) is added to the end of subsection (d) because the report prepared and filed by the treating facility at the end of the referral period is treated as supplemental to the mental evaluation report which likely was filed at least 90 days earlier. The committee intends the same parties who received the earlier mental evaluation should now receive the update report.

New Sec. 21. (previously 59-2917)

COMMENT

This section is amended for clarity. Provisions for the patient to be present at the trial, or the reasons the patient's presence has been requested to be waived and granted, currently found in subsection 59-2914(a)(2), are relocated here for ease of reference. The provisions for an order for treatment or dismissal of the case currently found in subsections (f), (g) and (h) are moved and rewritten as new section 22. See the comment to this new section.

As noted in the comment to section 16, in order for the continuance of a trial necessitated by a patient's demand for a jury trial to be held to no more than 30 days, the committee found it necessary to add a provision in paragraph (b) negating the requirement for the 20 day notice provided for in K.S.A. 43-166. The committee felt that since these trials are typically very short in duration, jurors would not be unduly burdened by receiving less than 20 days notice of their being summoned for jury duty.

New Sec. 22. (previously 59-2917(f), (g) and (h))

COMMENT

This section is amended for clarity and separated from what is now section 21 for ease of reference. New material appears in paragraph (b), but simply ties orders for treatment to the section providing for reviews and subsequent orders for treatment. The sentence concerning the participating mental health center being given responsibility for providing or securing treatment in paragraph (a) is significantly different from the language currently found in section 59-2917(f), but is based upon the belief by the committee that the intent of the current language is that the mental health center is to be the ultimate provider of treatment, if none other is available. This is made true because the centers, after reform, control who is and who is not authorized admission to a state psychiatric hospital (the former provider of last resort).

The current language specifies that if a QMHP denies authorization, the center the QMHP represents must accept responsibility to provide, or otherwise secure, treatment. The problem the committee finds with the current language is that no provision is made for the case of a petition being filed, the request being made for treatment at a state psychiatric hospital, but no QMHP screening ever having been performed. That leaves no center as the one responsible for the patient. While this scenario is probably unlikely to occur, it is a possibility. The new language implements the committee's understanding of the original intent to make mental health centers the "providers" of last resort. The committee understands that the identified participating mental health center may fulfill its duty by providing the necessary statement authorizing admission and treatment at a state psychiatric hospital and having the court reissue its order for treatment.

New Sec. 23. (previously 59-2918a)

COMMENT

This section is amended for clarity. Substantively added to the section are provisions for a mandatory due process hearing following the issuance of any ex parte emergency custody order revoking an outpatient treatment order and causing the patient to be detained. Such proceedings are required under the ruling made in G.T. v. Stone, 159 VT 607, 622 A.2d 491 (1992), and the committee finds the reasoning contained in this case equally applicable to Kansas. The intent is that such hearings should be held similar to the probable cause hearings required whenever temporary custody orders are sought. However, for those ex parte orders that only modify an existing outpatient order and allow the patient to continue on outpatient status, but with new conditions, the existing language is retained providing that if no party desires a hearing, none need be held and the ex parte order can become the final order.

New Sec. 24. (previously 59-2919)

COMMENT

Subsection (a) of this section is updated to reflect the changes of mental health reform, which make participating mental centers the "gatekeepers" to the state psychiatric hospitals. This subsection is now made consistent with the deletion of the statutorily defined catchment areas. See the comment to section 2.

Subsections (b) and (c) are rewrites of current sections 59-2944 (a) and (b), updated and amended for clarity and moved to this section for ease of reference.

New Sec. 25. (previously 59-2919a)

COMMENT

This section is amended for clarity and reorganized to follow the legal flow of review of a patient's status. Three significant changes are made from the current language, though the committee does not consider them to be substantive changes from the current law:

(1) A requirement is added in subsection (b) that the patient's attorney must file with the court a specified statement if the patient does not wish a review hearing. The committee's intent is that this statement will clarify the record.

(2) Provision is made in subsection (d) for review hearings to be held earlier than at the end of the 90 or 180-day treatment period, if that seems appropriate, and new orders entered. The committee intends that no patient who more properly could and should be transferred to outpatient treatment should have to continue in an inpatient treatment facility, merely because the 90 or 180-day period of time has not yet run. However, it is also the intent of the committee that not more than one such review hearing could be required to be held by the demand of a patient within each 90- or 180-day period. While nothing would prohibit a court from holding more than one such review hearing within those time frames, if that is felt necessary, the committee did not intend to burden courts with the necessity to hold hearings every time the patient felt like he or she wanted one.

(3) In new subsection (e), the burden of proof is placed upon the petitioner, the county or district attorney or treatment facility to show that the patient continues to meet the legal criteria to be held involuntarily after each review. The committee believes this is clearly the current law in view of the U.S. Supreme Court's ruling in Foucha v. Louisiana, 504 U. S. 71, 118 L.Ed 2d 437 (1992).

New Sec. 26. (previously 59-2920)

COMMENT

This section is amended for clarity. The word "may" is substituted for "shall" in the first sentence because the committee believes the intent of the current section is not to require that a court must utilize a relative to transport a patient.

New Sec. 27. (previously 59-2922)

COMMENT

This section is amended for clarity. A substantive change is made in the first paragraph placing the burden upon the court in which the petition is filed to transfer venue within 2 days after the probable cause hearing or change venue only upon the showing of good cause. The committee's intent in this 2-day rule is to insure that the patient's due process right to a speedy trial is not delayed merely because of a last minute change of venue, which could have been done earlier, but if now done on the eve of trial only makes that trial logistically impossible to hold. This change is also made because the committee understands that the intent of mental health reform is to maintain more patients in their home communities and have services provided locally. As additional resources have and continue to be made available to local mental health centers, these centers have been and are becoming more able to provide for the detention and care and treatment of patients which previously would have had to have been sent to a state psychiatric hospital. The committee is also aware that at this time many patients still have to be sent to a state psychiatric hospital and when that involves the patient being sent long distances from where the case was originally filed, transfer of venue to the district court in the county where the hospital is located makes further proceedings much more convenient for the professional staff of the hospital. Transfer of venue negates transportation of the patient back to court, but it also means family and community witnesses must travel to the site of the new venue. The committee's intent in this section is to allow for transfers of venue that make good sense, but to encourage courts to keep venue in cases where inpatient treatment may be expected to be short term and outpatient follow up to be done back in the community. The committee's

further intent is that the same court which hears the trial of a case and orders treatment should normally retain venue to hear the reviews.

Four other significant changes are made which the committee does not believe are substantive changes from current law:

(1) The last sentence currently found at the end of the first paragraph has been stricken in its entirety, because the committee believes it was primarily intended to allow changes of venue sought because of pre-trial publicity or other circumstances that would make selecting an impartial jury impossible. The committee believes the provision for change of venue for good cause shown would cover any circumstances where the patient could show that he or she would not get a fair hearing.

(2) Provision has been added in the second paragraph for facsimile transmission of records to make sure proceedings can be held with the least amount of delay in order to protect the patient's due process rights.

(3) The language currently found at the end of the third paragraph referring to the order for a mental evaluation is stricken because the committee believes the earlier requirement that the receiving court proceed as if the petition had originally been filed there means for the receiving court to pick up and proceed in the case from the point the transferring court left it. The committee could see no reason why only this one preliminary order should be singled out, and found no evidence that receiving courts currently feel compelled to reissue custody orders without similar language being in the law saying that such is not necessary. Therefore, the committee concluded the language was unnecessary. It is not the committee's intent that this deletion should be construed as meaning that previously issued orders for the mental evaluation now need to be reissued.

(4) Provision was added at the end of the third paragraph to require a continuance of up to 7 days to guarantee that notice of the new location at which a hearing, which had been previously scheduled by a transferring court, will be given to interested parties and to allow for scheduling problems created by a venue transfer. The committee believes such continuances are already required by due process, but adds the language for clarity.

New Sec. 28. (previously 59-2924)

COMMENT

This section is amended for clarity. The provisions currently found in subsections (c) and (f) concerning discharge have been deleted in their entirety and moved to section 29 for ease of reference and so that the transfer provisions, which apply only to facilities operated by the secretary of social and rehabilitation services, can be located within their own section. See also the comment to section 29.

A substantive change is the deletion of current subsections (d) and (e) in their entirety. Those subsections provide for "conditional release" of patients from inpatient care. The committee finds that these provisions are not used by the state psychiatric hospitals in the eastern area of the state where mental health reform has been in place longer, and believes that use of these provisions will shortly be phased out at Larned State Hospital since mental health reform is in place there too. The committee finds that treatment facilities are wary of their liability for patients under conditional release. The committee concludes the better way to provide for continued supervision of patients who no longer require inpatient care is through orders for outpatient treatment. Such orders are now more regularly being used in the eastern area of the state where mental health reform has given the participating mental health centers the active role in the follow-up care of patients leaving the state hospitals and intends that the concept be universally applied.

New Sec. 29. (previously 59-2924(c))

COMMENT

Subsection (a) is a rewrite of current subsection (c) of 59-2924. Subsection (b) is current subsection (f) of 59-2924. It is has been segregated into its own section for clarity and ease of reference (see comment to section 28). The last two sentences of current 59-2924(c) have been deleted. The committee determined that this language was added to the act as an earlier attempt at mental health reform. Since the adoption of screening and diversion by the mental health centers brought about by the 1990 reform act, the review and diversion by the head of a treatment facility has become unnecessary in cases involving a state psychiatric hospital. In most instances where a patient ends up in a private treatment facility they have gotten there by the screening and diversion occurring at the mental health center. In those few instances in which a patient arrives at a private treatment facility without having been screened at a mental health center, the general statutory directive of this section requiring the head of the treatment facility to discharge any patient who no longer needs care in that kind of a facility serves essentially the same purpose. The committee also notes the context of this section (involuntary commitments) means that a probable cause hearing would have been required to have been held within approximately 48 hours of when this screening and diversion was to have occurred and that that hearing provides considerable protection against a person being detained unnecessarily. The committee, therefore, concludes the current language is unnecessary and probably confusing and has deleted it. The committee does not intend for this to be construed to mean treatment facilities, upon admission, do not have any duty to review the necessity and appropriateness of a patient's admission nor to negate their professional ethical obligation to see to it that a patient receives only treatment which is necessary.

New Sec. 30. (previously 59-2925)

COMMENT

This section is amended for clarity. The phrase "unless there has been issued a superseding inpatient or outpatient treatment order not being discharged by this notice" has been added to prevent a misinterpretation of the word "discharge" from causing the case to be terminated prematurely. The committee intends section 29 and this section to be read together, and to continue the current concept that a patient should be released from commitment and court orders as soon as the patient is no longer in need of treatment, regardless of the fact that the last court order would legally extend the patient's commitment an additional length of time. When the patient is ready for release from treatment, the head of the last treatment facility to which the patient has been committed should do so, pursuant to section 29 and send a notice of that discharge to the court pursuant to this section, which will terminate the proceedings. This rule applies to both inpatient and outpatient treatment facilities. The committee is concerned about the use of the term "discharge." While the committee intends for this term to apply only to the final discharge and release from treatment, the committee fears the term "discharge" is so commonly used by treatment facilities to mean release from their care, even though the patient may be actually transferring to another provider, that notices of these non-terminating "discharges" will be sent to the court. This is not thought to be bad in itself because it helps to keep the record straight. However, as the committee expects more and more often patients to move from inpatient to outpatient care in succession, but recognizes that notices from the inpatient facility will likely lag behind the issuance of the outpatient order, meaning that the notice from the inpatient facility will be filed second in time to the outpatient order, the

committee was concerned that a misinterpretation of that notice or a strictly technical reading of the section could cause termination of the case when it should not be.

The provisions concerning notice of conditional release are deleted because of the deletion of the provisions for conditional release in section 28. See the comment to section 28.

New Sec. 31. (previously 59-2926)

COMMENT

This section is amended for clarity. A substantive change is made by the requirement added that the head of the treatment facility must notify the local county sheriff of an AWOL patient and request his or her return, in place of the current language which authorizes a "citizen's arrest warrant." The committee has heard that law enforcement officers are wary of their liability in executing such a "warrant." The committee believes the better solution to an AWOL patient is for the treatment facility to notify the sheriff and allow the sheriff to communicate with other law enforcement agencies, as necessary, and to utilize their existing authority to either take a dangerous person into custody or to execute the court's order for treatment. The committee also believes this requirement places an undue burden on the treatment facility to meet its obligation.

The provisions currently found in subsection (b) are deleted in their entirety. The committee believes the authority recited in this subsection is inherent in the whole of the act, provided for by the statutes which generally provide the authority of the secretary, or the secretary's designee, as head of a state treatment facility, to make rules and regulations as are contemplated in section 4, and equally applicable to other treatment facilities. The committee believes the language is unnecessary, but intends that its deletion should not be construed as any diminishment of the secretary's authority.

New Sec. 32. (previously 59-2927a)

COMMENT

This section is amended and restructured for clarity. Subsection (d) is a rewrite of what is currently section 59-2916a, which is moved to this section to combine the medication provisions into one section. The committee found that having provisions concerning the administration of medications in two separate sections was inconvenient and confusing. The committee adds language to require a report be submitted to the court prior to any hearing if mind altering or participation-affecting medications have been administered within 2 days of the hearing. By not specifying any particular form that report must be in, the committee allows for that report to be submitted either in writing or orally presented immediately prior to the hearing. Current language is amended to provide that any examination concerning whether the administration of medications has due process implications should occur prior to the hearing. If the court determines adverse affect, the court may grant a reasonable continuance as it deems appropriate to resolve any medication issues and is required to order the administration of these medications discontinued until the hearing can be held, unless these medications are found necessary to sustain life or protect persons, in which case, since they cannot be discontinued, the hearing must proceed.

New Sec. 33. (previously 59-2928)

COMMENT

This section is amended for clarity. Provisions concerning licensed adult care homes are deleted. The committee believes they are inappropriately placed in this act and should be placed within the adult care act. The definitions currently found in subsections (m) and (n) of 59-2902 are relocated here for ease of reference.

A substantive change is made in the length of time a patient may be left in restraint or seclusion without monitoring the patient's condition from 1 hour to 15 minutes. The committee believes that the shorter time period is far better clinical practice. The committee believes the additional burden this requirement places on treatment facilities is far outweighed by the protection afforded to the patient's health and safety. The committee understands the current practice at the state psychiatric hospital is to check on patients in restraint or seclusion between every 5 and 15 minutes, depending upon circumstances, and the committee intends to apply at least the longer standard to every type of treatment facility. Of course, this maximum allowable standard should not be interpreted to negate the necessity for shorter intervals as may be medically indicated, nor to prohibit a treatment facility from establishing within its own policies a requirement for shorter intervals.

New Sec. 34. (previously 59-2929)

COMMENT

This section is amended for clarity. The language added to subparagraph (a)(5) is a rewrite of current section 59-2943. Subparagraph (a)(12) is a rewrite of current section 59-2927.

New Sec. 35. (previously 59-2931)

COMMENT

This section is amended for clarity. The reference to the "applicant" ("petitioner" as the act has been amended by the committee) in subparagraph (a)(5) is deleted because the committee believes the law does not intend the petitioner to forever have access to the patient's records, but is intended to have access to only so much information as is necessary to prosecute the case. The committee believes that the provisions of (a)(7) cover this need, or it may be provided for by an order issued pursuant to (a)(4).

New Sec. 36. (previously 59-2932)

COMMENT

This section is revised only by amending the term "application" to read "petition" as that term has been substituted into this draft.

New Sec. 37. (previously 59-2934)

COMMENT

This section is amended only slightly for clarity.

New Sec. 38. (previously 59-2936)

COMMENT

This section is amended and restructured for clarity.

New Sec. 39. (previously 59-2937)

COMMENT

This section is amended only slightly to conform to the amended act.

New Sec. 40. (previously 59-2939)

COMMENT

This section is amended only slightly for clarity.

New Sec. 41. (previously 59-2940)

COMMENT

This section is amended for clarity and consistency with the amended act.

New Sec. 42. (previously 59-2941)

COMMENT

This section is amended only slightly for clarity.

New Sec. 43. (previously 65-5601)

COMMENT

Though not a part of the care and treatment act, Article 56 of chapter 65 has been reviewed by the committee because it is referenced in section 59-2931 and made integral to it. The definitions section was amended in subsection (h) to delete the reference to Norton state hospital since it is no longer in operation.

New Sec. 44. (previously 65-5603)

COMMENT

Subparagraph (a)(13) is amended for clarity and consistency with the concept of mental health reform. Subparagraph (a)(14) is added because the committee has heard that many requests for such information are regularly made to the state psychiatric hospitals, which would like to provide this information but report that they can find no current exception which would allow for them to do so. The committee believes no good reason exists why such an exception should not be added.

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MEMO TO: Members of House Judiciary Committee
FROM: Kansas Advocacy & Protective Services, Inc.
DATE: March 4, 1996
RE: Staff Report on SB 469--Amendments to the Care and Treatment Act for Mentally Ill Persons

Introduction

Kansas Advocacy & Protective Services, Inc. (KAPS) is a federally funded non-profit corporation which advocates for the rights of Kansans with disabilities. KAPS administers four programs: Protection and Advocacy for Individuals with Developmental Disabilities (PADD); Protection and Advocacy for Individuals with Mental Illness (PAIMI); Protection and Advocacy for Individual Rights (PAIR); and Protection and Advocacy for Assistive Technology (PAAT).

The PAIMI staff meet and interact on a regular basis with consumers of mental health services who have personal experience with the involuntary commitment process under Kansas law. Pursuant to federal mandates, the PAIMI staff are obligated to carry out the consumer's expressed wishes. The following concerns are based, in large part, on information derived from numerous meetings and conversations over time with consumers of mental health services in treatment facilities throughout Kansas.

SUMMARY OF KAPS' POSITION ON SB 469, AS AMENDED BY THE SENATE

Overall, KAPS staff supports SB 469 as an improvement to current law, but we do have certain concerns that were not addressed by the Senate which are addressed below.

KAPS staff believes great progress has been made in reorganizing the Care and Treatment Act to make the various sections more simplified and organized in a more logical order. SB 469 ensures that the Treatment Act is more compatible with Mental Health Reform in that the responsibility and involvement of the community mental health centers has been significantly increased. KAPS staff believes that SB 469, as amended by the Senate, adds several important protections from a consumer's standpoint including, but not limited to, the following:

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1) Elimination from the definition of a "mentally ill person subject to involuntary commitment" those persons whose sole diagnosis is not amenable to psychiatric treatment **[New Section 2(f), Page 2, lines 22-33]**;

2) An order of continuance of treatment must be acknowledged before either a judge or notary public in order to ensure that the request for continuance is made knowingly and voluntarily **[New Section 20(a), Page 18, lines 40-43, Page 19, line 1]**;

3) A hearing is held when an outpatient treatment order is revoked and the consumer is detained **[New Section 23(f)(1), Page 22, lines 40-43, Page 23, lines 1-6]**;

4) Persons who are hospitalized and placed in seclusion and restraints will be monitored at least every 15 minutes **[New Section 33(a), Page 30, lines 23-43, Page 31, lines 1-18]**; furthermore, the definition of "seclusion" has been expanded to include "room restriction" when the door is not locked, but the consumer may not leave the room without fear of further reprisal.

5) A patient's civil rights can limited by the head of the treatment facility for the orderly operation of the facility only when good cause exists **[New Section 4(a), Page 4, lines 39-43, Page 5, lines 1-6]**;

6) No medication or other form of treatment may not be administered to a voluntary patient without the patient's consent, or the consent of their legal guardian, or the patient's parent if the patient is a minor **[New Section 32(b), Page 29, lines 17-20]**; and

7) Guardians may not authorize procedures such as psychosurgery, electroshock therapy, experimental medication, aversion therapy and hazardous treatment procedures without the patient's consent unless the guardian first obtains a court order authorizing such treatment **[New Section 34(a)(6), Page 31, lines 41-43, Page 32, lines 1-4]**;

Proposed Amendments Which Are Not Supported By KAPS Staff

In certain instances, SB 469 makes substantive changes to current law which may result in the failure to provide consumers of mental health services with adequate protections under the law. An explanation of our concerns follows:

KAPS staff does not support the language of New Section 5(b)(3) **[Page 5, lines 31-43, Page 6, lines 1-2]**; proposed amendment to K.S.A. 59-2905(b)(3)] which would permit, in some cases, "voluntary" admissions of wards by their legal guardians. The Senate's amendments to the guardianship laws **[New Section 59(c), Page 57, lines 18-35]** does nothing to resolve our concerns. KAPS staff's reason for concern is based on, but not limited to, the following:

a) Involuntary hospitalization is a substantial deprivation of a person's liberty, to be done as a last resort, with adequate due process

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protections. KAPS staff does not believe the protection afforded under the proposed amendment is adequate for due process purposes. KAPS staff believes that a person whose liberty is deprived should be entitled to a hearing each time they are "voluntarily"committed by the guardian.

b) KAPS staff does not believe that the safeguards relied on by the Judicial Council raise to the level of providing the patient due process protections, except for the right to petition for habeas corpus. It has been the experience of KAPS staff that, as a practical matter, the option of the consumer petitioning for a writ of habeas corpus is illusory for some hospitalized persons with mental illness.

Additional Recommendations by KAPS Staff for Improvement to SB 469

Over time, KAPS staff have encountered may instances in which provisions of the Treatment Act are either carried out or are interpreted in ways that do not appear to be advantageous to consumers of mental health services. An outline of some of the problems identified by KAPS staff and some possible solutions is set forth below:

1) New Section 25 **[Page 24, lines 27-36]**; proposed K.S.A. 59-2919a] summarizes the procedures to be used in relation to patient's review hearings. According to subsection (a), the treatment facility is required to submit to the court a written report summarizing the treatment provided to the patient 14 days prior to the end of each treatment period. KAPS staff recommends that the written report also be provided to the patient in addition to the patient's attorney.

2) KAPS staff does not believe that the proposed amendment to subsection (b) of New Section 25 [**Page 24, lines 37-43 through Page 25, lines 1-8**; proposed K.S.A. 59-2919a] sufficiently provides due process protections to patients, although KAPS staff does view the proposed amendment as an improvement to current law. The proposed amendment to subsection (b) requires the patient's attorney to file a request for a review hearing if the patient desires a hearing. If the patient does not desire a hearing, the patient's attorney shall file a statement with the court that the attorney has consulted with the patient, the manner in which the attorney consulted, that the attorney fully explained to the patient their right to a hearing, the consequences of not requesting a hearing, but that the patient has decided that they do not want a hearing.

   Unfortunately, it has been our experience that some patients may lack the ability to conceptually understand their right to a review hearing due to illiteracy, cultural and language barriers, and that some patients may be discouraged from exercising their right. Therefore, KAPS staff recommends that patients be entitled to automatic review hearings, which, in our view, is more consistent with due process standards.

3) New Section 26 [**Page 26, lines 13-26**; proposed amendment to K.S.A. 59-2920] addresses the circumstances under which persons with mental illness are to be

transported to treatment facilities. It specifically provides that the "least amount of restraint necessary" is to be used in transporting such persons. However, consumers regularly inform KAPS staff of instances where persons with mental illness are automatically shackled and restrained prior to transportation without regard to the person's emotional condition.

From KAPS staff's perspective, it would be beneficial to revise the law to provide that cuffs and shackles are initially prohibited in the course of transportation unless recommended by a mental health professional knowledgeable about the person's condition. Thereafter, during the course of transportation, cuffs and shackles should be used only for good cause as the consumer's emotional condition warrants.

4) New Section 28(a) [**Page 27, lines 21-33**; proposed amendment to K.S.A. 59-2924(a)] is the section of the Treatment Act that pertains to the transfer of state hospital patients. KAPS staff has had a great deal of experience with transfers to a more restrictive environment, e.g. the Security Behavior Ward (SBW) at Larned State Hospital. KAPS staff believes that certain due process standards must be met when patients are transferred to such a restrictive ward. Consequently, we recommend that SB 469 be amended with the following principles in mind:

   a) Transfer should be used a last resort;
   b) The "least restrictive alternatives" concept should be incorporated into the law; and
   c) If the transfer is to a more restrictive setting, the initial hearing should be automatic. Furthermore, the patient should be entitled to subsequent periodic review hearings.
   d) The type of emergency that justifies a transfer to a more restrictive environment without notice should be defined;
   e) The patient is entitled to receive the notice of transfer;
   f) In the case of an emergency, notice should be provided to the patient as soon as possible prior to transfer, and to the patient's legal guardian within a reasonable time after transfer has occurred.

5) KAPS staff have long been of the opinion that the "right to object" to medication language in New Section 32(e) [**Page 30, lines 1-19;** proposed K.S.A. 59-2927a(b)] is strongly slanted to the benefit of the institutional system. Consumers of mental health services often convey to KAPS staff their perception that an administrative review, under the current law, is not a viable one.

It is our understanding that treatment professionals at state hospitals routinely use the initial commitment order to justify involuntary administration of medication throughout the course of a person's treatment. To our knowledge, the issue of a patient's capacity to make informed treatment decisions is rarely, if ever, explicitly reexamined during the period of hospitalization. In KAPS staff's view, this poses a significant due process issue. At a minimum, an individual's capacity to make

informed treatment decisions must be assessed contemporaneously with the person's decision to refuse treatment.

6) As indicated above, KAPS staff supports the Senate Amendments to the seclusion and restraint section **New Section 33(a), Page 30, lines 23-41]**. In addition, KAPS staff recommends that the practice of locking two or more patients in a room together should be explicitly prohibited. In 1993, such a practice resulted in the death of a state hospital patient.

7) New Section 34(a) [**Page 31, lines 19-41;** proposed amendment to K.S.A. 59-2929(a)] lists several rights of hospitalized persons with mental illness that are specially protected. Subsection (b) of New Section 34 [**Page 32, lines 25-38**; proposed amendment to K.S.A. 59-2929(b)] outlines a detailed process under which the listed rights may be restricted. It has been our experience with some treatment facilities that, rather than complying with the process for restriction of a patient's rights, a guardian's wishes are seemingly automatically respected. This tends to happen, perhaps most frequently, in the area of visitation. In a representative scenario, facility staff comply with a guardian's directive about visitation without regard to the consumer's wishes. Therefore, KAPS staff recommends that New Section 34 contain language which clearly establishes that all hospitalized persons with mental illness, including those with guardians, are entitled to take advantage of the listed rights.

We appreciate the opportunity to address your Committee on this important issue. Thank you for your consideration of our comments.

person is a mentally ill person subject to involuntary commitment for care and treatment under this act may be filed in the district court of the county wherein that person resides or wherein such person may be found. The petition shall state:

(1) The petitioner's belief that the named person is a mentally ill person subject to involuntary commitment and the facts upon which this belief is based;

(2) to the extent known, the name, age, present whereabouts and permanent address of the person named as possibly a mentally ill person subject to involuntary commitment; and if not known, any information the petitioner might have about this person and where the person resides;

(3) to the extent known, the name and address of the person's spouse or nearest relative or relatives, or legal guardian, or if not known, any information the petitioner might have about a spouse, relative or relatives or legal guardian and where they might be found;

(4) to the extent known, the name and address of the person's legal counsel, or if not known, any information the petitioner might have about this person's legal counsel;

(5) to the extent known, whether or not this person is able to pay for medical services, or if not known, any information the petitioner might have about the person's financial circumstances or indigency;

(6) to the extent known, the name and address of any person who has custody of the person, and any known pending criminal charge or charges or of any arrest warrant or warrants outstanding or, if there are none, that fact or if not known, any information the petitioner might have about any current criminal justice system involvement with the person; and

(7) the name or names and address or addresses of any witness or witnesses the petitioner believes has knowledge of facts relevant to the issue being brought before the court.

The petition shall be accompanied by:

(1) A signed certificate from a physician, licensed psychologist or [qualified mental health professional] stating that such professional has personally examined the person and any available records and has found that the person, in such professional's opinion, is likely to be a mentally ill person subject to involuntary commitment for care and treatment under this act, unless the court allows the petition to be accompanied by a verified statement by the petitioner that the petitioner had attempted to have the person seen by a physician, licensed psychologist or [qualified mental health professional] but that the person failed to cooperate to such an extent that the examination was impossible to conduct;

designee of the head of a treatment facility

designee

(2) if applicable because immediate admission to a state psychiatric hospital is sought, the necessary statement from a qualified mental health

Kansas Psychiatric Society

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March 4, 1996

To: House Judiciary Committee

From: Meg Henson
Government Relations Consultant

Subj: SB 469: Care and Treatment Act for Mentally Ill Persons

The Kansas Psychiatric Society supports the proposed amendment submitted by the Kansas Association of Professional Psychologists. The amendment would allow only a physician, a licensed psychologist or the designee of the head of a treatment facility to sign an affidavit stating that, in the professional's opinion, the person examined is likely to be mentally ill. This affidavit accompanies a petition to determine whether an individual is subject to involuntary confinement. The proposed amendment would preserve the status quo; language similar to it is currently codified at K.S.A. 59-2913.

The Kansas Psychiatric Society believes that only those individuals who are qualified and credentialed to diagnose mental illness should have the authority to make such a determination in an affidavit. The affidavit could play a significant role in the ultimate determination of a person's mental fitness, and, consequently, could significantly alter the course of an individual's life.

Thank you very much for your consideration of this proposed language.

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MESSAGE: I am requesting assistance with SB 469, which according to "IN SESSION" is a bill dealing with care and treatment of the mentally ill. My comments and concerns apply equally to alcohol committments. It seems that these things usually meet emergency status after 5 :00 P.M. or on the weekends. Consequently, in our County this means getting the Judge to the Courthouse, transporting the proposed patient 30 miles to Colby to get an evaluation done by your Mental Health Center, then transporting that person back to Atwood for a Protective Custody Hearing. We then must transport the patient to Larned State Hospital some 4 hours from Atwood. We need a window, where we could keep the proposed patient in the County Jail, separated from other prisoners, until the next morning at 9:00 A.M.. This means that there needs to be a provision in the law which would allow the proposed patient to be held for up to 15 hours before the procedure kicks in. I would not expect that we should be able to hold the proposed patient over a weekend, but the 15 hour window would certainly make these things easier to work with in this area of the state.

The hospitals in this area do not offer de-tox and have no facilities for the mentally ill. The closest facility that does offer this is Hays, some 140 miles from here. Invariably we end up working these things in the middle of the night and are transporting the proposed patients to Larned between 1:00 A.M. and 6:00 A. M. Under the law as it now stands, if we have a report of a problem with a mentally ill person at 9:00 P.M., we first must investigate the matter and if it is found that there is a possiblity that the person is dangerous to himself or others, then we have to contact High Plains in Hays to arrange an emergency evaluation; they then have to contact a therapist, usually in Goodland, and we then meet them in Colby, which is 30 miles from Atwood and 30 miles from Goodland; the patient is evaluated and if found to be in the need of immediate care and treatment, we then bring the proposed patient back to Atwood, contact the Judge and an attorney to represent the proposed patient and proceed with a hearing. If the proposed patient insists on a full-blown Protective Custody hearing, then we have to get the therapist that did the evaluation to travel to Atwood for the hearing also. Then after the hearing arrangements have to be made at Larned State Hospital and the proposed patient has to be transported there. Consequently, the window that I am talking about is very important for areas that are isolated as we are here. Thank you.

H. SCOTT BEIMS, RAWLINS COUNTY ATTORNEY

House Judiciary
3-4-96
Attachment 8