Approved
Date: February 28, 2001

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairperson John Vratil at 9:37 a.m. on February 27, 2001 in Room 123-S of the Capitol.

All members were present except: Senator O'Connor (excused)
Senator Oleen (excused)
Senator Gilstrap (excused)

Committee staff present:
Gordon Self, Revisor
Mike Heim, Research
Mary Blair, Secretary

Conferees appearing before the committee:
Randy Hearrell, Kansas Judicial Council (KJC)
Rebecca Wempe, Security Benefit Life Insurance Company (SBLIC)
Judge Marla Luckert, KJC
Jane Rhys, Kansas council Developmental Disabilities (KCDD)
Paula Sue Salazar, Crime Victims Compensation Board
Laura Howard, Assistant Secretary of Health Care Policy, SRS
Jim Germer, Kansas Advocacy and Protective Services (KAPS)
Elizabeth Adams, National Alliance on Mental Illness, (NAMI)

Others attending: see attached list

Minutes of the February 19th and 20th meetings were approved on a motion by Senator Adkins, seconded by Senator Haley. Carried.

HB 2082–concerning nonprobate transfer on death; re: nontestamentary nature

Conferee Hearrell testified in support of **HB 2082.** He presented a brief history of the bill (**2000 SB 485**) as it was studied by the KJC at the request of the 2000 House Judiciary Committee and he discussed KJC's work with SBLIC to resolve problems in the bill and to meet SBLIC's needs by clearly stating that certain contractual arrangements are nontestamentary in nature. (attachment 1)

Conferee Wempe testified in support of **HB 2082.** She briefly discussed financial services offered by SBLIC and defined and discussed the purpose of the bill as: "a modified version of Section 101 of the Uniform Nonprobate Tansfers on Death Act....which would provide that a variety of contractual arrangements, including beneficiary designations in individual retirement accounts, be regarded as nontestamentary in nature." (attachment 2)

HB 2084–concerning criminal procedure; re: competency to stand trial

Conferee Luckert testified in support of **HB 2084**. She discussed the issue of dealing with individuals who allegedly commit crimes but are incompetent to stand trial and not likely to become competent due to mental retardation or organic brain disease. She stated that these individuals cannot be involuntarily committed under the mental illness code because these disorders are excluded from the definition of "mentally ill person subject to involuntary commitment for care and treatment." This bill would amend the Criminal Procedure Code expanding the definition of mentally ill persons and would remedy the problem. (attachment 3)

Conferee Rhys testified in opposition to **HB 2084**. She discussed the following concerns: lack of expertise by psychiatric hospital staff to deal persons who have conditions unrelated to mental illness; increased costs of providing community based services to people with disabilities; and unfair treatment of persons depending upon the circumstances that resulted in the filing of the petition. She recommended an interim committee study this issue and that involuntary commitment proceedings should only be used in severe crime cases. (attachment 4)

...e Chair recessed the hearing to conduct a confirmation hearing on the reappointment of Paula S. Salazar to the Crime Victims Compensation Board. Conferee Salazar answered inquiries as they were addressed to her by Committee Members.

The Chair resumed the hearing on **HB 2084**.

Conferee Howard testified in opposition to **HB 2084**. She reviewed current civil and criminal law covering the issue of an alleged criminal's incompetency to stand trial due to mental retardation, organic brain disease, etc. and discussed the following concerns: the bill is not limited to certain types of crimes; no treatment or services provided in psychiatric hospitals specific to the needs of certain disabled persons; increased "use" of state hospitals as "placements" for persons who fall through the cracks of other systems; and questionable constitutionality of the bill. (attachment 5) Discussion followed relating to public safety issues, victims rights, and recommended solutions.

Conferee Germer testified in opposition to **HB 2084**. He recommended an interim committee study concerns surrounding this issue for the following reasons: information available that indicates individuals with mental retardation (MR) are usually competent to stand trial; recommended use of diversion and Individual Justice Plans (IJP); need to study actual incidence rates; constitutionality of the bill; lack of appropriate services to non-mentally ill persons; questionable cost and efficacy of treatment; procedural disparities between the bill and civil commitment; and the inappropriate use of appointed guardians. (attachment 6) Following brief discussion the conferee agreed to provide Committee with a representative sample of and IJP.

Conferee Adams testified in opposition to **HB 2084**. She reviewed the written testimony of the Chair of the National Alliance for the Mentally Ill of Kansas, Dr. Stephen Feinstein, discussing how the bill would: negate mental health reform; violate people's liberty; require costly specialized state hospital treatment units; and drain limited resources. She further discussed the formation of a task force and alternatives it should consider. (attachment 7)

At the Chair's request Conferee Luckert responded to the opponents testimony on **HB 2084**. She agreed with opponents that there are gaps in the law that need programmatic solutions. At the Chair's request she stated she would provide Committee with a written response to Dr. Feinstein's written testimony.

Written testimony was submitted in opposition to **HB 2084** by: Sharon Huffman, KDHR; (attachment 8) Ellen Piekalkiewicz, CMHC; (attachment 9) Dan Hermes, KADSPA; (attachment 10) Kathy Lobb, SACK; (attachment 11) and Mike Oxford, ILRC. (attachment 12)

The Chair informed the remaining scheduled conferees and anyone else who wished to present testimony on **HB 2084** that they could do so tomorrow if they so chose or could present written testimony.

The meeting adjourned at 10:32 a.m. The next meeting is February 28, 2001.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb 21, 2001

NAME	REPRESENTING
Bill Henry	KS Gov. Consulting
[illegible]	KCDD
[illegible]	HAPS
Tom Laing	InterHab
Brad Bryant	Sec. of State
Melissa Wangemann	Sec. of State
[illegible]	[illegible]
Marla Luckert	Judicial Council
Judy M. Hearrell	Judicial Council
Mike Haupt	ADAPT
Lissa Haupt	TILRC
Ari Hyten	OJA
Karen Seddat	SRS
Ellen Piekalkiewicz	Assn. of Counties
John House	SRS
Laura Howard	SRS
Trudy Racow	SRS
Joe Herold	KSC
Dan Hermes	KADSPA

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: Feb 27/2001

NAME	REPRESENTING
Jesse Borjon	Sec. of State
Jueconumine	Federico
Jeff Bettenberg	State Farm
Mike Hutt	Kearney Law Office
Roger Viola	SBL
Barbara Bishop	The Arc of Douglas County.
Elizabeth Adams	NAMI Kansas / The Kansas Mental Health Coalition
John Peterson	Security Benefit Group
Doug Smith	Pinegar-Smith Company
Barb Conant	Ks Trial Lawyers Assoc.

SJud 2-27-01 att 1

JUDICIAL COUNCIL TESTIMONY
ON 2001 HB 2082
FEBRUARY 27, 2001

During the 2000 Legislative session, the House Judiciary Committee requested that the Kansas Judicial Council study 2000 SB 485 concerning nonprobate transfer on death. The study was undertaken by the Judicial Council Probate Law Advisory Committee whose members are: Gerald L. Goodell, Chair, Topeka; Cheryl C. Boushka, Overland Park; Hon. Sam K. Bruner, Olathe; Tim Carmody, Overland Park; Michael L. Clutter, Topeka; Peter A. Cotorceanu, Topeka; Martin B. Dickinson, Jr., Lawrence; Jack R. Euler, Troy; Senator Greta Goodwin, Winfield; Mark Knackendoffel, Manhattan; Justice Edward Larson, Topeka; Philip D. Ridenour, Cimarron; and Willard B. Thompson, Wichita.

SB 485 proposed to enact Section 101 of the Uniform Nonprobate Transfer on Death Act (which is part of the Uniform Probate Code) into Kansas law. The reason for SB 485 is Security Benefit Life Insurance Company's desire to remove any doubt as to the validity of provisions for nonprobate transfers, such as IRA's, tax sheltered annuities, retirement plans and other instruments.

After consideration of SB 485, the Judicial Council Probate Law Advisory Committee supported the purpose of the bill, but was of the opinion the purpose could be accomplished more simply. The Probate Law Advisory Committee noted that while Kansas has adopted a few sections of the Uniform Probate Code, because Kansas is not a Uniform Probate Code state, that provisions of the Code often don't mesh well with Kansas law.

The Probate Law Advisory Committee worked with representatives of Security Benefit to resolve problems in the bill and to meet Security Benefit's needs. As drafted, the bill meets Security Benefit's needs in clearly stating that certain contractual arrangements are nontestamentary in nature. The Probate Law Advisory Committee and the Judicial Council support HB 2082.

Attached is a copy of Section 6-101 of the Uniform Probate Code relating to nonprobate transfers on death and a copy of 2000 SB 485.

SJud 2-27-01 att 1

PART 1

PROVISIONS RELATING TO EFFECT OF DEATH

Section 6–101. Nonprobate Transfers on Death.

(a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. This subsection includes a written provision that:

(1) money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(b) This section does not limit rights of creditors under other laws of this State.

COMMENT

This section is a revised version of former Section 6–201 of the original Uniform Probate Code, which authorized a variety of contractual arrangements that had sometimes been treated as testamentary in prior law. For example, most courts treated as testamentary a provision in a promissory note that if the payee died before making payment, the note should be paid to another named person; or a provision in a land contract that if the seller died before completing payment, the balance should be canceled and the property should belong to the vendee. These provisions often occurred in family arrangements. The result of holding such provisions testamentary was usually to invalidate them because not executed in accordance with the statute of wills. On the other hand, the same courts for years upheld beneficiary designations in life insurance contracts. The drafters of the original Uniform Probate Code declared in the Comment that they were unable to identify policy rea-

1-2

sons for continuing to treat these varied arrangements as testamentary. The drafters said that the benign experience with such familiar will substitutes as the revocable inter vivos trust, the multiple-party bank account, and United States government bonds payable on death to named beneficiaries all demonstrated that the evils envisioned if the statute of wills were not rigidly enforced simply do not materialize. The Comment also observed that because these provisions often are part of a business transaction and are evidenced by a writing, the danger of fraud is largely eliminated.

Because the modes of transfer authorized by an instrument under this section are declared to be nontestamentary, the instrument does not have to be executed in compliance with the formalities for wills prescribed under Section 2–502; nor does the instrument have to be probated, nor does the personal representative have any power or duty with respect to the assets.

The sole purpose of this section is to prevent the transfers authorized here from being treated as testamentary. This section does not invalidate other arrangements by negative implication. Thus, this section does not speak to the phenomenon of the oral trust to hold property at death for named persons, an arrangement already generally enforceable under trust law.

The reference to a "marital property agreement" in the introductory portion of subsection (a) of Section 6–101 includes an agreement made during marriage as well as a premarital contract.

The term "or other written instrument of a similar nature" in the introductory portion of subsection (a) replaces the former language "or any other written instrument effective as a contract, gift, conveyance or trust" in the original Section 6–201. The Supreme Court of Washington read that language to relieve against the delivery requirement of the law of deeds, a result that was not intended. *Estate of O'Brien v. Woodhouse*, 109 Wash.2d 913, 749 P.2d 154 (1988). The point was correctly decided in *First National Bank in Minot v. Bloom*, 264 N.W.2d 208, 212 (N.D.1978), in which the Supreme Court of North Dakota held that "nothing in [former Section 6–201] of the Uniform Probate Code . . . eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another."

SENATE BILL No. 485

By Committee on Judiciary

1-25

AN ACT concerning nonprobate transfer on death; relating to nontestamentary nature.

Be it enacted by the Legislature of the State of Kansas:

Section 1. (a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is nontestamentary. The provisions of this subsection include a written provision that:

(1) Money or other benefits due to, controlled by, or owned by a decedent before death must be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later;

(2) money due or to become due under the instrument ceases to be payable in the event of death of the promisee or the promisor before payment or demand; or

(3) any property controlled by or owned by the decedent before death which is the subject of the instrument passes to a person the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(b) The provisions of subsection (a) do not limit rights of creditors under other laws of this state.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.

Sn Jud
2-27-01
att 2

The Security Benefit Group of Companies

Security Benefit Life Insurance Company
Security Benefit Group, Inc.
Security Distributors, Inc.
Security Management Company, LLC

700 SW Harrison St.,
Topeka, Kansas 66636-0001
(785) 431-3000

Date: February 27, 2001

To: Members of the Senate Judiciary Committee

From: Rebecca Wempe
Assistant Vice President and Assistant Counsel
Security Benefit Life Insurance Company

Subj: House Bill 2082

Mr. Chairman, members of the Committee, my name is Rebecca Wempe and I am pleased to appear before you today on behalf of the Security Benefit Group of Companies.

Security Benefit Life Insurance Company ("Security Benefit") is a Kansas life insurance company located in Topeka, Kansas with approximately $10 billion in assets under management. Security Benefit offers fixed and variable annuities, money management services, retirement plans and, through its subsidiary broker/dealer, Security Distributors, Inc., a family of mutual funds. Security Benefit also offers individual retirement accounts. Approximately 4,000 Kansas residents invest in Security Benefit's mutual funds through IRAs.

Proposal: Security Benefit Life Insurance Company proposes that the Kansas Legislature enact House Bill 2082, a modified version of Section 101 of the Uniform Nonprobate Transfers on Death Act. This statute would provide that a variety of contractual arrangements, including beneficiary designations in individual retirement accounts, be regarded as nontestamentary in nature.

Background: Nonprobate transfers on death have been challenged as invalid testamentary transfers in states that have not adopted the Nonprobate Transfers on Death Act or similar legislation. See, e.g., E.F. Hutton & Co. v. Wallace, 863 F.2d 472 (6th Cir. 1988) (plaintiff argued that assets of custodial IRA were part of probate estate and did not pass to beneficiary named by the owner-decedent); In re Catanio, 703 A.2d 988, 991 (N.J. Super. Ct. App. Div. 1997) (where trust beneficiary did not acquire any interest in trust property prior to the death of the settlor, the trust was testamentary and invalid if not executed in compliance with the statute of wills); Virgil v. Sandoval, 741 P.2d 836, 838 (N.M. Ct. App. 1987) (plaintiff argued that deed executed by decedent was an attempted testamentary disposition and was invalid because it did not comply with the statutory provisions for the making and execution of a will); Bielat v. Bielat, 721 N.E.2d 28, 31

Sn Jud
2-27-01
att 2

(Ohio 2000) (wife argued that beneficiary clause in husband's IRA constituted testamentary language and was therefore null and void).

Kansas law on nonprobate transfers has evolved through a series of court decisions and legislative enactments. In 1974, the Kansas Supreme Court held that the transfer of a savings account payable to a third party upon the death of the depositor was testamentary in character, and thus invalid because it was not executed in compliance with the statute of wills. Truax v. Southwestern College, 214 Kan. 873, 883, 522 P.2d 412, 420 (1974). The Kansas Legislature effectively overruled Truax in 1979 when it enacted Kan. Stat. Ann. §§ 9-1215 to -1216, which authorized the transfer of property through payable on death bank accounts without compliance with the statute of wills. In 1987, the Supreme Court held that the payable on death statutes applied to Totten trusts, as well. In re Estate of Morton v. Moore, 241 Kan. 698, 705, 769 P.2d 616, 621 (1987). A Totten trust is created by depositing money into a bank account as "trustee" for a named beneficiary. Id. at 701, 769 P.2d at 618. The beneficiary's right to the trust funds arises upon the depositor's death. Id. Kansas law therefore clearly permits payable on death bank accounts and Totten trusts.

In McCarty v. State Bank of Fredonia, 14 Kan. App. 2d 552, 795 P.2d 940 (1990), the Kansas Court of Appeals held that the beneficiary designation in a custodial IRA was void and invalid. Ralph McCarty named his brother Clarence as the beneficiary of his IRA. Id. at 553, 795 P.2d at 942. After Ralph's death, Ralph's surviving spouse, Mary, sued to have the IRA beneficiary designation declared invalid and to have the assets of the IRA become a part of Ralph's estate. Id. The court rejected Clarence's argument that Ralph's IRA should be treated as a payable on death account or a Totten trust under Kan. Stat. Ann. § 9-1215. Id. at 559, 795 P.2d at 945. Instead, the court treated Ralph's IRA as a revocable inter vivos trust and ordered that the IRA assets be distributed in accordance with Ralph's will, subject to Mary's right to receive one-half of the assets. Id. at 557, 561-62, 795 P.2d at 944, 947.

The Supreme Court later disapproved of the McCarty Court's invalidation of the entire IRA in Taliaferro v. Taliaferro, 252 Kan. 192, 843 P.2d 240 (1992). The Taliaferro Court stated that the portion of Ralph's IRA not subject to Mary's right to elect should have been distributed to Clarence rather than to Ralph's estate. Id. at 204, 843 P.2d at 248. The dicta in Taliaferro, however, was based on the Court's opinion that McCarty improperly expanded the elective share law. Taliaferro did not address the issue of whether an IRA beneficiary designation would be invalid as testamentary in nature.

In 1994, the Kansas Legislature adopted Section 301 of the Uniform Nonprobate Transfers on Death Act, the Uniform Transfer on Death Security Registration Act (Kan. Stat. Ann. §§ 17-49a01 to 49a12). This law allows the owner of a security to register the title in transfer-on-death form. Kansas therefore already permits those nonprobate transfers governed by Section 201 (pay-on-death bank accounts) and Section 301 (transfer-on-death security registrations) of the Uniform Nonprobate Transfers on Death

Act. By enacting a modified version of Section 101, the remaining section of the Act, the Kansas Legislature would remove any doubt as to the validity of provisions for nonprobate transfers contained in other instruments, such as IRAs, tax-sheltered annuity custodial agreements, Section 529 qualified state tuition program accounts, and retirement plans. House Bill 2082 would eliminate litigation like McCarty, and ensure that beneficiary designations are upheld as suggested in Taliaferro.

Note that Security Benefit's proposal would not affect a surviving spouse's right of election. In 1994, the Kansas Legislature adopted the "Redesigned Elective Share" under the Uniform Probate Code. Kan. Stat. Ann. §§ 59-6a201 to -6a217. Under the new law, a surviving spouse is entitled to a specified percentage of the decedent's "augmented estate," which includes nonprobate transfers to others. Had House Bill 2082 been the law at the time of McCarty, the proceeds of the IRA would have been payable to the IRA beneficiary, subject to spousal election, rather than payable to the decedent's estate, subject to spousal election.

Twelve states (Alaska, Arizona, California, Colorado, Kentucky, Michigan, Montana, Nebraska, New Mexico, North Dakota, Texas and Wisconsin) have already adopted Section 101 of the Uniform Nonprobate Transfers on Death Act (or identical provisions found at Section 6-101 of the Uniform Probate Code). Four other states (Idaho, Maine, South Carolina and Utah) have adopted the pre-1989 version of the Act. Four states (Connecticut, Louisiana, Massachusetts and Missouri) have adopted other legislation specifically designating certain nonprobate transfers as nontestamentary.

Impact: By designating certain nonprobate transfer provisions as nontestamentary, House Bill 2082 would ensure that instruments containing such provisions do not need to be executed in compliance with the formalities required for wills and do not need to be probated. Uniform Nonprobate Transfers on Death Act § 101 comment (1991). Adoption of this statute would (i) ensure that the legitimate expectations of contract holders would be satisfied and their beneficiary designations upheld as valid; and (ii) save life insurance companies and other financial institutions from possible litigation regarding the lawful payee of contract proceeds on the death of the contract holder.

2-27-01
att 3

JUDICIAL COUNCIL TESTIMONY
ON 2001 HB 2084
FEBRUARY 27, 2001

The Judiciary Committee of the House of Representatives requested that Judicial Council study the problem of how the justice system in Kansas can deal with individuals who allegedly commit crimes, but are incompetent to stand trial and not likely to become competent in the foreseeable future due to mental retardation or organic brain disease. Under the mental illness code, such a person cannot be involuntarily committed because retardation and organic mental disorder are excluded from the definition of "mentally ill person subject to involuntary commitment for care and treatment" as found at K.S.A. 2000 Supp. 59-2946(f)(1). The issue originally arose from concerns expressed by judges in correspondence sent to their Representatives and to the Chair of the House Judiciary Committee regarding individuals who had committed offenses but could not be held in custody because they were not competent to stand trial and could not be involuntarily committed because they did not meet the definition of being mentally ill. The judges felt these individuals continued to be a risk to the safety of others. Additionally, the Attorney General became concerned when a case arose regarding an elderly gentleman who committed murder, but could not be held because of organic brain disease.

Prior to the mental health reforms enacted in 1996, the applicable definition for involuntary commitment was defined as a person who was suffering from a severe mental disorder to the extent the person was in need of treatment, lacked the capacity to make an informed decision regarding treatment, and was likely to cause harm to self or others. In 1996, the definition was amended to read:

> (e) "Mentally ill person" means any person who is suffering from a mental disorder which is manifested by a clinically significant behavioral or psychological syndrome or pattern and associated with either a painful symptom or an impairment in one or more important areas of functioning, and involving substantial behavioral, psychological or biological dysfunction, to the extent that the person is in need of treatment.
>
> (f) (1) "Mentally ill person subject to involuntary commitment for care and treatment" means a mentally ill person, as defined in subsection (e), who also lacks capacity to make an informed decision concerning treatment, is likely to cause harm to self or others, **and whose diagnosis is not solely one of the following mental disorders: Alcohol or chemical substance abuse; antisocial personality disorder; mental retardation; organic personality syndrome; or an organic mental disorder.**
>
> (2) "Lacks capacity to make an informed decision concerning treatment" means that the person, by reason of the person's mental disorder, is unable, despite conscientious efforts at explanation, to understand basically the nature and effects of hospitalization or

Sn Jud
2-27-01
att 3

> treatment or is unable to engage in a rational decision-making process regarding hospitalization or treatment, as evidenced by an inability to weigh the possible risks and benefits.
>
> (3) "Likely to cause harm to self or others" means that the person, by reason of the person's mental disorder: (a) Is likely, in the reasonably foreseeable future, to cause substantial physical injury or physical abuse to self or others or substantial damage to another's property, as evidenced by behavior threatening, attempting or causing such injury, abuse or damage; except that if the harm threatened, attempted or caused is only harm to the property of another, the harm must be of such a value and extent that the state's interest in protecting the property from such harm outweighs the person's interest in personal liberty; or (b) is substantially unable, except for reason of indigency, to provide for any of the person's basic needs, such as food, clothing, shelter, health or safety, causing a substantial deterioration of the person's ability to function on the person's own.

The portion of the amended language which created this issue was the new language excepting from the definition of "mentally ill person" those who suffer from alcohol or chemical substance abuse, antisocial personality disorder, mental retardation, organic personality syndrome, or an organic mental disorder. Seemingly, this amendment furthered the policy of removing such individuals from institutions.

The issue was assigned to the Criminal Law Advisory Committee. The first step of the study was to begin an extensive review of the statutes of other states. This review revealed that each state's approach was resource driven. In some states, special institutions, facilities, or programs affiliated with institutions, or other specialized programs exist for the care and treatment of such individuals. Other states have well-funded and extensive guardianship programs that include resources for the close supervision of such individuals outside of an institution.

Such issues exceeded the scope of the assignment received from this committee. Therefore, the committee proposed an amendment which would return to basically the same definition as was in place before 1996, at least as it would relate to those who had allegedly committed a crime. The proposed amendment would eliminate the exception of alcohol or chemical substance abuse, antisocial personality disorder, mental retardation, organic personality syndrome or organic mental disorder from the definition of mental illness if the person otherwise met the definition and was likely to cause harm to self or others. While this amendment addresses the statutory problem, it diverges for these limited purposes from the policy decision made by the Legislature and generally endorsed by the mental health community to move individuals from custodial, institutional environments to the community.

THEODORE B. ICE
District Court Judge
Harvey County Courthouse
P.O. Box 665
Newton, Kansas 67114

JUDGES OF THE NINTH JUDICIAL DISTRICT
Harvey and McPherson Counties
ADMINISTRATIVE JUDGE
CARL B. ANDERSON, JR.
DISTRICT JUDGES
THEODORE B. ICE, Division I
RICHARD B. WALKER, Division II

TELEPHONE
(316) 284-6898
FAX Number
(316) 283-4601

December 1, 1997

Representative Garry Boston
614 N. Main
Newton, KS 67114

Representative Ellen Samuelson
Rural Route
Hesston, KS 67062

Senator Christine Downey
10320 N. Wheat State Rd.
Inman, KS 67546

Dear Representative Boston, Samuelson & Senator Downey:

Recently, both of the undersigned have had criminal cases before us that have caused a great deal of concern and have illuminated a problem which we, to date, cannot resolve.

In both instances the Defendants were charged with serious criminal offenses (aggravated indecent liberties with a minor). In both cases it became apparent that there was some mental problem and they were referred to Larned State Security Hospital for competency evaluations. The result of those evaluations were that the Defendants were not competent to stand trial and not likely to gain competency in the foreseeable future. The diagnoses were one of mental retardation. Because of this, under the law, the Defendants cannot be held on the charges to stand trial and must be discharged from the criminal proceedings. Because they do not meet the definition for mental illness no civil commitment proceedings can proceed.

We now have people in the community that cannot be tried for their criminal offenses, cannot be hospitalized, but are, in the opinion of the evaluators, likely to reoffend in the future.

We have struggled with these cases in an effort to protect the community. In one instance a guardian was appointed and in another instance the juvenile, prior to the criminal offense, had committed a juvenile offense and was in SRS custody. Both of the Defendants were placed at Northview. It was our understanding at the time they went to Northview, one by SRS placement and one by a guardian placement, that they would be supervised 24 hours a day.

We now discover that is not possible because Northview is not reimbursed in a sufficient amount to allow hiring 24 hour supervision. Both of the former Defendants have been seen around town, Judge Ice saw one of them at a football game with a group of girls and became concerned enough that he left the game to see where the former Defendant was. It was obvious that there was no one else watching him.

Both of these Defendants, having a chance of reoffending in a similar manner, present an enormous problem. It will be extremely difficult to explain to the family of any possible future victims why nothing can be done with the offenders.

There are numerous constitutional problems here. Neither of them have been found guilty of their offenses because they could not be tried. Neither of them fall under the definition of mental illness and therefore cannot be hospitalized. One is living in his home with services being provided by Northview. The other is living in an apartment of Northview's with two other men with some periodic supervision.

The situation seems to call for the creation of some new category which might be carved out such as was done in the instance of the sexual predator law; however, the obvious problem in this new situation is that the persons involved have not been convicted of criminal offenses.

The big question is, how can the community be protected from these individuals? A second big question is how can this category be treated?

One of the ways to approach the problem might be to modify the competency to stand trial provisions so that if there is a finding that the individual is not likely to become competent to stand trial that they could still be held in some secure setting with treatment nevertheless being provided in the hopes that they would become competent without a length of time on the treatment process. This could very well encounter constitutional objections as well, and that fact would need to be considered. The big concern in these cases is the professional judgment that the Defendants are likely to reoffend in the future so perhaps the new category could be created to be dependent upon whether or not the Defendant is likely to reoffend in the foreseeable future. This would be similar to the competency to stand trial statute that says they need to be released from the State Hospital if they are not likely to become competent to stand trial in the near future.

We would be happy to discuss this issue more fully with you at your convenience but feel that it is a serious problem that somehow needs to be addressed in an attempt to close this void.

Very truly yours,

Theodore B. Ice
District Judge

Sincerely,

Richard B. Walker
District Judge

Kansas Council on Developmental Disabilities

BILL GRAVES, Governor
DAVE HEDERSTEDT, Chairperson
JANE RHYS, Ph. D., Executive Director

Docking State Off. Bldg., Room 141, 915 Harrison
Topeka, KS 66612-1570
Phone (785) 296-2608, FAX (785) 296-2861

"To ensure the opportunity to make choices regarding participation in society and quality of life for individuals with developmental disabilities"

SENATE JUDICIARY COMMITTEE

February 27, 2001

Testimony in Regard to House Bill 2084. An Act Relating To criminal procedure; relating to competency to stand trial.

Mr. Chairman, Members of the Committee, I am appearing today on behalf of the Kansas Council on Developmental Disabilities regarding H.B. 2084, regarding criminal procedure. The Kansas Council is a federally mandated, federally funded council composed of individuals who are appointed by the Governor, include representatives of the major agencies who provide services for individuals with developmental disabilities, and at least half of the membership is composed of individuals who are persons with developmental disabilities or their immediate relatives. Our mission is to advocate for individuals with developmental disabilities, to see that they have choices in life about where they wish to live, work, what leisure activities they wish to do, and so forth.

I have served for the past two and a half years on the Kansas Judicial Task Force on Guardianship. During that time, the issue of how best to handle persons with developmental disabilities who have committed crimes was discussed in a joint meeting with the Judicial Council's Criminal Law Advisory Committee. However, the joint meeting occurred only once and I did not participate in further deliberations. The Kansas Judicial Council's response was a legal one that did not take into account the programmatic issues involved.

We have serious concerns about this bill that we have described below.

1. Kansas psychiatric hospitals are designed to treat people who have mental illness. They have neither treatment programs nor staff with expertise in treating persons with other conditions (mental retardation, traumatic brain injury, etc.). We would also question their expertise in treating individuals with dual diagnoses.

2. Kansas has been a leader in developing successful community based alternatives for people with mental retardation and other developmental disabilities. This bill would encourage the

placement of persons in state hospitals and significantly increase costs of providing services to people with disabilities.

3. This bill would treat persons differently depending upon the circumstances that resulted in the filing of the petition. One set of criteria applies if the petition is initiated by the family, another set of criteria applies if the petition is initiated by the court. Finally, in the Kansas Developmental Disabilities Reform Act, individuals with developmental disabilities and their families can choose from whom and where they receive services (K.S.A. 39-1802. Policy of state. It is the policy of the state to assist persons who have a developmental disability to have: (a) Services and supports which allow persons opportunities of choice to increase their independence and productivity and integration and inclusion into the community). This Bill appears to go against the philosophy found in the Act.

We do recognize that there is a very small population of individuals who commit crimes and for whom there currently appears to be no adequate intervention methods. We propose that this issue be studied by an interim committee, one that would include persons knowledgeable in the field of disabilities, to develop a response that will more sensibly meet the needs of these individuals and the community. This committee would develop a proposal that has the involvement of community service providers, self-advocates, family members, advocates, and other interested parties and would present it to you during the next legislative Session.

At the very minimum, involuntary commitment proceedings should only be used in case of very severe crimes, certainly not for misdemeanors. We are not opposed to persons who commit crimes paying a penalty for committing these crimes. However, when they are not responsible for their actions, we must look at the care and treatment that they have received. If it is not appropriate, we should hold those individuals who are in control of the person who committed the crime responsible for that individual's actions. If there is no legal party then the Secretary of social and Rehabilitation Services should be directed to immediately pursue guardianship proceedings so that there will be a legal guardian in charge of seeing that the person receives adequate care and treatment.

As always, we greatly appreciate the opportunity of appearing before you and would be happy to answer any questions you may have.

Jane Rhys, Ph.D., Executive Director
Kansas Council on Developmental Disabilities
Docking State Office Building, Room 141
915 SW Harrison
Topeka, KS 66612-1570
785 296-2608

S Jud 2-27-01 att 5

Kansas Department of Social and Rehabilitation Services

Janet Schalansky, Secretary

Docking State Office Building
915 SW Harrison, 6th Floor North
Topeka, Kansas 66612-1570

for additional information, contact:

Operations
Diane Duffy, Deputy Secretary

Office of Budget
J.G. Scott, Director

Office of Planning and Policy Coordination
Trudy Racine, Director

phone: 785.296.3271 ***fax:*** 785.296.4685

Senate Judiciary Committee
February 27, 2001

Testimony on House Bill 2084

Health Care Policy
Laura Howard, Assistant Secretary
785.296.3773

Sn Jud 2-27-01 att 5

Kansas Department of Social and Rehabilitation Services
Janet Schalansky, Secretary

Senate Judiciary Committee
February 27, 2001

Testimony on House Bill 2084

Thank you Chairman Vratil and members of the committee for the opportunity to appear before you today and offer this testimony on behalf of Secretary Schalansky.

My name is Laura Howard. I am the Assistant Secretary of Social and Rehabilitation Services, Division of Health Care Policy. The Department of SRS, among its other duties and services, operates Osawatomie State Hospital, Larned State Hospital, Rainbow Mental Health Facility and the State Security Hospital at Larned.

I speak today in opposition to HB 2084.

HB 2084 is clearly intended to address a difficult problem. The problem HB 2084 attempts to address arises when a defendant in a criminal proceeding has been found not competent to stand trial, but the reason for their incompetency stems from some problem other than mental illness.

Current law requires the court, when it finds someone not competent and not likely to be made competent by short term treatment, to order the Secretary of SRS to file a civil commitment petition on that person. It is the same type of petition that is filed in any other mental illness commitment proceeding. Of course, if the reason the person is not competent to stand trial is because of mental illness, this requirement makes sense.

The problem with HB 2084 is that not all persons who are incompetent to stand trial are mentally ill. Sometimes, the cause is mental retardation, or because of a brain injury, or the result of an addiction to alcohol or other drugs. Whatever the cause, SRS is still required to file the mental illness petition and attempt a commitment. We go through the motions in these cases, and the court hearing the mental illness petition applies the law from Chapter 59 of the Kansas Statutes Annotated, and finds that the person is not a "mentally ill person subject to involuntary commitment." The law defining criteria for commitment of a person with mental illness provides four criteria in making that determination:

1) does the person have a serious mental illness for which they are in need of treatment;

2) does the person lack the capacity to understand the nature of their illness and the need for them to receive treatment;

3) because of their illness and lack of understanding, are they therefore dangerous either to themselves or to others or to the property of another; and

4) is their illness not one of those conditions for which mental illness treatment will not help them. (An example is Mental Retardation. No amount of psychotherapy, no administration of psychotropic medications is going to make a mentally retarded person not mentally retarded.)

So, for example, if the person in question is a person with mental retardation, the mental illness petition is denied and dismissed. And, because the person is not competent to stand trial, the criminal charges are dismissed.

HB 2084 tries to address the problem by changing the civil commitment criteria. It eliminates criteria - 2 and 4 above and changes criteria 3 to be just some kind of dangerousness. It attempts to alter and expand the definition of "mental illness" for this purpose, and to use the definition for mental illness which the Chapter 59 statutes reserve for voluntary admissions to the hospital.

Specifically, this bill broadens the definition of who may be civilly committed when they are accused of a criminal offense, found incompetent to stand trial, and found unlikely to regain that competence. This bill would add at least the following persons to those who can be civilly committed: persons with alcohol or chemical substance abuse, antisocial personality disorders, mental retardation, organic personality syndrome, and organic mental disorders. These are the persons specifically exempted from the definition under K.S.A. 59-2946 (f)(1).

SRS opposes HB 2084 based on the following concerns:

1. HB 2084 is not limited to certain types of crimes. Even people charged with a minor misdemeanor could be found incompetent to stand trial and civilly committed to a state institution for a long period of time.

2. State psychiatric hospitals are for the treatment of mental illness. Individuals with other types of disabilities would receive no treatment or services that are specific to their needs.

3. There would be an increase in the number of individuals residing in our state institutions. Kansas has been very successful in developing community-based alternatives that are not only less costly but also more effective in the treatment of mental illness. This would be a step backwards and would encourage the use of state hospitals as "placements" for individuals who fall through the cracks of other systems.

4. HB 2084 may be unconstitutional because it treats individuals differently depending on what circumstances led up to the filing of the petition. For example, if a family calls a Community Mental Health Center when a loved one becomes threatening or causes some harm – and a civil petition ultimately is filed, one set of criteria apply. However, if a family calls 911 and law enforcement becomes involved and criminal charges are filed, we still end up at this civil petition stage. HB 2084 would impose a second and different set of criteria. Under current law, regardless of which call the family makes, the criteria for civil commitment is the same.

Committing individuals without a mental illness to state psychiatric hospitals is not the answer. These individuals need treatment or services specific to their disability, not to be warehoused in large and costly institutions. SRS would be glad to participate in discussions about a more workable solution.

Thank you for the opportunity to share our concerns, and I would be glad to answer any questions.

KANSAS ADVOCACY & PROTECTIVE SERVICES, INC.

3745 S.W. Wanamaker Rd.
Topeka, Kansas 66610
(785) 273-9661
(785) 273-9414 Fax

3218 Kimball Ave.
Manhattan, Kansas 66503
(785) 776-1541
(785) 776-5783 Fax
(877) 776-1541 TDD/Voice

James Germer, Executive Director

Sherry Diel, Deputy Director
Tim Voth, Attorney
Kari Ramos, Advocate
Lynn Cumbie, Advocate

Scott Letts, Deputy Director
Lori A. Davis, Attorney
Christy Walker, Advocate
Jim Griffin, Advocate

Michelle Rola', CFO
Michele Heydon, Advocate
Michael Goren, Advocate
Jai Sookram, Ph.D.

February 27, 2001

To: Senate Judiciary Committee
From: James L. Germer, Executive Director
Kansas Advocacy and Protective Services, Inc. (KAPS)
Re: House Bill 2084 regarding competency to stand trial

Thank you, Senator Vratil and members of the Committee, for this hearing regarding House Bill 2084. Kansas Advocacy and Protective Services, Inc., is a federally funded, private, non-profit corporation that is federally mandated to utilize legal, administrative and other appropriate remedies in advocating for protection of rights of individuals with disabilities.

We have grave concerns about HB 2084 for the reasons set forth below. We understand that there may be issues and frustrations where courts have criminal defendants with substance abuse problems, or who have antisocial personality disorders, mental retardation, organic personality syndrome, or organic mental disorders. We believe, however, that review of these complex issue can be best done by an interim committee. Too much is at stake for hurried consideration at this point.

Issues that will need to be considered include:

1) Contrary to the apparent prevalent belief, individuals with mental retardation (MR) are usually competent to stand trial. Individuals who work in the criminal justice field, including evaluating psychiatrists, may have little or no experience in the developmental disabilities field and so carry assumptions that these individuals who have MR are not competent. We can provide information showing that in some instances individuals with MR are *mistakenly thought not to be competent* to stand trial, whether by arresting officers, attorneys, courts, or evaluation personnel.

2) Use of diversion and individual justice plans. The Individual Justice Plan, or IJP, is an inter-agency approach to issues that arise when an individual with disabilities comes into contact with the criminal justice system. Its primary goal is to prevent incarceration of individuals with disabilities by giving them support services in the community. We would be happy to provide further information on IJP's.

3) The actual incidence rates where individuals without mental illness have been found not competent to stand trial, and further, the actual level of incidence where problems relating to public

safety result or where community based treatment providers refuse to assist with appropriate services and supports.

4) We strongly believe that the contemplated statutory changes are not constitutional and we are researching the issue. There have been a series of lawsuits against state mental health systems for inappropriately confining people with developmental disabilities or head injuries in state psychiatric facilities, even where these folks have been dually diagnosed as having a mental illness. It is our understanding that from a treatment perspective, a state psychiatric hospital is about the worst possible placement for persons with brain injuries.

We have strong concerns about whether placement of individuals other than having mental illness violates constitutional law (e.g, Equal Protection, Due Process, the Americans with Disabilities Act, Right to Treatment, Olmstead, Least Restrictive Environment, etc.). We are currently researching this issue, but have not had time to complete it by today. We would be happy to disseminate this research upon its completion. If the bill passes in its present form, however, we are concerned that we might have no choice but to initiate litigation to contest it.

5) The difficulty psychiatric treatment personnel will have in providing appropriate services and supports to individuals without mental illness.

6) The fact that mental retardation and organic disorders are relatively more permanent compared to mental illnesses and substance abuse. If an individual is not competent because of these disabilities, the individual is less likely to ever regain competency.

7) Cost and efficacy of treatment factors involved with institutionally based detention for individuals who do not have mental illness.

8) Procedural disparities between proposed HB 2084 and civil commitment. We agree with SRS: Under proposed HB 2084, if a petition for involuntary commitment is initiated by family, then one set of criteria applies; if it is filed as a result of criminal proceedings, another set of criteria applies.

9) The appointment of guardians. We believe that guardianship seldom, if ever, appropriate when used as a source of control for a person who chooses to behave in a disruptive or uncontrolled manner.

Should there be any questions or requests, please do not hesitate to contact us.

Respectfully submitted,

James L. Germer, J.D.
Executive Director

Testimony offered in opposition to HB 2084

To

The Senate Judiciary Committee

February 27, 2001

By

Stephen H. Feinstein, Ph.D.
President, National Alliance for the Mentally Ill of Kansas
Chairman, Kansas Mental Health Coalition

Sn Jud
2-27-01
att 7

Thank you, Mr. Chairman, for the opportunity to appear before you today to offer testimony on behalf of the National Alliance for Mental Illness of Kansas and the Kansas Mental Health Coalition.

My name is Stephen H. Feinstein and I am President of the NAMI Kansas Board of Directors and Chairman of the Kansas Mental Health Coalition. I have a doctorate in Psychology and a decade of experience in administration of state psychiatric and developmental disability hospitals. From 1993 to 1997 I was Superintendent at Osawatomie State Hospital. Prior to that I was Superintendent of the Eastern Oregon Psychiatric Center and the Eastern Oregon Training Center for people with developmental disabilities. I want to be very clear that I am neither a physician, a licensed clinical psychologist, nor an attorney. So, when I address issues relating to those disciplines I do so as an experienced and knowledgeable lay person. I am presently retired and continue to advocate for people with brain disorders that manifest as mental illness.

The position of the organizations that I represent is that HB 2084 is a retrograde answer to a serious community concern because it will:

- Negate Mental Health Reform by committing people to state hospitals when they can be better served in their communities;
- Violate people's liberty by allowing their inappropriate long term confinement in state hospitals;
- Require the development and maintenance of costly specialized state hospital treatment units; and
- Drain limited resources to provide a higher than necessary level of care;

Mental Health Reform

The process of Mental Health Reform in Kansas began a decade ago with the commitment of the Legislature to shift the focus of treatment of people with serious and persistent mental illness from the state hospitals to their home communities. Although the hospitals had already been downsized through a process called "deinstitutionalization", which began around 1955, they still accounted for the lion's share of the state mental health budget. It was recognized that many of the remaining hospital beds were occupied by people who could be better served in the community. With the advent of Mental Health Reform the hospitals' focus shifted from long term care to short term care. The new goals for our state hospitals were to stabilize the patient medically and behaviorally, establish an effective medication regime and provide a timely and seamless transition back into the community system of care.

The lynchpin of mental heath reform is that admission to a state hospital can only be accomplished by having the person evaluated by a Qualified Mental Health Professional (QMHP) attached to a mental health center. That is important for two reasons: 1. It assures that only those people who are mentally ill and need that level of care are admitted and 2. It assures that people who are admitted to a state hospital become the responsibility of a mental health center that will become part of their inpatient treatment

team. The latter is the only way the patient can be assured continuity of care and a timely discharge into appropriate community services.

Because the Mental Health Reform process worked well and significantly more effective antipsychotic medications became available, enough beds were take out of service to allow the closure of one of the three Kansas state hospitals. The money formerly used to support these beds was transferred to the community system of care. I am sure that you will hear from both consumers of mental health services and their providers of service, that this was a wise and appropriate course of action. At present, enough beds remain in the state hospitals to address the acute care needs of people who require public inpatient psychiatric care. At the same time, we are aware that this balance is tenuous and can be quickly lost if the state continues to lose community hospital beds or if state hospital beds are occupied by a new population of long term patients.

Inappropriate Confinement

HB 2084 adds the definition of mentally ill persons as contained in the Care and Treatment Act for Mentally Ill Persons to the Criminal Code Procedure. It then expands the definition of mentally ill persons to make it possible to involuntarily commit individuals who are found incompetent to stand trial and whose only mental disorder is alcohol or substance abuse, antisocial personality disorder, mental retardation, organic personality disorder, or organic mental disorder. The bill is a return to the status quo ante 1996.

On January 31st of this year the Judicial Council testified to the House Judiciary Committee regarding HB 2084. They said that the concerns of the judges who requested this change in statute related to people with mental retardation or organic brain disorder who committed a crime. They were concerned for the safety of the community because these individuals could not be held in custody since they were incompetent to stand trial and could not be involuntarily committed because they did not meet the definition for mental illness. The Attorney General was also concerned because an elderly man who committed murder could not be held because of organic brain "disease".

People with the sole diagnosis of alcohol and substance abuse, antisocial personality disorder and organic personality disorder were not an issue for the judges or the Attorney General. These diagnostic categories have been included in the bill because they were included prior to 1996. No specific arguments or evidence has so far been presented that they represent a significant population of people who present to the court as incompetent to stand trial and not likely to become competent in the foreseeable future. These diagnoses should be amended out of the bill.

As a former superintendent of a state facility for people with developmental disabilities I can tell you that there is irrefutable evidence that even the most severely developmentally disabled person with mental retardation can live in and be part of the community. However, it requires timely, adequate and appropriate support to make this possible. If

that person breaks the law and is not competent to stand trial, the goal of the state ought to be the same as that for other people who break the law. That is, to help them change their behavior and maintain their place in the community. It ought not to be to confine them for the rest of their life. Which is what will happen if HB2084 becomes law.

The Organic Brain Disorders referred to in the case of HB 2084 are the result of damage to the association cortical areas of the brain that is severe and widespread enough to cause dementia. The dementia can be either static, the result of a one-time event, or progressive, the result of continuing insult to the brain. The sources of damage are varied and can include, for example, head trauma, infarcts (clots) to the brain, age-associated deterioration, chronic hydrocephalus, AIDS, Alzheimer's disease, Huntington's disease, drug and/or alcohol abuse, and a long list of other diseases.

Why should we not put people with dementia in hospitals? Simply put, **dementia is untreatable and the function of hospitals is to deliver high intensity treatment.** Osawatomie State Hospital does have a Geriatric unit and at the time I was Superintendent there they had a number of demented patients. While these patients received excellent care, they could have received the same care in a nursing home. The problem was that no nursing home would take them because they were sometimes violent, or aggressive, or noisy and they needed a lot of nursing care. The nursing home industry ought to be encouraged to serve this population by providing adequate payment incentives and appropriate statutory language. It does not make fiscal or medical sense to commit people to a state hospital for treatment of organic brain disorders.

In light of the foregoing we believe that confinement of people with developmental disabilities or organic brain disorders in a state hospital when there is no possibility of changing their mental status is a sham. It is certainly an unjustifiable taking of their liberty. We believe it would violate their constitutional rights and we would consider joining with other advocates in a lawsuit against the state if HB 2084 becomes law.

Specialized State Hospital Treatment Units

We would like to suggest that the Legislative Services Fiscal Note for House Bill 2084 does not convey the full potential fiscal impact of the bill. The report does speak to the cost of building two additional 30-bed units in a new State Security Hospital at Larned. That amount is $8.0M from all funding sources. They also project that, "If the two additional units were filled, the total operating costs would be approximately $3.5M each year." You need to know that approximately 85% of the costs of operations of your state hospitals are staff related and certain minimum staffing levels are required, whether or not any unit is full. The Legislature will have to fund these units at the full amount, if it creates them. No doubt they will fill over time because there will be very few, if any, discharges. However, in the meantime, the hospital will not be able to reduce the cost of these units by using them for the general population as well as the HB 2084 population. The two populations cannot be safely mixed.

In the event that HB 2084 becomes law it will be necessary to open specialized units at Osawatomie State Hospital (OSH) and Larned State Hospital (LSH) to house the new populations of patients. That raises the following issues:

1. It is not possible to safely mix people with developmental disabilities with higher functioning people with mental illnesses who may take advantage of them;
2. The nursing care requirements for these populations of patients are different from those of the general population of the hospital. Therefore it will be necessary to develop and maintain new specialized treatment teams in addition to existing hospital staff;
3. People with developmental disabilities and people with dementia do not do well in large busy congregate living situations. Therefore Osawatomie State Hospital and Larned State Hospital will have to operate small, state of the art, special units designed to meet the needs of these patients; and
4. Over time the number of beds for this population will have to be increased. This is the case because these disorders do not respond to treatment and the likelihood of discharge from the facility is nil.

We suggest that the fiscal impact of HB 2084 must also take into account the cost of serving alleged misdemeanants in special units at OSH and LSH. From my experience at OSH I think it would not be unreasonable to project operating costs for these units at least as high as those proposed for the State Security Hospital. Furthermore, 30 bed units for this population are not appropriate and much smaller units are more expensive to build and operate. The Fiscal Note obviously underestimates the cost of HB 2084.

Draining Mental Health Resources

Mental Health Reform created a partnership between consumers of services, providers of services, local governments and state government that recreated and reenergize the Kansas mental health services system. Over the last decade we have worked together to build an effective community system of services while maintaining our capacity to provide appropriate inpatient care. The Legislature has been generous in its funding and support of expanded community services. Without that support we could not have achieved or maintained Mental Health Reform.

We view HB 2084 as a serious threat to the continued fiscal support necessary to adequately serve Kansans with mental illness. We recognize that there is a finite pool of dollars available to meet all the needs of the people of this state and we know that every year the Legislature struggles with short falls in revenue and endless needs that demand attention. We fear that the dollars that are identified to pay for HB 2084 will come at the cost of losing programs that are critical to people with mental illness. This is especially troubling because we know that these dollars will not have any positive impact on the lives of the target populations. Million of dollars will be spent to confine people rather than to address their problems with appropriate care and support in the community.

Exploring Alternatives

The concerns of the Judiciary and the Attorney General are valid and should be addressed. We know that the behavior of alleged misdemeanants and felons can be so dangerous and so destructive that the community has a legitimate reason to fear for its safety. Sometimes the repetitive nature but not the severity of the illegal behavior causes community anger and alarm. In most cases the defendant is competent to stand trial and suffers the natural consequences of his/her action.

But when a person's mental disability is severe enough to make them incompetent to stand trial they are probably not able to benefit from those consequences. Nonetheless, with effective intervention and supervision by well-trained caregivers most can avoid repeating illegal behavior. In cases where close daily supervision and nursing care are necessary to avoid dangerous or destructive behavior, the person ought to be able to access services in a community nursing facility.

We believe that a Legislative task force or an SRS task force composed of representatives of the Judiciary, SRS, interested advocacy organizations and consumers of services ought to be charged with the task of identifying alternative ways to address the problem identified by the drafters of HB 2084. The Task Force should report their findings to this committee in time for it to draft legislation for the 2002 session of the Legislature. We believe that the task force should consider, at least, the following alternatives:

- Expand the mission, staffing, and capacity of the DD/MH Dual Diagnosis Unit at Parsons State Hospital;
- Explore the creation of regional three to five bed support houses staffed with DD training specialists that would admit people in community crisis for up to 30 days. Admission would require a legal and binding contract between the person in crisis, the community service provider, and the person's landlord or other housing provider to provide specific training with specified outcomes. The contract must require that service provider work with the house staff and maintain regular contact with the houseguest. It must require that the houseguest's community home or living arrangement will be maintained in his or her absence. Finally it must specify that the houseguest will come voluntarily to the support house and will work diligently on the tasks agreed to in the contract.
- SRS should work with representatives of the nursing home industry to develop a cadre of nursing homes with programs designed to serve people with Organic Mental Disorders who have exhibited illegal or dangerous behavior. Consideration should be given to developing a payment structure that makes this type of service attractive to nursing homes.
- A community mediation service specifically designed to address conflicts between disabled individuals and their neighbors should be sponsored by the courts. All parties to the conflict should be involved in the negotiations. Agreements reached, as a result of the mediation, should be binding on all the parties.

- If a disabled individual has committed a misdemeanor or a felony and is found incompetent to stand trial, the Court should have the authority to order an independent audit of the person's support services and living arrangement. The court should require the service provider to make available such services and changes in living environment as are necessary to allow the defendant to live peacefully in the community.

In conclusion, HB 2084 is badly flawed, inordinately costly, and violates the constitutional rights of disabled Kansas citizens. We urge you not to pass this bill.

att 5

KANSAS

Bill Graves
Governor

DEPARTMENT OF HUMAN RESOURCES
Kansas Commission on Disability Concerns

Richard E. Beyer
Secretary

Mission Statement: The Kansas Commission on Disability Concerns believes that all people with disabilities are entitled to be equal citizens and equal partners in Kansas society

TESTIMONY TO SENATE JUDICIARY COMMITTEE
Tuesday, February 27, 2001
by Sharon Huffman, Legislative Liaison

Thank you for the opportunity to testify in opposition to HB 2084. The Kansas Commission on Disability Concerns (KCDC) is an advisory commission that provides information and education to the legislature and governor on issues of importance to Kansans with disabilities. The mission statement of KCDC is: The purpose of the Kansas Commission on Disability Concerns is to involve all segments of the Kansas community through legislative advocacy, education and resource networking to ensure full and equal citizenship for all Kansans with disabilities.

KCDC understands the problems that some jurisdictions throughout the state are having with certain individuals who might be considered to be a menace to society. We don't believe that the problem can best be solved by institutionalizing individuals who would be better served in the community. Today you have heard testimony from KAPS about the potential violation of an individual's right to be served in the most integrated setting. KCDC and many others worked for years to reduce the population in state institutions, then worked to get some of them closed completely. What is being proposed in HB 2084 would only result in the need to increase beds at the State Security Hospital in Larned. It would not solve the problem of how best to provide services in the most integrated setting for individuals with organic mental illness.

We respectfully suggest that you consider recommending this issue for an interim study and not pass this bill.

1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1877
Voice (785) 296-1722 • TTY (785) 296-5044 • Fax (785) 296-0466
toll free outside Topeka 1-800-295-5232 • TTY toll free 1-877-340-5874 • adabbs.hr.state.ks.us/dc

Sn Jud
2-27-01
att 8

Association of Community Mental Health Centers of Kansas, Inc.
700 SW Harrison, Suite 1420, Topeka, KS 66603-3755
Telephone (785) 234-4773 Fax (785) 234-3189
Web Site: www.acmhck.org

Testimony to the Senate Judiciary Committee
Presented by Ellen Piekalkiewicz
February 27, 2001

The Association of Community Mental Health Centers (CMHCs) opposes HB 2084.

CMHCs are the entities that are statutorily responsible for admission to state hospitals and discharge planning from the state hospitals. As result of Mental Health Reform, SRS provides through contract a maximum number of state hospital bed days the CMHC can access.

H.B. 2084 would expand the definition of mentally ill to include individuals who have a brain injury, are mentally retarded or have a substance abuse addiction. CMHCs are therefore, concerned that the result of this policy is that CMHCs could became responsible for individuals that they have no expertise serving, meaning individuals who do not have a mental illness. It could also mean that individuals that are not mentally ill would occupy already scare state psychiatric hospitals beds for long periods of time.

The change in the definition of mentally ill was changed in 1996 because the State of Kansas was pursuing a policy of serving individuals with disabilities in their communities. The individuals that this bill would effect can be served appropriately in custodial or supportive community-based settings if funding was made available.

As you are aware, the state fiscal note for this bill is $8 million for construction for additional capacity which will needed if bill becomes law and $3.5 million in additional funds for annual operating costs. Institutional care is not only the most expensive type of care but inappropriate for most individuals. Prior to Mental Health Reform and DD Reform many individuals were sent to the state hospitals for the rest of their lives.

H.B. 2084 is only one solution to the problem and an expensive one.

We request that a Task Force be established including all relevant stakeholders such as members of the Judicial Branch, SRS, Community Developmental Disability Organizations, Community Mental Health Centers, consumers, families and law enforcement to spend time seeking solutions that are more appropriate. The issue for the courts is obviously a real one. The solution proposed, however, solves one problem by creating an even bigger one for the mental health and other systems.

Thank you for this opportunity to testify in opposition to H.B. 2084.

Sen Jud 2-23-01 att 9

KADSPA

Kansas Alcohol and Drug Service Providers Association, Inc.

LEGISLATIVE TESTIMONY

TO: Chairman John Vratil and Members of the Senate Judiciary Committee

FROM: Dan Hermes, Kansas Alcohol and Drug Abuse Service Providers Associations

DATE: February 27, 2001

SUBJECT: HB 2084

Mr. Chairman and Members of the Committee, my name is Dan Hermes and I represent the Kansas Alcohol and Drug Abuse Service Providers Association.

I appear today in opposition to HB 2084. As you have heard, the definition of mentally ill persons as contained in the Care and Treatment Act for Mentally Ill Persons is added to the Criminal Procedure Code under HB 2084.

Specifically, the bill broadens the definition of who may be civilly committed to persons with substance abuse problems, mental retardation or organic mental disorders.

The only state security hospital is the SRS hospital at Larned. This facility is already too small to meet the state's current needs and does not currently provide treatment for substance abuse problems or for the mentally retarded. This bill would require a significant investment in construction, operation and programming in order to deal with the increased number of individuals receiving evaluation and treatment as well as the involuntary commitments that result. The Division of the Budget fiscal note on HB 2084 estimates $8.0 million in construction costs and $3.5 million in operating expenditures assuming the need for 30 additional beds.

Second and more important, this bill is a large step backward in terms of treatment and in terms of the rights of people with disabilities and substance abuse problems. Committing individuals without mental illness to state psychiatric hospitals is not the answer to addressing the problem that this bill attempts to correct. These individuals need treatment and services specific to their disability or problem, not to be warehoused in large and expensive institutions.

I thank the committee for its time and attention and would stand for any questions.

700 S.W. Harrison, Suite 1420, Topeka, Kansas 66603 * Telephone 785-234-4160 * Fax 785-234-3189

Milt Fowler, President * Natalie Meugniot, Managing Officer * Dan Hermes, Governmental Relations Officer

Sen Jud
2-23-01
Att 10

SELF-ADVOCATE COALITION OF KANSAS

2518 RIDGE CT #236
LAWRENCE, KS 66046

Toll-free 1-888-354-7225
FAX 785-843-3728
e-mail SACK@grapevine.net
http://www.grapevine.net/~thearcdc/SACK/

Members of the Senate Judiciary Committee:

I represent the Self-Advocate Coalition of Kansas, a consortium of advocacy groups from across the state. All the members of these self-advocate groups are people with developmental disabilities like myself. We do not want people with developmental disabilities to be ordered into mental hospitals or institutions.

Most people with developmental disabilities know their rights and can participate in their own defense if they are accused of doing something wrong. People with developmental disabilities should face the consequences of their actions and get the help they need, not be sent to an institution that does not provide the correct services and that cannot help them.

The first thing that should happen if a person with a developmental disability is sent to the court is to determine if the person is getting the proper supports in his or her community. If the person's current supports are not adequate, there are ways within the system to improve those supports. A judge should determine whether a person has a developmental disability and make the appropriate referral to the service provider in the community not just send the individual to an institution or a state hospital.

Not all judges understand developmental disabilities. Judges may not understand that community service providers are required to provide the supports that each person needs to stay in their community successfully. Some may confuse developmental disabilities with mental illness if the law does not require them to examine each person individually.

We understand that judges want to make it easier to get treatment for people who need it. However, changing the law so people with developmental disabilities can be institutionalized is not the way to do it.

Respectfully submitted,

Kathy Sue Lobb
Legislative Liaison

Sn Jud
2-23-01
att 11

Kansas Association of KACIL Centers for Independent Living

February 27, 2001

Gina McDonald
President/CEO

Member Agencies:

Center for Independent Living for Southwest Kansas
Garden City, KS
316/276-1900 Voice

Coalition for Independence
Kansas City, KS
913/287-0999 Voice/TT

ILC of Northeast Kansas
Atchison, KS
913/367-1830 Voice

ILC of Southcentral Kansas
Wichita, KS
316/942-6300 Voice/TT

Independence, Inc.
Lawrence, KS
785/841-0333 Voice
785/841-1046 TT

Independent Connection
Salina, KS
785/827-9383 Voice/TT

LINK, Inc.
Hays, KS
785/625-6942 Voice/TT

Prairie Independent Living Resource Center
Hutchinson, KS
316/663-3989 Voice

Resource Center for Independent Living, Inc.
Osage City, KS
785/528-3105 Voice

Southeast Kansas Independent Living, Inc.
Parsons, KS
316/421-5502 Voice
316/421-6551 TT

The Whole Person, Inc.
Kansas City, MO
816/561-0304 Voice
816/531-7749 TT

Topeka Independent Living Resource Center
Topeka, KS
785/233-4572 Voice/TT

Testimony
to the
Senate Committee on Judicary
regarding
House Bill 2084

By Mike Oxford
Kansas Association of Centers for Independent Living

Centers for Independent Living (CILs) are private-not-for-profit organizations run by and for people with disabilities. This means that the majority of the each center's board of directors must be people with a variety of disabilities and that a majority of the staff including management must be people with disabilities. Thus centers speak not only for people with disabilities, but as people with disabilities.

Fundamental to the philosophy of independent living is the notion that all people regardless of age or type or severity of disability are equal under the law and have the right to live and participate in community and community life. With the right to participate, however, comes responsibility. Rights and responsibility go hand in hand. All citizens should know that actions entail consequences regardless of the presence of a disability. If people with disabilities commit crimes then the trial process and the punishment should be the same as for those without disabilities who commit similar crimes.

If people accused of crimes cannot be brought to trial due to incompetence and if the same people cannot be committed for treatment and rehabilitation thus resulting in dismissing charges, then there is a problem that clearly needs to be fixed.

The Kansas Association of Centers for Independent Living believes that the purpose of involuntary commitment should be to provide appropriate treatment, training and rehabilitation so that people, regardless of their disability, understand what the nature of trial process is and why they have been charged with a crime. Referrals should be made to institutions both public and private and to community based treatment and rehabilitation programs that are equipped and appropriate to meet the treatment, training and rehabilitation needs of the individual with the disability so that individual can participate in the criminal trial process and if convicted understand why they're being punished, or so that society can reasonably expect the criminal behavior to stop. If the individual really cannot understand right from wrong and cannot learn to stop criminal behavior, then that individual must necessarily lose certain rights to freedom either from being institutionalized or from being otherwise restricted from community life.

1423 West Crawford ◆ Salina, KS 67401 ◆ Voice/TT: 785/825-2675 ◆ Fax: 785/825-7029
Capitol Office ◆ 501 Jackson, Suite 450 ◆ Topeka, KS 66603-3373 ◆ Voice/TT: 785/233-4550 ◆ Fax: 785/233-4231

Sen Jud
1-23-01
att 12

Centers for Independent Living demand equality and full participation for all people with disabilities. With this demand comes acceptance of responsibility and understanding about consequences for actions and behavior, including criminal behavior. Involuntary commitment should not be a facile panacea for the legal system to avoid accommodating people with disabilities. It should not be a catchall for any and all situations. The legal system must ensure that all who should be brought to the bar of justice are so brought regardless of the nature or severity of the disability. Expanding involuntary commitment may be a useful tool in some cases – better than dismissing charges and doing nothing. It needs to be used carefully and appropriately so that people with disabilities may benefit from learning from mistakes and society knows that nobody gets off scott free from criminal behavior. On the other hand, long involuntary commitments for relatively minor crimes like stealing a candy bar would seem excessive when training combined with a more or less restrictive community program would probably serve the purpose better and a lot cheaper.

KACIL suggests that the way to solve this problem would be to make a range of alternatives available depending on the individual's circumstances, and the nature of the crime. One size fits all or setting up a dichotomy will never work. Judges probably do need more discretion for making involuntary commitments in certain cases. However, if involuntary commitment is the only option between a trial and dismissing charges, then justice will not be served, nor will society's best interests, nor will people with disabilities' interests. KACIL recommends that judges be given a range of involuntary commitment options ranging from more or less restrictive community based programs and community service to institutional placement and "doing time". The purpose and the length of the commitment, in any case, would be the same. The person would gain capacity to understand right from wrong and would stand trial or society could reasonably expect the behavior to have stopped.

As written, House Bill 2084 paints with too broad a brush and for that reason is not supported. If amended as suggested above, then it would be make good policy.

Thank you for considering the remarks of centers for independent living.