

MINUTES OF THE SENATE JUDICIARY COMMITTEE.

The meeting was called to order by Chairman John Vratil at 9:35 a.m. on March 10, 2003, in Room 123-S of the Capitol.

All members were present except: Senator Haley (E)

Committee staff present: Mike Heim, Kansas Legislative Research Department
Lisa Montgomery, Office of the Revisor of Statutes
Dee Woodson, Committee Secretary

Conferees appearing before the committee:

Sheila Reynolds, Kansas Judicial Council
Denise Everhart, Acting Commissioner, Juvenile Justice Authority

Others attending: see attached list

HB 2035 - Children in need of care; right to counsel

Chairman Vratil opened the hearing on **HB 2035**. Sheila Reynolds, Professor at the Washburn Law School, testified on behalf of the Kansas Judicial Council in support of **HB 2035**. Ms. Reynolds said there was ambiguity in KSA 38-1505(a), which provides that courts must appoint an attorney for a child alleged to be in need of care, to serve as the child's guardian *ad litem* (GAL). She explained that most attorneys believe that the statute means the GAL must represent not the child, but the best interests of the child, as determined by the GAL. She added that the Kansas Supreme Court interprets the statute this way in its Guidelines for Guardians Ad Litem, which state that the GAL must determine the best interests of the child, present all relevant facts to the court, and make recommendations to the court, which may vary from what the child desires.

Ms. Reynolds stated that if the legislature intends that the appointed lawyer serve as a GAL, the statute should be amended to remove the ambiguity by adding the phrases "represent the best interests of the child" in subsections a and d. She said there was no cost in clarifying the role of the attorney. She added that the interests of children are better served by providing the judges who must decide how to protect them with the best information and ideas available. Ms. Reynolds said this proposed bill just seeks to clarify what most people understood what the role to be so there will not be confusion over that. She stated that there should be a provision in the bill that if the GAL disagrees with the child's position, the GAL should be required to inform the court of what the child's position is, so the child's wishes can be factored into the judge's decision. (Attachment 1)

Committee discussion regarded questions pertaining to the House amendment in section 1, which deleted lines 24 through 29, but required the reporting to the court when there is a conflict and did not give any guidance to the court as to what to do afterwards.

The Chair closed the hearing on **HB 2035**.

HB 2015 - Modification of sentence of juvenile offender by the court based on medical condition

Chairman Vratil opened the hearing on **HB 2015**. Denise Everhart, Acting Commissioner for the Juvenile Justice Authority, testified in support of **HB 2015**. She explained that this bill will allow sentence modification, based on a serious medical condition, of the juvenile offender sentenced to a juvenile correctional facility. She said that this bill will allow for the Commissioner to apply through the sentencing judge for a sentence modification based on a serious medical condition at any time during an offender's incarceration in a juvenile correctional facility. (Attachment 2)

The Chair noted that the fiscal note on this bill indicated that there could be a positive bed space impact. (Attachment 3)

Final action on:

SB 195 - Kansas Parole Board; membership reduced to three

Chairman Vratil reviewed **SB 195**, and brief discussion was held regarding possibly cross referencing to another statute regarding two members constituting a quorum. The Revisor advised there was no need to

CONTINUATION SHEET

MINUTES OF THE SENATE JUDICIARY COMMITTEE on March 10, 2003 in Room 123-S of the Capitol.

cross reference.

Senator O'Connor moved to delete lines 18 through 27 on page two of the bill as it was not needed. The motion was seconded by Senator Umbarger, and the motion carried.

Senator Oleen asked for language clarification regarding page 1, lines 39 and 40 relating to the confirmation process. The Chair stated he thought the sentence was unnecessary as requested staff to find out why the sentence was added. He also suggested that staff look at other statutes dealing with other appointed bodies to see if the language in this bill is consistent with language in those other statutes. Chairman Vratil said the Committee would hold up final action on this bill until staff had furnished the requested information.

SB 243 - Uniform controlled substances act schedule IV substances

Chairman Vratil reviewed **SB 243**. Senator Schmidt said he had a proposed amendment and explained the purpose of the amendment was to return the law regarding the relationship between K.S.A. 65-4150 and K.S.A. 65-7006 to the situation that existed before the 2002 Kansas Court of Appeals decision in *State v. Frazier*. He said the proposed amendment was contained in **HB 2317**. He distributed copies of a proposed amendment to the bill, and said his amendment was the italicized language on lines 28 through 32, and only changes the definition of drug paraphernalia to make clear that the general definition of drug paraphernalia does not include the same items in the methamphetamine statute. (Attachment 4)

Following Committee discussion and questions, Senator Schmidt stated he would obtain a bed impact report from Barbara Tombs, Kansas Sentencing Commission, and other information that might be pertinent to this discussion before taking final action on this bill. Chairman Vratil stated that the Committee would not take action on this bill today in order to allow time to study the proposed amendment.

SB 197 - Alcoholic beverages; furnishing to and consumption by persons under age 21

Chairman Vratil reviewed **SB 197**, and explained that the bill had two separate and distinct aspects. He said one of them was to increase the penalty for a minor in possession, and to stair step that penalty, i.e. on a first conviction a driver's license would be suspended for 30 days, on a second conviction it would be 90 days, and on a third conviction the suspension would be for one year. He stated that portion of the bill did not get much discussion during the hearing so it appeared to be acceptable to the Committee members. The Chair stated that the controversial aspect of this bill appears to be on page 1, which deletes lines 35 through 37, and he was proposing to leave the stricken language on page 1, lines 35 through 37, and remove the strikeout on page 2, lines 35 through 39. He called for discussion on this proposed amendment. Senator O'Connor said she would like to see some more work done on the bill to make sure it is correct before sending it out of Committee. After considerable discussion, the Chair announced that the Committee would continue to work this bill at a later meeting.

The meeting was adjourned at 10:30 a.m. The next scheduled meeting is March 11, 2003.

JUDICIAL COUNCIL TESTIMONY ON HOUSE BILL 2035
Professor Sheila Reynolds, Washburn Law School

The First Problem

There is ambiguity in KSA §38-1505(a), which provides that courts must appoint an attorney for a child alleged to be in need of care, to serve as the child's guardian *ad litem* (GAL). The statute at one point states:

The guardian ad litem shall make an independent investigation of the facts upon which the petition is based and shall appear for and **represent the child**.

Most attorneys believe that the statute means the GAL must represent not the child, but the best interests of the child, as determined by the GAL. The Kansas Supreme Court interprets the statute this way in its Guidelines for Guardians Ad Litem, which state that the GAL must determine the best interests of the child, present all relevant facts to the court, and make recommendations to the court, which may vary from what the child desires.

However, because of the words bolded above, some lawyers believe that KSA §38-1505 means that the GAL must represent the child in a traditional attorney-client relationship, with a duty of protecting the confidences of the child-client and of advocating the decisions made by the child-client. The ethical regulations for attorneys do not permit an attorney to play both roles at the same time. If the attorney represents the child, the attorney must protect the confidences of the child and is forbidden to report confidential relevant facts to the court. If the attorney represents the child, the attorney must advocate for the wishes of the child, even though the attorney has formed an opinion that the child's wishes are not best for the child and that the judge should in fact make a decision different from what the child wants.

Solution. Serving as a GAL for a child in need of care is a difficult endeavor which can best be done if expectations are clear. If the legislature intends that the appointed lawyer serve as a GAL, the statute should be amended to remove the ambiguity by adding the phrases "**represent the best interests of the child**" in subsections a and d. There is no cost in clarifying the role of the attorney. The interests of children are better served by providing the judges who must decide how to protect them with the best information and ideas available.

The Second Problem

If the GAL disagrees with the child's position, the GAL should be required to inform the court of what the child's position is, so the child's wishes can be factored into the judge's decision. Although many GAL's do that, there is not a requirement in the law to do so. Subsection a adds that requirement.

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IN THE SUPREME COURT OF THE STATE OF KANSAS

ADMINISTRATIVE ORDER NO. 100

RE: GUIDELINES FOR GUARDIANS AD LITEM

The Supreme Court guidelines are recommended for the representation of children by guardians *ad litem* in cases pursuant to the Kansas Code for the Care of Children, K.S.A. 38-1501 *et seq.*; the Parentage Act, K.S.A. 38-1110 *et seq.*; and Domestic Relations, K.S.A. 60-1601 *et seq.* unless departure is authorized by the presiding judge or designee for good cause shown.

The appointing judge or designee should:

- 1) issue an Order appointing the guardian *ad litem* on a form substantially as attached, and
- 2) insure compliance with this Administrative Order.

A guardian *ad litem* should:

1) Conduct an independent investigation consisting of the review of all relevant documents and records including those of social service agencies, police, courts, physicians (including mental health), and schools. Interviews either in person or by telephone with the child, parents, social workers, relatives, school personnel, court appointed special advocates (CASAs), caregivers, and others having knowledge of the facts are recommended. Continuing investigation and ongoing contact with the child are mandatory.

2) Determine the best interests of the child by considering such factors as the child's age and sense of time; level of maturity; culture and ethnicity; degree of attachment to family members, including siblings; as well as continuity, consistency, permanency and the child's sense of belonging and identity.

3) File appropriate pleadings on behalf of the child. Appear for and represent the child at all hearings. All relevant facts should be presented to the court, including the child's position. If the child disagrees with the guardian *ad litem*'s recommendations, the guardian *ad litem* must inform the court of the disagreement. The court may, on good cause shown, appoint an attorney to represent the child's expressed wishes. If the court appoints an attorney, that individual serves in addition to the guardian *ad litem*. The attorney must allow the child and the guardian *ad litem* to communicate with one another but may require such communications to occur in the attorney's presence.

4) Provide reports at every hearing, such reports being written or oral at the discretion of the judge.

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5) Explain the court proceedings and the role of the guardian ad litem in terms the child can understand.

6) Make recommendations for specific appropriate services for the child and the child's family.

7) Monitor implementation of service plans and court orders.

8) Participate in prerequisite education prior to appointment as a guardian *ad litem* which consists of not less than six (6) hours including one (1) hour of professional responsibility, and participate in annual continuing education consisting of not less than six (6) hours. Areas of education should include, but are not limited to, dynamics of abuse and neglect; roles and responsibilities; cultural awareness; communication and communication with children skills and information gathering and investigatory techniques; advocacy skills; child development; mental health issues; permanence and the law; community resources; professional responsibility; special education law; substance abuse issues; school law; and the code for the care of children. Such hours of continuing education, if approved by the Continuing Legal Education Commission, shall apply to the continuing legal education requirements of Supreme Court Rule 802 and the minimum total hours annually required by that rule are not modified by these guidelines. The appointing judge or designee shall have the authority to approve the prerequisite education and continuing education not otherwise approved by the Continuing Legal Education Commission. Guardians ad litem shall be responsible for maintaining a record of their own participation in prerequisite and continuing education programs. Upon the request of the appointing judge or designee, the guardian ad litem shall be required to provide evidence of compliance with this order. Such prerequisite education may be waived by the appointing Judge or designee upon showing of a need for emergency temporary appointment. The educational requirements shall be completed within six (6) months of appointment. These educational requirements shall not be effective for a period of six (6) months from the date this order is adopted by the Supreme Court.

By order of the Court, this 7 day of march, 2002.

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ORDER APPOINTING GUARDIAN AD LITEM

IN THE DISTRICT COURT OF _____ COUNTY, KANSAS

JUDICIAL DISTRICT

In the Interest of

Case No. _____

ORDER APPOINTING GUARDIAN AD LITEM

NOW on this _____ day of _____, _____, it is ordered that
_____, a duly qualified practicing attorney in _____
County, Kansas, is hereby appointed as guardian *ad litem* for the above-named minor.

1. The guardian *ad litem* shall be served with copies of all pleadings and other papers filed herein. The guardian *ad litem* shall comply with all the guidelines of Kansas Supreme Court Administrative Order No. _____.

2. Upon presentation of a certified copy of this Order to any agency, organization, person or office, including the Clerk of this Court, any school personnel, any drug or alcohol treatment provider, any police department or other law enforcement agency, any pediatrician, psychologist, psychiatrist, hospital, mental health treatment facility or other medical or mental health care provider or any social worker or social welfare agency, the aforementioned shall be permitted to communicate orally or in writing with the guardian *ad litem* about any records or treatment relating to the minor child and/or the minor child's parents, and the aforementioned shall permit the guardian *ad litem* to inspect and copy any such records. The guardian *ad litem* shall maintain any information received from any such source as confidential and shall not disclose the same except in reports to the Court or as otherwise permitted by the Code for Care of Children.

3. The guardian *ad litem* is hereby vested by the Court with all powers, privileges and responsibilities necessary for the full and effective performance of the duties and obligations to the minor child as set forth in this Order.

Judge

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KANSAS

JUVENILE JUSTICE AUTHORITY
DENISE L. EVERHART, ACTING COMMISSIONER

KATHLEEN SEBELIUS, GOVERNOR

SENATE JUDICIARY COMMITTEE MARCH 10, 2003

Testimony on House Bill 2015

House Bill 2015 will allow sentence modification, based on a serious medical condition, of the juvenile offender sentenced to a juvenile correctional facility. The intent is similar to that of SB 339, passed last session, which provides for the Secretary of Corrections to make application to the Kansas Parole Board for release of an inmate who is functionally incapacitated (see attached). This bill will allow for the Commissioner to petition through the sentencing judge for similar action.

Currently, courts may modify a sentence of an offender committed to a juvenile correctional facility in only two circumstances.

1. K.S.A. 38-1665 allows for the modification of a sentence within 60 days after the commitment. This provision could be used to apply for a sentence modification if an offender is seriously ill and or functionally incapacitated within the first 60 days after commitment. If the illness occurs later, this provision cannot be used.
2. K.S.A. 38-16, 131 provides for a mechanism for the Commissioner to file a motion to modify the sentence but only if the offender has served the minimum term under the placement matrix and only based on good behavior.

This bill will allow for the Commissioner to apply through the sentencing judge for a sentence modification based on a serious medical condition at any time during an offender's incarceration in a juvenile correctional facility.

While the savings in cost of medical services to the agency for an individual case could be substantial, the number of such occurrences is expected to be very few. Therefore the overall impact on JJA operations and budget is expected to be minimal.

I respectfully request passage of this bill. Thank you for your attention and consideration.

Senate Judiciary

3-10-03

KANSAS

DIVISION OF THE BUDGET
DUANE A. GOOSSEN, DIRECTOR

KATHLEEN SEBELIUS, GOVERNOR

January 27, 2003

The Honorable Ward Loyd, Chairperson
House Committee on Corrections and Juvenile Justice
Statehouse, Room 427-S
Topeka, Kansas 66612

Dear Representative Loyd:

SUBJECT: Fiscal Note for HB 2015 by Joint Committee on Corrections and Juvenile Justice Oversight

In accordance with KSA 75-3715a, the following fiscal note concerning HB 2015 is respectfully submitted to your committee.

Under current law, a court may modify the sentence of a juvenile offender who has been committed to a juvenile correctional facility within sixty days of the commitment. The Commissioner of the Juvenile Justice Authority may also file a motion with the court to have a juvenile offender's sentence modified for good behavior, if the juvenile offender has served the minimum term under the placement matrix. HB 2015 would add a third justification for a sentence modification. The bill would allow the courts to modify a juvenile offender's sentence within sixty days of his or her commitment based on the juvenile offender's medical condition.

Removing juvenile offenders with serious medical conditions would result in some cost savings at the juvenile correctional facilities. However, the number of juvenile offenders who would be affected by this bill cannot be determined. As a result, the Juvenile Justice Authority cannot estimate the amount of such savings.

Sincerely,



Duane A. Goossen
Director of the Budget

Senate Judiciary

3-10-03

Attachment 3-1

cc: Lynaia South, Juvenile Justice Authority

14 Section 1. K.S.A. 65-4150 is hereby amended to read as follows: 65-
15 4150. As used in this act:

16 (a) "Controlled substance" means any drug, substance or immediate
17 precursor included in any of the schedules designated in K.S.A. 65-4105,
18 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

19 (b) "Deliver" or "delivery" means actual, constructive or attempted
20 transfer from one person to another, whether or not there is an agency
21 relationship.

22 (c) "Drug paraphernalia" means all equipment, products and mate-
23 rials of any kind which are used or intended for use in planting, propa-
24 gating, cultivating, growing, harvesting, manufacturing, compounding,
25 converting, producing, processing, preparing, testing, analyzing, packag-
26 ing, repackaging, storing, containing, concealing, injecting, ingesting, in-
27 haling or otherwise introducing into the human body a controlled sub-
28 stance in violation of the uniform controlled substances act. "Drug
29 paraphernalia" shall not include any drug product containing ephedrine,
30 pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine,
31 anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or
32 their salts, isomers or salts of isomers or any product containing the same.

33 "Drug paraphernalia" shall include, but is not limited to:

34 (1) Kits used or intended for use in planting, propagating, cultivating,
35 growing or harvesting any species of plant which is a controlled substance
36 or from which a controlled substance can be derived.

37 (2) Kits used or intended for use in manufacturing, compounding,
38 converting, producing, processing or preparing controlled substances.

39 (3) Isomerization devices used or intended for use in increasing the
40 potency of any species of plant which is a controlled substance.

41 (4) Testing equipment used or intended for use in identifying or in
42 analyzing the strength, effectiveness or purity of controlled substances.

43 (5) Scales and balances used or intended for use in weighing or meas-
1 uring controlled substances.

2 (6) Diluents and adulterants, such as quinine hydrochloride, manni-
3 tol, mannite, dextrose and lactose, which are used or intended for use in
4 cutting controlled substances.

5 (7) Separation gins and sifters used or intended for use in removing
6 twigs and seeds from or otherwise cleaning or refining marihuana.

7 (8) Blenders, bowls, containers, spoons and mixing devices used or
8 intended for use in compounding controlled substances.

9 (9) Capsules, balloons, envelopes and other containers used or in-
10 tended for use in packaging small quantities of controlled substances.

11 (10) Containers and other objects used or intended for use in storing
12 or concealing controlled substances.

13 (11) Hypodermic syringes, needles and other objects used or in-
14 tended for use in parenterally injecting controlled substances into the
15 human body.

16 (12) Objects used or intended for use in ingesting, inhaling or oth-
17 erwise introducing marihuana, cocaine, hashish, or hashish oil into the
18 human body, such as:

19 (A) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with
20 or without screens, permanent screens, hashish heads or punctured metal
21 bowls;

22 (B) water pipes;

23 (C) carburetion tubes and devices;

24 (D) smoking and carburetion masks;

25 (E) roach clips (objects used to hold burning material, such as a mar-
26 ihuana cigarette, that has become too small or too short to be held in the
27 hand);

28 (F) miniature cocaine spoons and cocaine vials;

29 (G) chamber pipes;

30 (H) carburetor pipes;

31 (I) electric pipes;

32 (J) air-driven pipes;

33 (K) chillums;

34 (L) bongs; and

35 (M) ice pipes or chillers.

36 (d) "Person" means any individual, corporation, government or gov-
37 ernmental subdivision or agency, business trust, estate, trust, partnership,
38 association or other legal entity.

39 (e) "Simulated controlled substance" means any product which iden-
40 tifies itself by a common name or slang term associated with a controlled
41 substance and which indicates on its label or accompanying promotional
42 material that the product simulates the effect of a controlled substance.

Senate Judiciary

3-10-03

Attachment 4-1