

Approved:  
Date 4-29-04

## MINUTES OF THE HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE

The meeting was called to order by Chairman Ward Loyd at 1:30 p.m. on February 12, 2004 in Room 241-N of the Capitol.

All members were present except:

Representative Lana Gordon – excused  
Representative Eric Carter - absent

Committee staff present:

Jill Wolters, Revisor of Statutes Office  
Jerry Ann Donaldson, Legislative Research Department  
Becky Krahl, Legislative Research Department  
Connie Burns, Committee Secretary

Conferees appearing before the committee:

Victor Rivers, Actor  
Tim Madden, DOC  
John Badger, SRS  
Sidney Willens  
Representative Goering  
Representative Newton  
Paul Morrison, District Attorney  
Christine Kenney, Douglas County  
Mike Jennings, Sedgwick County  
Darrel Donahue, AARP  
Ron Schnider, KS Trial Lawyers  
Ton Laing, InterHab  
Steve Howe, Johnson County  
Bryon Pierce, Overland Park Police Department  
Lisa McCormick, Johnson County  
Rex Beasley, AG  
Patricia Biggs, KS Sentencing Commission  
Chris Tymeson, Wildlife and Parks

Others attending:

See Attached List.

### **HB 2730 – Endangering a child when the child's life is endangered or child is present in a meth lab or where meth is sold is a severity level 9, person felony.**

Chairman Loyd reopened the hearing on **HB 2730**.

Victor Rivers, actor appeared before the committee to talk in support of the bill and the advocacy movement and what the effect has done in his life.

Chairman Loyd closed the hearing on **HB 2730**.

Commissioner Everhart provided information that was requested for the committee on Kansas Juvenile Detention Facilities, their location and licensed capacity. (Attachment 1)

### **HB 2636 – Allowing SRS and law enforcement agencies access to victim information.**

Chairman Loyd opened the hearing on **HB 2636**.

John Badger, Chief Counsel SRS, appeared before the committee in support of the bill. The bill would

amend current law to allow SRS to access certain information containing names and addresses of crime victims for purposes of satisfying the notification requirements of KSA 59-29a13. ([Attachment 2](#))

Tim Madden, Department of Corrections, appeared before the committee to present testimony provided by Secretary Werholtz in support of the bill. The bill facilitates the sharing of crime victim information by various law enforcement agencies and SRS thus enhancing notification to crime victims of various events. ([Attachment 3](#))

Chairman Loyd closed the hearing on **HB 2636**.

**HB 2690 – Upon conviction, allowing the victim to get the financial records of criminal offender.**

Chairman Loyd opened the hearing on **HB 2690**.

Representative Goering appeared before the committee in favor of the bill. The bill makes a minor change to existing law that will have significant benefits to victims of crime. Under current law the information is made available to the crime victim when the defendant has been ordered to pay restitution. ([Attachment 4](#))

Sidney Willens, attorney, spoke in favor of the bill, and Kansas allows a veil of secrecy over the financial resources of convicted felons and forces victims of crime into civil court to gain financial information. . By adding two words *upon conviction* to KSA 60-4035 would lift the veil of secrecy. ([Attachment 5](#))

Chairman Loyd closed the hearing on **HB 2690**.

**HB 2621 – Crime of harming, disabling or killing a game warden dog.**

Chairman Loyd opened the hearing on **HB 2621**.

Chris Tymeson, Chief Counsel Wildlife and Parks, appeared before the committee to encourage favorable passage of the bill. He stated this bill would amend current statutory protections for inflicting harm, disability or death to certain dogs to include game warden dogs. ([Attachment 6](#))

Chairman Loyd closed the hearing on **HB 2621**.

**HB 2693 – Mistreatment of a dependent adult; increasing penalties if value of financial gain is over \$500.**

Chairman Loyd opened the hearing on **HB 2693**.

Representative Newton appeared as a proponent on the bill. The bill is an attempt to broaden the protections of dependent adults, including the elderly and those with physical and mental illness disabilities. ([Attachment 7](#)) The balloon amendment would change lines 10, 13 and 16 on page 2 from financial gain to resources, recommended after discussion with the Attorney General's office. ([Attachment 8](#))

Paul Morrison, District Attorney Tenth Judicial District, appeared to offer full support of the bill. In the past these cases were charged and tried as violations of the Theft statute, the theory being that the victims were deceived and or taken unfair advantage of. In the recent case *State v. Maxon*, the Kansas Court of Appeals held that violations of this nature are not thefts, but merely violations of the dependent adult statute, a misdemeanor. This has created a major loophole in the law that allows paltry penalties for what can be massive thefts. ([Attachment 9](#))

Christine Kenney, Douglas County District Attorney, spoke in favor of the bill, that protection should take many forms, including severe penalties for anyone who takes unfair advantage of their vulnerability. This group has increasingly become an easy target for criminals. By enacting the statute the legislature recognizes the harm to our dependant adults is greater, thus making it a person, rather than non-person crime. ([Attachment 10](#))

Mike Jennings, Sedgwick County, submitted written testimony in support of the bill. ([Attachment 11](#))  
Nola Foulston, District Attorney Eighteenth Judicial District, submitted written testimony in support of the bill. ([Attachment 12](#))

Darrell Donahue, Congressional District Coordinator for AARP Kansas, appeared in support of the bill. Elder abuse can be physical, financial or psychological and may take place in a home or an institutional setting. Elder abuse can also be systemic, when guardianship procedures intended to protect the infirm, ill or incompetent are used to deprive vulnerable older people of their rights or resources. We ask you to expand protections and enhanced penalties in order to further protect vulnerable adults from abuse, neglect and exploitation. ([Attachment 13](#))

Ron Schneider, Kansas Trial Lawyers Association, supports the bill. Existing law does not adequately punish the crimes, nor does it distinguish levels of financial loss, leaving law enforcement with inadequate tools to fight these serious crimes, which mostly occur against the elderly. ([Attachment 14](#))

Tom Laing, InterHab, appeared as a proponent of the bill and urged the committee to consider additional language. ([Attachment 15](#))

Steve Howe, Assistant Prosecuting Attorney Johnson County, spoke in favor of the bill. The criminal conduct destroys the victim's life savings and leaves them dependant on government assistance. These defendants use various forms of deceit and intimidation to destroy the victims lives. This bill would allow for just punishment for the most egregious crimes against the most vulnerable in our society. ([Attachment 16](#))

Byron Pierce, Detective Overland Park Police Department, urged the committee to strongly support the passage of the bill because it will have a positive impact on the most vulnerable members of our community. ([Attachment 17](#))

Lisa McCormick, Investigator Johnson County District Attorney's Office, in favor of the bill. She stated that there has been a frightening increase in the number of elderly consumers who are victims of financial exploitation. This bill will deter these types of financial crimes and protect our most vulnerable population. ([Attachment 18](#))

Rex Beasley, Deputy Attorney General, to convey the interest of the Attorney General to protect the interest of vulnerable adults in the State of Kansas and support the bill and the balloon. The proposed changes make the penalties for committing financial abuse of a dependent adult consistent with the penalties for committing theft. ([Attachment 19](#)) The case Kansas v. Maxon was provided for the committee. ([Attachment 20](#))

Deanne Bacco, Executive Director Kansas Advocates for Better Care, submitted written testimony in support of the bill. ([Attachment 21](#)) Linda Wright, Chairperson of Elder Abuse Committee of COMVAC submitted written testimony in favor of the bill. ([Attachment 22](#))

Patricia Biggs, Executive Director Kansas Sentencing Commission, providing the Bed Impact of the bill.

Chairman Loyd closed the hearing on **HB 2693**.

**HB 2319 – Unlawfully hosting minors consuming alcoholic liquor or cereal malt beverages**  
**SB 197 – Alcoholic beverages; furnishing to and consumption by persons under age 21**

Representative Yoder provided the Committee the **Subcommittee Report on HB 2319** and **SB 197** was provided. The subcommittee unanimously voted to amend **HB 2319** in **SB 197**.

Representative Kassebaum moved to accept the subcommittee report. Representative O'Malley seconded the motion.

Chairman Loyd continued the motion to the meeting on February 13, 2004.

The meeting was adjourned at 3:23 PM. The next meeting is February 13, 2004.



**HOUSE CORRECTIONS AND JUVENILE JUSTICE COMMITTEE**  
**GUEST LIST**

DATE 2/12/04

NAME	REPRESENTING
JEREMY S BARCLAY	KDOC
TEM MADDOW	KDOC
Debi Hicomb	KDOC
John Badger	SRS
Michael White	KCDAA
Sidney L. Wilkins	DAVID BLASS
Candace Anderson-Dupee	SAINC Hutch
Jan Sommer	Harney Co DV/SA Newton
Joe Stryton	JJA
Daniel Donahoe	AARP
Rebekah Gaston	AG
Stacy Jeffer	AG- consumer protection
Matt Austin	OWENS
Suzi Martinez	Shawnee Co Family Resource Center
Connie Snyder	Shaw. Co. Family Resource Center
Rex Beasley	Attorney General Clinic
Marg Yaroblashki	Crisis Center of Dodge City
Laura Patzner	Family Crisis Center, Inc Great Bend
Sandy Barnett	KCSA ✓
Victor Rivers	NNEDV
Tom Laine	Inter Hab
Don Smith	KTLA
Barb Coxart	KTLA
Sarah Jane Rouse	BaduGi SafeCenter / R/S Lawrence #

## KANSAS JUVENILE DETENTION FACILITIES

Detention Facility	Location	Licensed Capacity (per KDHE)		
Forbes - Kelly Youth Svcs (private)	Topeka	28		
Franklin Co. JDC	Ottawa	7		
Greater Western Ks JDC - Kelley (private)	Wakeeney	12		
Johnson County JDC	Olathe	70		
Leavenworth Co. JDC	Leavenworth	18		
N. Central Ks JDC	Junction City	28		
NE KS JDC/aka Douglas Co Youth Svcs	Lawrence	18		
Reno Co. Youth Services	Hutchinson	19		
Saline Co. JDC	Salina	10		
SE Regional JDC	Girard	25		
Sedgwick County JDF	Wichita	40		
Shawnee Co. DOC/JDC	Topeka	76		
SW Ks Regional JDC	Garden City	28		
Wyandotte County JDC	Kansas City	48		
<b>Total Detention:</b>		<b>427</b>		

Kansas Department of

# Social and Rehabilitation Services

Janet Schalansky, Secretary

## House Committee on Corrections and Juvenile Justice

February 12, 2004

### House Bill 2636 - Crime Victims Information

**Legal Division**

John Badger, Chief Counsel

For additional information contact:  
Public and Governmental Services Division  
Tanya Dorf, Director of Legislative Affairs

Docking State Office Building  
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**Kansas Department of Social and Rehabilitation Services  
Janet Schalansky, Secretary**

House Committee on Corrections and Juvenile Justice  
February 12, 2004

**House Bill 2636 - Crime Victims Information**

Mr. Chairman and members of the Committee, I am John Badger, Chief Counsel for the Department of Social and Rehabilitation Services. Thank you for the opportunity to appear before you today in support of House Bill No. 2636.

This bill would amend current law to allow SRS to access certain information containing names and addresses of crime victims for purposes of satisfying the notification requirements of K.S.A. 59-29a13. This statute relates to the release of a person who has been civilly committed under the Kansas Act for Commitment of Sexually Violent Predators. It provides that "prior to the release of a person committed under this act, the Secretary shall give written notice of such placement or release to any victim of the person's activities or crime who is alive and whose address is known to the Secretary."

The present concern is that SRS often does not have complete records relating to past victims, including last known addresses. HB 2636 will allow victim information listed pursuant to the Kansas Offender Registration Act and with the Kansas Department of Corrections to be shared with SRS in order to make the sending of the statutorily required notices more accurate and effective.

This bill would result in notices being received in a more timely manner by former victims of a sexually violent predator, which would then allow them a better opportunity to take any precautionary actions they deem necessary.

For this reason, it is respectfully requested the Committee act favorably on HB 2636.

Thank you.



# KANSAS

KANSAS DEPARTMENT OF CORRECTIONS  
ROGER WERHOLTZ, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

Testimony on HB 2636  
to  
The House Committee on Corrections and Juvenile Justice

By Roger Werholtz  
Secretary  
Kansas Department of Corrections

February 12, 2004

HB 2636 amends K.S.A. 22-4909 and K.S.A. 74-7338 to provide for the release of information regarding victims of crimes to the Secretary of Social and Rehabilitation Services. HB 2636 also makes the availability of crime victim information to law enforcement agencies uniform. Finally, HB 2636 retains the provisions of current law regarding the confidentiality of crime victim information relative to the general public. HB 2636 is a result of interagency meetings between the Governor's Office, Department of Corrections, and the Department of Social and Rehabilitation Services to enhance services addressing the needs and interests of crime victims.

Currently, K.S.A. 22-4909 permits sheriffs and the Kansas Bureau of Investigation to release crime victim information to other law enforcement agencies. However, under current law, crime victim information maintained by the Department of Corrections pursuant to K.S.A. 74-7338 is not available to other law enforcement agencies. HB 2636 provides access by law enforcement agencies, that have a legitimate purpose for the information, to crime victim information maintained by the Department of Corrections to the same extent as is provided for such information maintained by sheriffs and the Kansas Bureau of Investigation.

The Crime Victims Services Division of the Department of Corrections maintains extensive records regarding the victims of crimes in order for the Department to provide information to crime victims regarding events pertaining to offenders who have victimized them. HB 2636 provides for the utilization of the Department's information by other law enforcement agencies, including prosecutors, as well as SRS in providing notification to crime victims.

The amendment of K.S.A. 22-4909 and K.S.A. 74-7338 by HB 2636 to include the sharing of crime victim information with the Secretary of Social and Rehabilitation Services would aid SRS in providing the notification to crime victims of events pertaining to persons remanded to the custody of SRS as civilly committed sexually violent predators pursuant to the K.S.A. 59-29a01 et seq. The Sexually Violent Predators Commitment Act requires SRS to provide crime victims with notification regarding the release of committed predators. Since, persons committed to the custody of SRS as sexually violent predators have previously been in the custody of other law enforcement agencies, the information regarding crime victims that is necessary for SRS to meet its notification obligations has already been collected by those law enforcement agencies.

HB 2636 facilitates the sharing of crime victim information by various law enforcement agencies and SRS thus enhancing notification to crime victims of various events. The Department urges favorable consideration of HB 2636.

**JEFF GOERING**

REPRESENTATIVE, 105TH DISTRICT  
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(316) 773-2167

STATE CAPITOL BUILDING—ROOM 175-W  
TOPEKA, KANSAS 66612-1504  
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TOPEKA

HOUSE OF  
REPRESENTATIVES

## COMMITTEE ASSIGNMENTS

MEMBER: CORRECTIONS AND JUVENILE JUSTICE  
JUDICIARY  
TAXATION

Mr. Chairman, and members of the committee, thank you for the opportunity to testify in favor of HB 2690.

HB 2690 makes a minor change to existing law that will have significant benefits to victims of crime. Under current law, crime victims are entitled to receive records in the possession of the court and court services regarding the financial assets of the defendant, as well as information regarding the income and employment of the defendant. However, under current law, this information is made available to the crime victim when the defendant has been ordered to pay restitution. As such, this information is not made available to the crime victim prior to sentencing, which is when issues of restitution are considered by the court.

In the past we have made efforts to include victims of crime in the sentencing process. Crime victims are allowed to address the court at the time of sentencing to provide the court with the victim's view point prior to sentencing. Because information regarding the defendant's financial assets, income or employment is not made available to crime victims prior to sentencing, crime victims are not able to meaningfully offer an informed opinion to the court on the issue of restitution or the defendant's ability to make the victim financially whole. Allowing the victims of crime access to information in the court's possession regarding the assets, income and employment of the defendant will permit victims of crime to fully participate in the sentencing process.

Thank you for your attention and your careful consideration of this bill, and I would appreciate your support in passing this bill out of committee favorably.

5

**SIDNEY L. WILLENS**

ATTORNEY AT LAW

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REMARKS OF SIDNEY L. WILLENS BEFORE THE CORRECTIONS AND JUVENILE JUSTICE  
COMMITTEE OF THE KANSAS HOUSE ON FEBRUARY 12, 2004, TOPEKA, KS  
HOUSE BILL 2690

A victim of "road rage" more than a year ago, David Glass still suffers double vision and headaches at the hands of a convicted offender who has been permitted to hide his financial assets from my client.

Missouri, Nebraska, Oklahoma, the federal system, to name a few jurisdictions, call for convicted offenders to disclose financial information.

Kansas allows a veil of secrecy over the financial resources of convicted felons and forces victims of crime into civil court to gain that information.

Yet, in Kansas criminal courts, judges are called upon to order "workable" plans of restitution for victims of crime.

Say, a judge orders restitution of \$6,000 for a crime victim at \$100 a month for 60 months. The defendant, unable to pay, is brought back into court and ordered to jail. His wife and five children hit the welfare rolls.

That's not a "workable" plan.

But, say, the judge orders the same amount of restitution -- \$6,000--at \$200 a month for 30 months and the convicted offender is able to pay,

That is a "workable" plan. The victim is better off. He gets his money in less time and maybe even the offender is better off. After all, if the judge knew of the offender's financial ability, the court just might reduce the term of probation to two years.

Why drain judicial and correctional resources if we don't have to?

Next month I will appear with David Glass at a restitution hearing in Johnson County District Court with a prosecutor who has already informed me that he has no power to obtain discovery of the convicted motorist who beat my client so viciously. (See attached letter of January 22, 2004 from Johnson County Assistant District Attorney Robert R. Johnson).

That means, of course, that the only person in the courtroom who will know where the money is is the convicted offender himself.

The offender has no constitutional right to remain silent on that issue.

Add only two words to K.S.A.60.4035 to lift an absurd veil of secrecy. The statute will then read: Records subject to disclosure when offender ordered to pay restitution. **UPON CONVICTION** records of information in the custody of the Kansas parole board, any community correctional service program or any district court regarding the financial assets, income or employment of a criminal offender shall be subject to disclosure to any victim to whom such offender has been ordered to pay restitution, or to anyone acting on behalf of such victim to collect the ordered restitution, until such time as all restitution is paid in full. (emphasis added).

OFFICE OF DISTRICT ATTORNEY  
PAUL J. MORRISON, DISTRICT ATTORNEY  
Robert R. Johnson, Assistant District Attorney

January 22, 2004

Sidney L. Willens  
Attorney at Law  
1211 W. 113<sup>th</sup> Terr.  
Kansas City, MO 64114-5259

Re: **State of Kansas vs. Kelley**  
Case No. 03CR72

Dear Mr. Willens:

This letter is in response to your letter of January 17, 2004, regarding the above-referenced matter. I know of no statutory or case law authority that allows a prosecuting attorney in a criminal case to require a criminal defendant to provide financial information to the prosecutor. Consequently, I am unable to provide you with your requested information regarding Mr. Kelley's financial condition.

Should you have questions or comments, do not hesitate to call or write.

Sincerely,



Robert R. Johnson  
Assistant District Attorney

RRJ/lma

**LIFT THE VEIL OF SECRECY !**

**HOUSE BILL 2690**

**K.S.A. 60-4035. Records subject to disclosure when offender ordered to pay restitution. UPON CONVICTION records of information in the custody of the Kansas parole board, any community correctional service program or any district court regarding the financial assets, income or employment of a criminal offender shall be subject to disclosure to any victim to whom such offender has been ordered to pay restitution, or to anyone acting on behalf of such victim to collect the ordered restitution, until such time as all restitution is paid in full.**

*Presented to Kansas House Committee on Corrections and Juvenile Justice on February 12, 2004 by Sidney L. Willens*

## Why not make criminals pay?

By Sidney L. Willens

*Criminals and Victims*, by Lois G. Forer  
(312 pages; Norton; \$14.94)

**Y**ou be the judge.

• Reginald grabbed an old man's billfold, pushed him down and broke his hip.

• Alfie shot his girlfriend's lover point-blank in the face. The bullet blinded him.

• Thomas embezzled \$1,000.

• Marian shoplifted a \$200 ring.

Is it prison or probation? Either decision alone is wrong, says Judge Lois Forer. The author of *Criminals and Victims* calls for probation—with strings attached.

Judge Forer ordered Reginald to get a job—any job—and pay his elderly victim's medical bills. Alfie got 19 years' probation on "consecutive" charges with an order to pay his blind victim \$25 a week or \$1,300 a year—also saving taxpayers \$20,000 a year, the cost of jailing a wrongdoer.

Thomas coughed up \$1,000 for his former employer and a \$3,000 fine for taxpayers of Pennsylvania where Judge Forer has been a Philadelphia trial judge 10 years. Marian returned the ring and was fined \$600, triple its value.

*Criminals and Victims* calls for states to enact a crime victim's compensation statute with trial judges ordering convicted offenders to pay damages to a fund for crime victims.

Say you are slugged and robbed of \$500 and incur \$1,000 in medical expenses. The judge orders your assailant to pay \$1,500 "restitution" plus a fixed sum of "reparation" to the common fund for crime victims. "Crime victims often require money immediately for doctor and hospital bills," Judge Forer writes. "A pool of money is needed for them."

Among 29 states with crime victim's

*Sidney L. Willens, a Kansas City lawyer, was instrumental in developing a police complaint office and a county ombudsman for citizens, a police-social worker program for juveniles, and a notification project at the prosecutor's office for crime victims and witnesses. He frequently reviews books on the law and court system.*

### Campaign kick-off

**H**ave you suffered personal injury at the hands of a criminal?

The Crime Victim's Compensation Law Committee will launch a statewide citizens' effort to persuade the Missouri Legislature to set up a pool of money for crime victims. Convicted offenders would pay into the fund.

Testimony from injured crime victims will be heard by the four-member committee beginning at 8:30 a.m. Friday, Oct. 24, in the Jackson County legislative assembly area on the second floor of the courthouse, 415 East 12th.

Injured crime victims desiring to testify before the committee or at legislative hearings next year in Jefferson City may call Mrs. Jodie Smith, victim-witness assistant in the Jackson County prosecutor's office, at (816) 881-3440.

The public and political candidates in the Nov. 4 general election are invited. Special invitations have been issued to statewide candidates. Similar hearings are planned after the election in St. Louis and Springfield.

### Judges' comment

Jackson County Circuit Court judges and county criminal justice officials give their views on the proposed crime victim compensation statute on page 4f.

compensation laws, 12 make convicted offenders pay for the legislation. Last fiscal year Pennsylvania raised more than \$1.5 million for crime victims from \$10 court costs assessed each convicted offender. (See accompanying box.)

"Too many judges say crime victim reparation and restitution are futile and difficult to administer," Judge Forer writes. "But a concerted, unremitting effort by a judge and probation department to compel enforcement of such orders

can work."

How does a jobless probationer pay? He gets a job or goes to jail. After all, judges extract child support payments from errant fathers who fear jail.

"After a few months in prison most offenders manage to obtain a promise of a job and petition for release," Judge Forer writes. "After release they resume payments. There is seldom a second default."

Of 400,000 prisoners across the nation, 350,000 ought to be out working, Judge Forer says. They aren't dangerous. They will get jobs if the alternative is prison.

Idleness and joblessness trigger violent crime. So Judge Forer calls on the criminal justice system to see that young school dropouts get basic skills and jobs.

Take Willie, convicted of robbery. "I may be ignorant, but I ain't stupid," Willie told Judge Forer. So Judge Forer ordered prison officials to offer Willie remedial reading. When Judge Forer opposed Willie's early prison release because he didn't enroll in remedial reading, Willie enrolled.

Judge Forer argues persuasively for judges to order money paid to victims instead of prison for lawbreakers. Timely payments of restitution and reparation, however small, signal a "positive act of atonement."

Judges offer society's last hope. Either an offender shapes up and gets a job or he or she inflicts misery on all of us again and again. After all, offenders seldom get imprisoned forever—even the dangerous ones.

Judge Forer concedes that rehabilitation is no easy task. Jobs are hard to come by for convicted offenders. Yet Judge Forer has learned from 10 years on the bench that an offender will find a job, however menial, to escape jail. All that is needed, she adds, is a conscientious judge and a diligent probation officer to carry out the judge's order of restitution.

"A criminal justice system aiming to recoup losses for crime victims dispenses justice," Judge Forer writes. "The public is spared huge costs of incarcerating offenders, offenders are spared degradation of prison, and profit is taken out of crime, the reason most crimes are committed."

# KANSAS

DEPARTMENT OF WILDLIFE & PARKS

KATHLEEN SEBELIUS, GOVERNOR

**Testimony on HB 2621 related to Game Warden Dogs  
To  
House Committee on Corrections and Juvenile Justice**

**By Christopher J. Tymeson  
Chief Legal Counsel  
Kansas Department of Wildlife and Parks**

**February 12, 2004**

HB 2621 would amend current statutory protections for inflicting harm, disability or death to certain dogs to include game warden dogs. The provisions of this bill would take effect on July 1, 2004. HB 2621 is one of the Department's legislative initiatives and the Department encourages favorable passage of the bill.

The Department's canine program is relatively new and began in 2003 to assist Conservation Officers in the enforcement of wildlife conservation laws. Utilizing working canines in conservation enforcement law is not a new concept. Utah and Colorado both began using canines with respect to their conservation programs in the early 1980's. The use of those dogs centered on more traditional law enforcement roles, including defensive tactics.

The Department's canine program focuses on search and recovery in the wildlife arena rather than defensive/aggressive tactics or narcotics discovery as used in traditional law enforcement. The canines and their handlers have all undergone intensive training in the areas of locating persons, identifying game and recovery of evidence related to wildlife crimes. In addition, the canines are used in a variety of public programs to promote conservation ethics.

Office of the Secretary

1020 S Kansas Ave., Ste. 200, Topeka, KS 66612-1327

Phone 785-296-2281 Fax 785-296-6953 [www.kdwp.state.ks.us](http://www.kdwp.state.ks.us)

House Corr & JJ  
Attachment 6

2-12-04



DEAN NEWTON  
 REPRESENTATIVE, 21ST DISTRICT  
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COMMITTEE ASSIGNMENTS  
 MEMBER: APPROPRIATIONS  
 EDUCATION AND LEGISLATIVE  
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TOPEKA

HOUSE OF  
 REPRESENTATIVES

The Honorable Ward Loyd  
 Chair, Corrections and Juvenile Justice Committee  
 State Capitol, Room 427-S  
 Topeka, KS 66612

Representative Loyd and Members of the Corrections and Juvenile Justice Committee:

Thank you for the opportunity to appear before you as a proponent of HB 2693. The legislation you have in front of you is an attempt to broaden the protections of dependent adults, including the elderly and those with physical and mental illness disabilities.

There are numerous cases where elderly victims are taken advantage of by various individuals, including family members, home health care workers, trustees and those with power of attorney. Most of the abuse is financial and is done through intimidation, manipulation and deception. Examples of recent abuse this legislation is addressing include:

- A case where five people worked together to steal over \$600,000 in a ten month period from an elderly victim. The victim was recently widowed and was diagnosed with a mental illness. Prior to her husband's death, the victim knew the five perpetrators as business clients of her late husband. Shortly after her husband's death, these individuals worked hard to gain her trust. They used this relationship to steal hundreds of thousands of dollars from the victim.
- An attorney who was assigned as trustee to liquidate the estate of one of his own family members stole over \$100,000 from the rest of his family.
- A home health care nurse who took advantage of a young victim with severe physical disabilities. The nurse placed numerous charges on the victim's credit card without her permission.
- Home health care workers in a number of instances have stolen from elderly individuals that have major health problems at the time of the thefts. The thefts were accomplished a variety of ways including fraudulent use of a power of attorney and unauthorized use of the victim's credit cards and checks.

There is a glaring inconsistency in the criminal code with respect to these situations that this legislation attempts to remedy. The loophole allows criminals who commit major crimes to simply receive a slap on the wrist under the law. Basically, under the current criminal code a person who steals \$500 or \$10 million from a dependent adult are subject to the same penalty under the law. The practical effect of this fact is that both individuals receive a slap on the wrist under the law.

My legislation changes the law to make it a severity level 7, person felony if a person steals more than \$25,000. The theft of property of at least \$500 but less than \$25,000 is a severity level 9, person felony offense and it is a Class A misdemeanor if the theft is less than \$500.

The change in the law makes it much more likely that these major criminals will receive significant punishment rather than a slap on the wrist. Most importantly, the loophole is eliminated with very little impact on prison beds.

The punishment simply does not fit the crime in these instances and I urge your support for this bill. Criminals who commit these major felonies belong in prison and not on the streets.

## HOUSE BILL No. 2693

By Representatives Newton and Davis

2-3

Proposed amendment  
Representative Newton  
February 11, 2004

House Corr & JJ  
Attachment 8  
2-12-04

9 AN ACT concerning crimes and punishment; relating to mistreatment  
10 of a dependent adult; amending K.S.A. 21-3437 and repealing the ex-  
11 isting section.  
12

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

14 Section 1. K.S.A. 21-3437 is hereby amended to read as follows: 21-  
15 3437. (a) Mistreatment of a dependent adult is knowingly and intention-  
16 ally committing one or more of the following acts:

17 (1) Infliction of physical injury, unreasonable confinement or cruel  
18 punishment upon a dependent adult;

19 (2) taking unfair advantage of a dependent adult's physical or financial  
20 resources for another individual's personal or financial advantage by the  
21 use of undue influence, coercion, harassment, duress, deception, false  
22 representation or false pretense by a caretaker or another person; or

23 (3) omitting or depriving treatment, goods or services by a caretaker  
24 or another person which are necessary to maintain physical or mental  
25 health of a dependent adult.

26 (b) No dependent adult is considered to be mistreated for the sole  
27 reason that such dependent adult relies upon or is being furnished treat-  
28 ment by spiritual means through prayer in lieu of medical treatment in  
29 accordance with the tenets and practices of a recognized church or relig-  
30 ious denomination of which such dependent adult is a member or  
31 adherent.

32 (c) For purposes of this section: "Dependent adult" means an indi-  
33 vidual 18 years of age or older who is unable to protect their own interest.  
34 Such term shall include:

35 (1) Any resident of an adult care home including but not limited to  
36 those facilities defined by K.S.A. 39-923 and amendments thereto;

37 (2) any adult cared for in a private residence;

38 (3) any individual kept, cared for, treated, boarded or otherwise ac-  
39 commodated in a medical care facility;

40 (4) any individual with mental retardation or a developmental disa-  
41 bility receiving services through a community mental retardation facility  
42 or residential facility licensed under K.S.A. 75-3307b and amendments  
43 thereto;

1 (5) any individual with a developmental disability receiving services  
2 provided by a community service provider as provided in the develop-  
3 mental disability reform act, or

4 (6) any individual kept, cared for, treated, boarded or otherwise ac-  
5 commodated in a state psychiatric hospital or state institution for the  
6 mentally retarded.

7 (d) (1) Mistreatment of a dependent adult as defined in subsection  
8 (a)(1) is a severity level 6, person felony.

9 (2) *Mistreatment of a dependent adult as defined in subsection (a)(2)*  
10 *is a severity level 7, person felony if the value of the ~~financial gain is~~ resources are*  
11 *\$25,000 or more.*

12 (3) *Mistreatment of a dependent adult as defined in subsection (a)(2)*  
13 *is a severity level 9, person felony if the value of the ~~financial gain is~~ at*  
14 *least \$500 but less than \$25,000.*

15 (4) *Mistreatment of a dependent adult as defined in subsection (a)(2)*  
16 *is a class A misdemeanor if the value of the ~~financial gain is~~ less than*  
17 *\$500.*

18 (5) Mistreatment of a dependent adult as defined in subsection ~~(a)(2)~~  
19 ~~and~~ (a)(3) is a class A person misdemeanor.

20 Sec. 2. K.S.A. 21-3437 is hereby repealed.

21 Sec. 3. This act shall take effect and be in force from and after its  
22 publication in the statute book.

## Testimony Regarding House Bill 2693

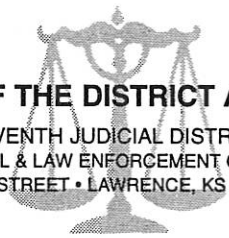
Paul J. Morrison, District Attorney - Tenth Judicial District  
February 12, 2004

I'm here today to offer my full support for this bill. As you might or might not know, our office has had several cases in the last few years wherein unscrupulous people have taken advantage of dependant adults, usually elderly, and taken property from them. While the amount of victimization has varied greatly, we had one case where over half a million dollars in assets were taken from a mentally ill elderly widow.

In the past many of these cases were charged and tried as violations of the Theft statute, the theory being that the victims were deceived and or taken unfair advantage of. While the appellate courts of several other states have supported that legal concept, Kansas Court of Appeals has not. In the recent case of State v. Maxon, the Kansas Court of Appeals held that violations of this nature are not thefts, but merely violations of the dependent adult statute, a misdemeanor. Unfortunately, this has created a major loophole in the law that allows paltry penalties for what can be massive thefts.

This bill simply aligns the taking of financial resources from a dependent adult with the same penalties in the Theft statute. It will close this loophole without impacting the prison population. I strongly suggest that you pass this bill.

10



**OFFICE OF THE DISTRICT ATTORNEY**

SEVENTH JUDICIAL DISTRICT  
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DISTRICT ATTORNEY  
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February 12, 2004

Committee on Corrections and Juvenile Justice  
Hearing on HB 2693, Amendments to K.S.A. 21-3437  
Testimony of Christine E. Kenney, Douglas County District Attorney

Dear Chairperson Lloyd and Committee Members:

Protection of our elderly and dependent adult citizens has become priority in this nation. As the percentage of our population becomes more dependent, the need for legislation to protect them increases. Protection should take many forms, including severe penalties for anyone who takes unfair advantage of their vulnerability. This group has increasingly become an easy target for criminals.

In 1992 this legislature enacted K.S.A. 21-3437, Mistreatment of a dependent adult. This legislation is an acknowledgment that our elderly and dependent adults need special protection. We recognized that this is a group of people specially situated, and against whom thefts and financial abuse are more devastating. This is not a group who can take on a second job to try to replace stolen savings, investments, or even collectibles. This is a group that is affected more drastically by these crimes, not only financially, but also emotionally. This is a group of people for whom the need to rely on others for assistance is difficult to accept, yet often necessary for survival. These crimes are generally committed by someone who has gained the victim's trust, then violated that trust for selfish gains.

The language of HB 2693 addresses specifically the financial abuse section of K.S.A. 21-3437. Thus, the language of HB 2693 mirrors the penalties for the crime of theft under K.S.A. 21-3101 with the exception that at all levels, violation of K.S.A. 21-3437 be classified as a person crime for the reasons stated above.

An example of a case in my jurisdiction where the shortcomings of the penalties of K.S.A. 21-3437 was highlighted is *State v. McKenzie*, 03CR0659. The incidents in this case occurred between 5-1-01 and 6-1-02 and involved an in-home care nursing service. The victims were an 80 year old and 93 year old

couple. The defendant was the care provider. Conservators were appointed in May and June 2002. The financial abuse was discovered after the appointment of the conservator.

The conservator discovered that between April 2001 and May 2002, over \$300,000 was paid to the defendant. One example was a check for \$35,000 for yard work. The owner of a landscape service estimated his charge for the same work would be \$1100. Another incident that came to the attention of the conservator was that the victims were charged \$47,000 for in-home care, during a time the victims had been moved to a full-time nursing care facility. One victim died in August 2002. The other died in July 2003.

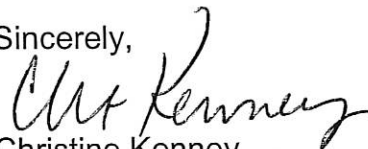
The defendant was convicted of four counts of Mistreatment of a dependant adult, all A person misdemeanors under the current statute.

K.S.A. 21-3437 is designed to protect people who need assistance, but for whom asking for help is difficult. Many are extremely independent and find it hard to accept the fact that they have to rely on someone else. For the person providing the help to violate that trust is a crime more serious than simply the amount of the financial abuse.

The proposed changes to K.S.A. 21-3437 in HB 2693 would create a greater deterrent of crimes against these victims by punishing those who see our vulnerable citizens as easy targets and whose resources are there for the taking. The changes proposed in HB 2693 would make the penalty fit the crime. If \$70,000 were stolen from any one else in this room, the crime would be a level 7 non-person felony. Because the law requires that the more specific crime be charged, this same act committed against a dependant adult would only be an A person misdemeanor. Clearly, when enacting this statute, the legislature recognized that the harm to our dependant adults is greater, thus making it a person, rather than non-person crime.

I thank this committee for taking the time to consider this request. If you have any questions, please do not hesitate to contact me.

Sincerely,



Christine Kenney  
Douglas County District Attorney



OFFICE OF THE DISTRICT ATTORNEY  
EIGHTEENTH JUDICIAL DISTRICT

NOLA FOULSTON  
*District Attorney*

SEDGWICK COUNTY COURTHOUSE  
535 N. MAIN  
WICHITA, KANSAS 67203

(316) 383-7281  
FAX: (316) 383-7266

TO: Chairman Ward Loyd and the members of the House Committee on Corrections and Juvenile Justice

FROM: Mike Jennings, Assistant District Attorney, Eighteenth Judicial District (Wichita)

RE: H.B. 2693, an act protecting dependent adults from physical abuse and financial exploitation

DATE: February 12, 2004

I would like to thank the Chair and the Committee for this opportunity to speak on behalf of Nola Foulston, the District Attorney for the Eighteenth Judicial District, in strong support for this Bill. Mrs. Foulston has submitted her testimony in writing and it is before the Committee.

In our view, the liability established by this Bill provides the same protection from physical abuse for dependent adults that is now extended to children by K.S.A. 21-3609. However, liability for physical abuse of children is punished as a level 5 person felony. We believe the same penalty should apply when dependent adults are beaten or otherwise abused. They, like children, are dependent on their "caretakers" and are, almost by definition, unable to defend themselves. Accordingly, we request the Committee to make the offense defined in (a)(1) a level 5 person felony rather than a level 6 person felony.

The Bill changes the present law by creating a severity level 7 person felony where the amount of the financial gain unfairly obtained is \$25,000.00 or more and a severity level 9 person felony where the amount is \$500.00 or more, but less than \$25,000.00. At the present time, taking unfair financial advantage of a dependent adult is a class A person misdemeanor. We do support the increased penalty as it tracks the amount of harm done.

Abuse of elders is a serious offense to their dignity and utterly destructive of what for many elderly is a fragile self esteem. There is justice in the increased penalties.





12

*Office of the District Attorney*  
*Eighteenth Judicial District of Kansas*

*District Attorney Nola Tedesco Foulston*  
*Chief Deputy Kim T. Parker*

February 12, 2004

Testimony in Support of House Bill 2693  
Amendments to K.S.A. 21-3437 Mistreatment of a Dependent Adult

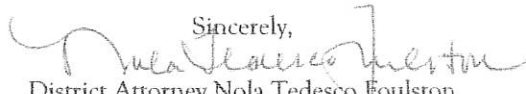
Thank you for the opportunity to give testimony in support of these important amendments that recognize the need for greater punishment of offenders who prey on elderly victims. It is a tragedy of significant dimension that dependent adults can become victims of illegal financial deprivation without attendant recourse. This bill draws a new line in the sand.

As a law enforcement official, I have heard the reports of elderly patients and individuals unable to protect their own interest: Grandma doesn't have any savings...we don't know where it went. She was writing checks to different people and she doesn't remember who they are...We went to the house and found that all the silver was gone...everything we valued has been spirited away from their homes...things we can never replace. Things we valued ...sentimental pieces that disappeared into thin air...her car is gone and we don't know where to find it, but worse, she has no money in her checking account. We trusted her caregiver...we put her in this care home because we trusted them...we were sure she would be safe and secure here. Granddad never would do this on his own. Charlie just does what people tell him to do..

We hear the reports.. We say.. "That's criminal"... Now is the opportunity to act.

Presently, the penalty for illegal financial advantage, regardless of the value of the loss in money or property, is a Class A misdemeanor. In principal, this statute deals with the theft of financial resources illegal means, yet the statute does not categorize the offense consistent with the penalties provided elsewhere in the criminal code. These amendments recognize this fault in the statute and correct the error. Where the value of the criminal financial gains is \$25,000 or more, section (2) line 10 p. 2 provides a severity level 7-person felony. Where the value of the criminal financial gains between \$500 and \$25,000, the penalty is a severity level 9-person felony. Below the amount of \$500, the penalty remains a Class A Misdemeanor.

These amendments to the existing statute are well thought out, consistent with the application of the law and existing criminal statutes. This statute, as amended, will allow prosecutors the ability to more fully assist in resolving crimes against the elderly and to aid in crime prevention by the enactment and publication of this statute on the books of the State of Kansas. I urge the passage of this statute as proposed.

Sincerely,  
  
District Attorney Nola Tedesco Foulston  
18<sup>th</sup> Judicial District of Kansas

*Sedgwick County Courthouse - 535 North Main - Wichita, Kansas 67203*  
*Telephone (316) 383-7281 Facsimile (316) 383-7266*

House Corr & JJ  
Attachment 12  
2-12-04



February 12, 2004

Representative Loyd, Chair  
Corrections and Juvenile Justice Committee

Good afternoon Chairman Loyd and Members of the Corrections and Juvenile Justice Committee. My name is Darrell Donahue and I am a Congressional District Coordinator for AARP Kansas. AARP Kansas represents the views of our more than 350,000 members in the state of Kansas. Thank you for this opportunity to express our support and comments on House Bill 2693.

The American Psychological Association (APA) estimates that every year approximately 2.1 million older Americans are victims of physical, psychological, or other forms of abuse and neglect. Those statistics may not tell the whole story. For every case of elder abuse, neglect or exploitation that is reported to authorities, experts estimate that there may be as many as five cases that have not been reported.

Elder abuse can be physical, financial or psychological and may take place in a home or an institutional setting. Elder abuse can also be systemic, when guardianship procedures intended to protect the infirm, ill or incompetent are used to deprive vulnerable older people of their rights or resources.

All 50 states and the District of Columbia have laws addressing elder abuse in domestic and institutional settings. These laws generally specify the protected population, who is mandated to report, the method and timing of reports, agencies that administer the laws, and the timing and method for investigating reports. Typically, adult protective services laws enable protective services agencies to offer a variety of remedial services to a victim but do not provide for criminal or civil prosecution. In fact, fewer than half of the states have provisions in their laws for penalties against perpetrators of abuse, neglect or exploitation.

Some states have adopted enhanced criminal penalties in order to deter abuse, neglect or exploitation of vulnerable adults. The premise of these penalties is that society should punish more severely behaviors that are particularly repugnant. The enhanced penalties should apply where the vulnerable individuals are unable by reason of mental or physical incapacity to protect themselves from abuse, neglect or exploitation or to provide for their own health, safety or welfare.

Civil actions against abusers may also deter the victimization of vulnerable individuals. Furthermore, these penalties may provide the only real remedies that an elderly victim has available. For example, victims of financial exploitation who can recover their assets may preserve independence and autonomy.

over

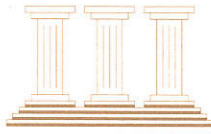
AARP believes that states should enact laws that:

- Provide strong legal protections against all forms of abuse or exploitation of incapacitated and vulnerable adults.
- Make it a criminal offense, with potential for enhanced penalties, to abuse, neglect or exploit a vulnerable adult.
- Provide victims and their legal representatives adequate civil procedures and remedies (including a shift in the burden of proof).
- Award attorney's fees and costs, expedited hearings and posthumous recoveries for pain and suffering against perpetrators of abuse, neglect or exploitation.

Additional and special efforts are necessary to protect vulnerable older adults. Therefore, we respectfully urge you to give favorable consideration to House Bill 2693 and expand protections and enhanced penalties in order to further protect vulnerable adults from abuse, neglect and exploitation.

Thank you for your consideration in this matter.

Darrell Donahue  
AARP Kansas



## KANSAS TRIAL LAWYERS ASSOCIATION

*Lawyers Representing Consumers*

Testimony  
HB 2693

KTLA supports HB 2693 which reclassifies as felonies (except for criminal gain under \$500) various crimes of mistreatment of a dependent adult, which are financial exploitation crimes at varying levels according to the value of monetary gain. Existing law does not adequately punish the crimes, nor does it distinguish levels of financial loss, leaving law enforcement with inadequate tools to fight these serious crimes, which mostly occur against the elderly.

Elder abuse grows as the population ages, and is largely under-reported. The most recent comprehensive study on the issue, the National Elder Abuse Incidence Study, prepared for the U.S. Department of Health and Human Services in 1998, reported that the best national estimate of the number of abused, neglected or financial exploited individuals across the nation was about 450,000 in 1996, but cautions that the figure may have been as high as 690,000. The National Center on Elder Abuse reports that the estimates of the number of abused elders ranged in 1996 from 820,000 to 1.8 million. By any measure, the numbers of victims are too high.

The National Elder Abuse Incidence Study further concluded that financial and material exploitation of elders comprised about 30% of all incidents under the "abuse, neglect and exploitation" umbrella. This category of financial exploitation is the third largest category in the catch-all of abuse against seniors (which in the study included 7 categories), following close behind the categories of neglect and emotional/psychological abuse.

Perpetrators of financial and material exploitation mostly target the oldest of the old. Nearly 48% of the incidents of financial and material exploitation of persons over 60 are perpetrated against individuals aged 80 years and older.

As the problem of financial exploitation of elders grows, Kansas law enforcement officials need the proper criminal classifications to assist efforts to curb these crimes and to protect dependent seniors and other dependent adults. HB 2693 helps to accomplish those goals and to protect the rights and property of Kansas elders.

*Terry Humphrey, Executive Director*



15

700 SW Jackson, Suite 803, Topeka, KS 66603-3737 phone 785/235-5103, tty 785/235-5190, fax 785/235-0020 interhab@interhab.org www.interhab.org

TO: Hon. Ward Loyd, Chairperson  
House Committee on Corrections and Juvenile Justice

FR: Tom Laing, Executive Director  
InterHab: The Resource Network for Kansans with Disabilities

RE: House Bill 2693 – relating to mistreatment of a dependent adult

InterHab is a thirty-five year old organization of community service providers and community developmental disability organizations. Our 42 members provide and/or administer services for persons with developmental disabilities in every region of the state. We serve nearly 10,000 Kansans – from infants to older Kansans – who have developmental disabilities. Most of the adults we serve would be covered by the protections offered in this bill.

**We support the intent of House Bill 2693 to give local authorities greater tools for timely and certain enforcement of statutes to protect vulnerable persons from exploitation. We also ask the committee to consider expanding the view of how this may be done, as you review the bill, to assure that multiple acts of exploitation are brought into sharper focus.**

In the field of developmental disability services, most persons receiving services are very low income persons, and would rarely be exploited for amounts of money above the \$500 threshold by which this bill distinguishes between misdemeanor and felony considerations. While such amounts are below the proposed threshold, they are still very serious financial losses.

Exploitation of persons with developmental disabilities, therefore, tends to involve small sums of money and in some cases within a pattern of criminal behavior that may not be immediately detected. When such an act is detected it is sometimes found to be a series of acts involving numerous persons, in which cases such totals may exceed, in the aggregate, the \$500 threshold.

It appears the threshold in the bill is individualized per act per person who has been exploited, in which case none of the instances described above would rise to felony consideration.

If that is correct, we would urge the Committee consider:

1. Multiple convictions, irrespective of the amount, may warrant felony consideration, or
2. In multiple acts of exploitation, the amount of financial losses should be aggregated among all victims of the same perpetrator to determine whether the threshold is met.

We appreciate the Committee's consideration of these suggestions, and encourage favorable consideration of House Bill 2693.

Thank you.

**Testimony to the House Judiciary Committee  
Regarding House Bill 2693  
Steve Howe, Assistant Prosecuting Attorney - Johnson County District Attorney's Office  
February 12, 2004**

I have been a prosecutor for 15 years. During the last five years, I have been assigned to our White Collar/Consumer Fraud Unit. I have seen an increase in financial crimes that target dependent adults.

This can take the form of credit card fraud, changing benefactors of estates, and adding their names to deeds and bank accounts. These acts are conducted by home health care workers, investment counselors, attorneys, accountants, and telephone solicitors. These criminals can be a family member or a perfect stranger.

This criminal conduct, many times, destroys the victim's life savings and leaves them dependant on government assistance. These defendants use various forms of deceit and intimidation to destroy the victims lives.

The current law is a misdemeanor for financial abuse, whether the suspect stole \$10.00 or \$10 million. This bill would right this wrong and allow for just punishment for the most egregious crimes against the most vulnerable in our society.

## Testimony Regarding House Bill 2693

Detective Byron Pierce, Overland Park Police Department  
February 12, 2004

I have been in law enforcement for 15 years. During the last eight years I've been assigned to the Overland Park Police Department's financial crimes unit investigating fraud. My duties have included investigating the financial exploitation of the elderly and dependent adults. In the late 1990s, I investigated a case that involved a 73 year old widow woman who had been financially exploited by a family of six who were not previously known to her. This family over an eight month period of time defrauded her out of her life savings of \$400,000.00. They accomplished this by playing on her mental capacity stating that they had seen "visions of her deceased husband." This family also used their small children to play on the woman's feelings stating they heard her deceased husband's voice coming through the children's baby monitor. This case was prosecuted by the Johnson County District Attorney's Office and all defendants were convicted of multiple misdemeanors due to the fact that there is no applicable state statute that for harsher penalties of this type of fraud. It was difficult as an investigator to digest the lax laws that allegedly protect the elderly. I felt that the law had no credibility and it did not hold these people accountable for the extreme financial abuse of this elderly person.

I strongly support the passage of this bill because it will have a positive impact on the most vulnerable members of our community.

**Testimony to the House Judiciary Committee  
Regarding House Bill 2693  
Lisa McCormick, Investigator - Johnson County District Attorney's Office  
February 12, 2004**

My name is Lisa McCormick and I'm an Economic Crime Investigator for the Johnson County District Attorney's Office. During my four years with the office, I have seen a frightening increase in the number of elderly consumers who are victims of financial exploitation. Simply put, they're duped out of their life savings by unscrupulous con artists. These con artists can be a family member, financial planner, care-giver or so-called friend.

Two recent cases our office prosecuted illustrate this growing problem. One case involved a 73-year-old woman who suddenly lost her husband. Less than a month after his death, the woman was "befriended" by an entire family who claimed to love and care for her. What they really cared about, however, was the woman's sizable bank account. Our elderly consumer also had no friends, and suffered from various mental health conditions that made her an even easier target. She also had no experience with finances, didn't understand the difference between writing a check for \$25 or \$25,000, didn't know how to balance a checkbook, or even how to do the grocery shopping. She had a panic attack when she went to the grocery store shortly after her husband died - it was the first time she'd been in a super market in more than 20 years.

In less than a year, the family who befriended our victim stole more than \$630,000 from her. They used the woman's money to buy jet skies, mobile homes, antiques, huge trucks and other vehicles. One family member also conned our victim into selling her \$177,000 home for \$100,000. They then convinced her into giving them thousands of dollars to reduce the mortgage and make improvements to the property. We're convinced this family would have depleted all the woman's savings if our office hadn't intervened.

Another case involved a financial planner who stole more than \$55,000 from an 83-year-old woman. This woman also had limited knowledge of finances. The financial planner convinced the woman to invest her life savings in one annuity and then make periodic withdrawals. When the checks arrived, the financial planner conveniently showed up at the woman's house, took her to the bank, and convinced her to write checks to him - under the guise of paying her taxes or buying her a certificate of deposit. Instead, he used the money for his financial gain.

Our office sees cases like this every day . . . and the numbers are growing at an alarming rate. The elderly live on limited incomes, which are often tied to the turbulent stock market, and they can't afford to lose any of their savings - whether it's \$500 or \$500,000. We believe this bill will deter these types of financial crimes and protect our most vulnerable population.





STATE OF KANSAS  
OFFICE OF THE ATTORNEY GENERAL

**PHILL KLINE**  
ATTORNEY GENERAL

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February 19, 2004

Committee on Corrections and Juvenile Justice  
Hearing on HB2693, Amendments to K.S.A. 21-3437  
Testimony of Rex G. Beasley, Deputy Attorney General

Dear Chairperson Lloyd and Committee Members:

On behalf of Attorney General Phill Kline, I wish to convey his interest in protecting the interests of vulnerable adults in the State of Kansas and his support for HB2693 and the balloon amendments offered by Representatives Newton and Davis.

The Attorney General has made no secret of the fact that the most vulnerable members of society, including elderly and dependent adults, are a priority to his administration. In reviewing the laws currently in place that are designed specifically to protect the elderly and the dependent adults it was felt that the laws, as they are currently written, fall short of the protection that our senior citizens, as well as those adults that depend on us for their care and support, deserve.

In particular, K.S.A. 21-3437, in its current form, while recognizing that there exists a need to protect our most vulnerable citizens, fails to provide a significant deterrent to the criminals who prey on these individuals. These are criminals who portray themselves as being the victim's friend, as being trustworthy, and then take advantage of that "trust" often causing financial hardship and devastation to the victim. Victims who are forced due to circumstances outside of their control to set aside their pride and depend on others for their care and well-being. Unlike the citizen who can look out for themselves, and overtime, erase most if not all of the effects of such victimization, our dependent adults typically do not have that luxury. The effects are devastating and long-lasting, impacting the very resources they depend on for their survival.

Under the current law, when a dependent adult is made the victim of financial abuse, the crime is mistreatment of a dependent adult, and the offender, if found guilty of committing the crime suffers only a class A person misdemeanor conviction, regardless of the amount of financial abuse or the total loss suffered by the victim. However, if the victim had not been a dependent adult, and they suffered a loss in excess of \$500, the crime charged is theft, and, if found guilty, the offender will likely be convicted of a felony.

There has been an unsuccessful attempt to address this matter through the courts. In *State v Maxon*, Nos. 87,696 and 87,697, a case decided by the Kansas Court of Appeals on November 21, 2003, the Court reversed two felony theft convictions of Christopher and Jodi Maxon, and affirmed misdemeanor convictions for mistreatment of a dependent adult. The Maxons were charged with and convicted of two counts of felony theft and one count of mistreatment of a dependent adult, for their respective roles in what the Court described as “the approximately 8-month long feeding frenzy” in which the defendants took over \$600,000 from an elderly, recently-widowed woman by taking advantage of her vulnerability and inability to protect her own interest. The Court in reversing part of their convictions, held that “[t]he State cannot elect to prosecute the defendant for the general crime of theft when the defendant’s acts constitute the specific crime of mistreatment of a dependent adult.” The Court reasoned that the victim in this case was a dependent adult, as defined by K.S.A. 21-3437, and, although the financial loss suffered by the victim would have amounted to a felony under the Kansas theft statute, *Maxon* could not be charged with theft because there was a more specific crime, mistreatment of a dependent adult, available.

Our elderly and dependent adults depend on us for their care and well-being, despite their unwillingness to be so dependent. As caretakers we are also responsible for enacting laws that will serve to protect them from the effects of crime. It is obvious that the legislature realized the importance of protecting our vulnerable citizens. Now it is time that we recognize that the taking of financial resources from a dependent adult constitutes a heinous violation of trust and deserves more than a misdemeanor conviction. The proposed changes in HB 2693 make the penalties for committing financial abuse of a dependent adult consistent with the penalties for committing theft.


Thank you for the opportunity to testify on this very important issue, and for your consideration. Please do not hesitate to contact our office if you should have any questions.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL  
PHILL KLINE

Rex Beasley,  
Deputy Attorney General  
Medicaid Fraud and Abuse Division

20

 | [Keyword](#) | [Name](#) » [SupCt](#) - [CtApp](#) | [Docket](#) | [Date](#) |

No. 87,696

No. 87,697

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,

*Appellee,*

v.

CHRISTOPHER MAXON,

*Appellant.*

STATE OF KANSAS,

*Appellee,*

v.

JODI MAXON,

*Appellant.*

SYLLABUS BY THE COURT

1. To establish the crime of mistreatment of a dependent adult, K.S.A. 21-3437, the State does not need to prove that the victim was dependent upon the defendant; the crime may be committed by a person who is not the victim's caretaker.
2. In a multiple acts case, the jury must be unanimous as to which act or incident constitutes a crime. However, the unanimity requirement is satisfied by giving the jury a unanimity instruction.
3. To establish the offense of theft by deception, the State must prove: (1) The victim was the owner of the property, (2) the defendant obtained control over the property by means of a false statement or representation which deceived the property owner and upon which he or she relied, and (3) the defendant intended to deprive the owner permanently of the use or benefit of the property. The elements of theft by deception are not established by either: (1) proving the defendant induced a transfer of property with statements or representations which are true or which are not proved to be false; or (2) proving the defendant made a false statement or representation if the property owner was not induced to make the particular transfer in reliance on the statement or representation.
4. To commit theft by obtaining or exerting unauthorized control over property, the defendant must exercise the control over the property without the consent of the property owner.

5. In Kansas, a defendant who takes unfair advantage of the financial resources of an adult who is unable to protect his or her interest for another individual's personal or financial advantage by the use of undue influence has committed the specific crime of mistreatment of a dependent adult, in violation of K.S.A. 21-3437. The State cannot elect to prosecute the defendant for the general crime of theft when the defendant's acts constitute the specific crime of mistreatment of a dependent adult.

Appeal from Johnson District Court; JAMES FRANKLIN DAVIS, judge. Opinion filed November 21, 2003. Affirmed in part and reversed in part.

*Allan E. Coon*, of Norton, Hubbard, Ruzicka & Kreamer L.C., of Olathe, and *Scott C. Gyllenborg*, of Scott C. Gyllenborg, P.A., of Olathe, for appellants.

*Stephen M. Howe* and *Steven J. Obermeier*, assistant district attorneys, *Paul J. Morrison*, district attorney, and *Phill Kline*, attorney general, for appellee.

Before JOHNSON, P.J., GREENE, J., and DAVID W. KENNEDY, District Judge, assigned.

JOHNSON, J.: Christopher and Jodi Maxon were each convicted of two counts of theft and one count of mistreatment of a dependent adult. They appeal, challenging the sufficiency of the evidence and the imposition of Christopher's upward dispositional departure sentence. We affirm the mistreatment of a dependent adult convictions but reverse the theft convictions, thereby rendering the sentencing question moot.

The scenario presented is one in which the defendants took unfair advantage of the vulnerability of an elderly, recently-widowed woman for the defendants' personal and financial gain. The difficult legal questions presented emanate from the State's charging the defendants with felony thefts for conduct that appears to fit squarely within the definition of misdemeanor mistreatment of a dependent adult.

The victim, Bea Bergman, lost her husband, Paul, to a heart attack in January 1999. Bea and Paul had lived modestly and accumulated substantial assets valued in the millions of dollars. Bea had relied on Paul to handle all their major financial decisions and, at his death, was even relying exclusively on him for transportation. After Paul's death, Bea was "[v]ery confused and very lost"; she experienced several episodes of anxiety for which she summoned emergency medical assistance. The month following Paul's death, Dr. Yvette Crabtree of the Kenyon Clinic examined Bea and prescribed an anti-anxiety medication and an antidepressant.

Also in the month following Paul's death, Bea called Maxon Moving to arrange for the hauling of Paul's personal effects to the Salvation Army. Maxon Moving was a family-owned operation and had been one of Paul's regular customers since the 1940s. Further, Paul and Bea had hired Maxon Moving to move their belongings on a number of occasions. Bea talked with Joyce Maxon and mentioned that she intended to give her husband, Ron Maxon, Sr., a marble-top table that Ron Sr. had admired during previous moves. The next day Ron Sr. went to Bea's house. Bea gave him the table, as well as a thank you card containing a \$2,000 check.

Shortly thereafter, Joyce became a frequent visitor at Bea's house. She would transport Bea to antique shops, to the grocery store, to the doctor's office, and to church. Eventually, Joyce was spending weekday nights at Bea's house, and Bea would spend the weekend at Joyce's house. Bea became progressively integrated into the Maxon family, which, in addition to Ron Sr. and Joyce, included Ron

Maxon, Jr., Christopher Maxon, Jodi Maxon, and Sharyl Ledom. Bea attended Maxon family functions and wanted the Maxons to call her "Aunt Bea." Coincidentally, as Bea was being welcomed into the Maxon family circle, she began writing checks to and purchasing property for the various Maxon family members. During the approximately 8-month long feeding frenzy, Bea dispersed over \$600,000 to or for the benefit of the Maxons. However, during this same period, Bea also wrote checks to her daughter, her granddaughter, and a niece.

Specifically, the theft charges in this case involved: (1) the sale of Bea's house to Christopher and Jodi; and (2) Christopher's purchase of a new truck. In May 1999, Bea had listed her house for sale with her real estate agents, Linda and Charles Stanfield; the listing price was \$177,500. Shortly after the listing, Bea moved into an apartment. The listing was cancelled in June 1999, and Christopher and Jodi moved into the house. In July, the new occupants fenced the yard, installed a hot tub, and built a new deck, albeit Bea footed the bill. In late July or early August, Christopher and Jodi contracted with Bea to purchase the house for \$100,000, financed in part with a \$99,500 promissory note which was to balloon upon the Maxons' sale of their La Cygne, Kansas, house. The note was paid in full within 3 or 4 months. There was some testimony that Bea had offered to give the house to Christopher and Jodi.

In October 1999, Christopher picked out a new Ford truck at a dealership in Olathe. He asked the salesman for permission to drive the truck to show his mother, because if she approved of the vehicle, she would give him the purchase money. Christopher drove to Bea's apartment, gave her a ride, and presented her with the bill. Bea wrote a \$38,745.34 check, payable to Olathe Ford, and gave it to Christopher to purchase the truck. Bea was not sure, but she thought Jodi accompanied Christopher when this transpired. The truck was titled solely in Christopher's name.

In November 1999, Bea reconciled with her estranged son, Paul Thorpe. Thorpe and his wife subsequently moved into an apartment down the hall from Bea.

During the Christmas season of 1999, Bea severed her relationship with the Maxons. The rift was precipitated by the Maxons' Christmas gifts to Bea, which she considered to be miserly responses to her Christmas gifts to them of \$25,000 checks. She was hurt by the Maxons' failure to reciprocate her generosity and had no further contact with the Maxons.

Subsequently, Bea's son examined her financial records and noted the checks that had been written to the Maxons. Bea and her son met with the attorney that was acting as Paul's executor, who referred them to another attorney, Harry Wigner. Wigner sent Bea to a psychiatrist for an examination and contacted the district attorney's office about the possibility of filing criminal charges.

The psychiatrist, Dr. Everette Sitzman, diagnosed Bea as suffering from bipolar disorder with episodes of hypomania and prescribed a mood stabilizing agent. The doctor opined that people with Bea's affliction are vulnerable to influence by others and often require a protective trust or conservatorship to protect their assets.

After a year-long investigation, the Johnson County District Attorney's office filed charges against Ron Sr., Joyce Maxon, Jodi Maxon, Christopher Maxon, Sharyl Ledom, and Ron Maxon, Jr. All of the defendants, except for Ron Jr., were tried together. The case before us involves the charges against Christopher and Jodi which were identical: (1) one count of felony theft of Bea's house; (2) one count of felony theft of United States currency (used to purchase the Ford truck); and (3) one count of

misdemeanor mistreatment of a dependent adult. The thefts were charged in the alternative, alleging that they were committed by obtaining or exerting unauthorized control over the property or that they were committed by obtaining the property through deception. Further, the jury was given an aiding and abetting instruction. Christopher and Jodi were convicted on all counts; the jury found the thefts were committed in both alternative manners. The district court granted the State's motion for an upward dispositional departure sentence in Christopher's case based on Bea's vulnerability and sent him to prison for 38 months. Jodi received a presumptive probation sentence.

Appellants structure their appeal to first challenge the sufficiency of the evidence to support a conviction based upon K.S.A. 2002 Supp. 21-3701(a)(1), arguing they did not obtain or exert unauthorized control over any of Bea's property, *i.e.* no theft occurred. As a sub-issue, appellants assert that they could not have aided or abetted a theft that did not occur. Next, the Maxons argue the absence of any evidence to establish that any false statements or representations were made to induce Bea to transfer her property, negating the sufficiency of the evidence to support the theft by deception convictions under K.S.A. 2002 Supp. 21-3701(a)(2). Again, as a sub-issue, appellants assert that the aiding or abetting instruction could only have been applicable to Jodi, if at all, but that no evidence exists that she advised, counseled, procured, or encouraged Christopher to commit a crime. The third issue presented challenges the sufficiency of the evidence to support the convictions for mistreatment of a dependent adult, asserting that Bea was not a "dependent adult" in 1999 and that appellants did not mistreat her. Included in the third issue is a multiple acts argument. Finally, appellants challenge the constitutionality of Christopher's upward dispositional departure sentence, as well as the existence of substantial and competent evidence of a substantial and compelling reason to depart. We will take the liberty of addressing the issues in a different order than that presented.

#### *MISTREATMENT OF DEPENDENT ADULT*

In deciding appellants' challenge to the sufficiency of the evidence to support their convictions for mistreatment of a dependent adult, we review all of the evidence, viewed in the light most favorable to the prosecution, to determine if a rational jury could have found the defendants guilty beyond a reasonable doubt. See *State v. Zabrinas*, 271 Kan. 422, 441-42, 24 P.3d 77 (2001). We are to refrain from the temptation to weigh the evidence or pass on the credibility of the witnesses. *State v. Sanders*, 272 Kan. 445, 455, 33 P.3d 596 (2001).

The statute creating this crime is K.S.A. 21-3437, the relevant portions of which are:

"(a) Mistreatment of a dependent adult is knowingly and intentionally committing one or more of the following acts:

....

(2) taking unfair advantage of a dependent adult's physical or financial resources for another individual's personal or financial advantage by the use of undue influence, coercion, harassment, duress, deception, false representation or false pretense by a caretaker or another person . . . .

....

"(c) For purposes of this section: 'Dependent adult' means an individual 18 years of age or older who is unable to protect their own interest."

The elements instruction given in these cases informed the jury that it had to find, *inter alia*, that the defendants "knowingly and intentionally took unfair advantage of Bea Bergman's financial resources for another individual's financial advantage by the use of undue influence, coercion, deception, false representation, or false pretense" and that Bea Bergman was a "dependent adult." The elements instruction provided the statutory definition of dependent adult; a separate instruction provided definitions of undue influence, coercion, deception, and false pretense.

Christopher and Jodi present two arguments: (1) The evidence does not establish that Bea was a dependent adult; and (2) no evidence was presented to establish undue influence, coercion, deception, or false pretense. To the extent appellants' arguments require statutory interpretation, our review is de novo. See *Thomas v. Hannigan*, 27 Kan. App. 2d 614, 616, 6 P.3d 933 (2000).

### *Was the Victim a Dependent Adult?*

Following the definition of dependent adult, K.S.A. 21-3437(c) provides a list of factual circumstances which are included within the definition, e.g. any resident of an adult care home. None of the illustrations is applicable here. Appellants argue the evidence did not establish that Bea was dependent upon Christopher and Jodi or that she was unable to handle her own financial affairs.

The State did not have to prove that Christopher and Jodi were the persons on whom Bea was dependent. The statute specifically prohibits the taking of unfair advantage of a dependent adult "by a caretaker or *another person*." (Emphasis added.) K.S.A. 21-3437(a)(2). Persons other than a caretaker can mistreat a dependent adult, if the victim is unable to protect herself or himself.

In arguing the insufficiency of the evidence to establish Bea's inability to protect her own interest, appellants acknowledge that Dr. Sitzman provided direct testimony on that question. However, appellants urge us to discount Dr. Sitzman's testimony and look to the other evidence supporting their contention that Bea was a confident, assertive individual. Our standard of review precludes our making an assessment of Dr. Sitzman's credibility or weighing his testimony against that of the other medical professionals, no matter how qualified or persuasive the others might appear on the record. The jury viewed the witnesses firsthand and its factual determination must be respected.

### *Evidence of Mistreatment*

Appellants persuasively argue that the evidence did not support a finding that they utilized coercion, deception, false representation, or false pretense to obtain money and property from Bea. However, the statute is drawn in the disjunctive; evidence of undue influence is sufficient to support a conviction.

Christopher and Jodi point to his mother, Joyce, as the source of influence over Bea and contend that "appellants cannot be held responsible for any influence which may have been exercised by persons other than themselves." Appellants omit any discussion of the aiding and abetting jury instruction.

The evidence was sufficient to establish that the Maxon family systematically preyed upon Bea's mental and emotional vulnerability to obtain her money. Joyce orchestrated the transfers, timing the gift requests to coincide with Bea's manic or "giving" periods and deciding who would be the next recipient of Bea's bounty. However, all family members, including Christopher and Jodi, participated in the scheme. Indeed, the siblings apparently squabbled about who should get the next distribution

and the inequities in the amounts each was receiving.

The legislature, by enacting K.S.A. 21-3437, intended to criminalize the conduct in which Christopher and Jodi engaged in conjunction with other Maxon family members. The evidence was sufficient to support the convictions for mistreatment of a dependent adult.

### *Multiple Acts*

Appellants complain that the evidence depicted several acts which could each constitute the crime of mistreatment of a dependent adult and, therefore, they were deprived of their right to a unanimous verdict because the verdict forms did not require the jury to specify an underlying act. The State alleged that Bea had given checks and property to Christopher and Jodi with a value in excess of \$200,000, including several items other than the house sale and Ford truck purchase which were the subjects of the theft charges. The State was relying on these other transfers to support the mistreatment of a dependent adult charge.

Appellants acknowledge that the jury was given two unanimity instructions; one for Christopher and one for Jodi. Those instructions specifically told the jury that "[i]n order for the defendant to be found guilty of . . . mistreatment of a dependent adult in Count III, you must unanimously agree upon the same underlying act."

In a multiple acts case, the jury must be unanimous as to which act or incident constitutes the crime. *State v. Davis*, 275 Kan. 107, 115, 61 P.3d 701 (2003). The State may either elect the particular act upon which it is relying or the court must provide a unanimity instruction. See *State v. Timley*, 255 Kan. 286, 289-90, 875 P.2d 242 (1994). Here, the State opted for a unanimity instruction. Appellants got what they were entitled to have, and there was no error.

### *THEFT BY DECEPTION*

Appellants' challenge to the sufficiency of the evidence to support their theft convictions under the K.S.A. 2002 Supp. 21-3701(a)(2), theft by deception, alternative is subject to the same standard of review as cited above. *State v. Fritz*, 261 Kan. 294, 299, 933 P.2d 126 (1997), summarized the elements of theft by deception:

"To establish the offense of theft by deception, the State must prove: (1) The victim was the owner of the property, (2) the defendant obtained control over the property by means of a false statement or representation which deceived the property owner and upon which he or she relied, and (3) the defendant intended to deprive the owner permanently of the use or benefit of the property."

Appellants note that the record contains no evidence that they made an express or implied false statement or representation in conjunction with the house sale or the truck purchase. Further, they argue that Bea did not rely on any false statements or representations that may have been made. We agree.

The State's brief emphasizes the circumstances surrounding the two transactions but fails to identify any falsity upon which Bea relied. The representations which might have induced Bea's actions are either true or not shown to be false. As examples: Christopher's statement that he needed a new truck because the transmission was out of his existing truck is not refuted in the record; the representation



that Christopher and Jodi were having difficulty selling their La Cygne house is supported in the record.

The only arguably false statement referred to by the State involved comments that certain Maxon family members had seen or heard from Bea's dead husband. While such statements may have been calculated to endear the Maxons to Bea or to further the general exploitation of the vulnerable widow, any inference of a causal connection between the statements and the specific transactions being prosecuted is too nebulous to support a criminal conviction.

The evidence was insufficient to support the convictions for theft by deception, and those convictions are reversed.

#### *THEFT BY OBTAINING OR EXERTING UNAUTHORIZED CONTROL*

Alternatively, Christopher and Jodi were alleged to have committed theft by the more commonly understood means of simply taking Bea's property without her permission. In statutory parlance, they were charged with "[o]btaining or exerting unauthorized control over property." K.S.A. 2002 Supp. 21-3701(a)(1). The elements instruction identified the stolen property as: (1) the house and property at 11412 Flint, Overland Park, Johnson County, Kansas; and (2) United States currency in connection with the purchase of the Ford F-350 pickup.

The appellants point us to the obvious problem with defining their acts as a traditional theft, *i.e.* they obtained control over the property with Bea's permission. Bea not only authorized Christopher and Jodi to take control of the property, but she actively participated in effecting the transfers. Bea signed and acknowledged the execution of the warranty deed to transfer the residential real estate; Bea wrote the check, payable to Olathe Ford, and gave it to Christopher.

In *State v. Greene*, 5 Kan. App. 2d 698, 702, 623 P.2d 933 (1981), this court examined the phrase "obtaining or exerting unauthorized control" in connection with the criminal deprivation of property statute, K.S.A. 2002 Supp. 21-3705. The court noted that the term "unauthorized" is not defined by the Kansas Statutes and then adopted the following definition: ""Unauthorized control means control exercised over property of another without the consent of the owner."" 5 Kan. App. 2d at 703 (quoting Wilson, *Thou Shalt Not Steal: Ruminations on the New Kansas Theft Law*, 20 Kan. L. Rev. 385, 395 [1972]).

Based on that definition, the theft convictions cannot stand if Bea consented to the property transfers. On appeal, the State does not contend that Bea did not consent to the defendants' control over the property, but rather the argument is that Bea's consent was ineffective because she did not possess the necessary mental capacity to give her property to the defendants.

The State acknowledges the absence of any Kansas case addressing whether a donee can be convicted of theft for accepting a gift from a mentally impaired donor. We are directed to decisions from other states to persuade us that such a prosecution should be permitted in this state. See *Gainer v. State*, 553 So. 2d 673, 679-80 (Ala. Crim. App. 1989); *State v. Calonico*, 256 Conn. 135, 155-56, 770 A.2d 454 (2001); *Deranger v. State*, 652 So. 2d 400, 401 (Fla. Dist. App. 1995); *Lucas v. State*, 183 Ga. App. 637, 641, 360 S.E.2d 12 (1987); *People v. Camiola*, 225 App. Div. 2d 380, 381, 639 N.Y.S.2d 35 (1996).

The State relies heavily on *Gainer*, in which the Alabama Court of Criminal Appeals noted that several other states had adopted specific "statutory provisions vitiating consent obtained from one whom the defendant knows or should know lacks the mental capacity to voluntarily and intelligently give such consent." 553 So. 2d at 679. The court further commented:

"There is no such provision in Alabama law with regard to offenses involving theft. . . . However, we are of the opinion that, even without an express statutory provision to that effect, mental deficiency on the part of the victim, which is known or should be known to the defendant, can render ineffective the apparent consent by that victim in a prosecution for theft [by knowingly obtaining or exerting unauthorized control over the property of another]." 553 So. 2d at 679.

Like Alabama, our statutes do not contain a specific provision that negates an individual's consent when the defendant knows or should know the donor lacks the mental capacity to give consent. See Colo. Rev. Stat. § 18-1-505(3)(b) (2003) (assent does not constitute consent if "given by a person who, by reason of immaturity, mental disease or mental defect, or intoxication, is manifestly unable and is known or reasonably should be known by the defendant to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense"); Tex. Penal Code Ann. § 31.01(3)(C) (2003) (consent is not effective if "given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions"). On appeal, the State urges us to judicially create a definition of "unauthorized control" that includes a consensual transfer from a donor who has insufficient mental capacity to give a voluntary or intelligent consent.

The initial dilemma presented by the State's argument is determining the legal standard that should be applied to determine the level of incapacity that would vitiate the transferor's consent. Without some standard, a donee would not have a sufficiently adequate warning that his or her acceptance of a gift is a theft and the law would not adequately guard against arbitrary and discriminatory enforcement. See *State v. Bryan*, 259 Kan. 143, Syl. ¶ 2, 910 P.2d 212 (1996). Does a transferor have to possess the capacity to contract? See *Mills v. Shepherd*, 159 Kan. 668, Syl. ¶ 1, 157 P.2d 533 (1945) ("The test of mental capacity to contract or to convey property is whether the person possesses sufficient mind to understand, in a reasonable manner, the nature and effect of the act in which he is engaged."). Would the State have met its burden of proving an unauthorized transfer by proving Bea fit the definition of a "disabled person" under the involuntary conservatorship statutes in effect at the time of transfer? K.S.A. 59-3002 ("Disabled person" means any adult person whose ability to receive and evaluate information effectively or to communicate decisions, or both, is impaired to such an extent that the person lacks the capacity to manage such person's financial resources or, except for reason of indigency, to meet essential requirements for such person's physical health or safety, or both."). Alternatively, we could be guided by the current act for obtaining a guardian or conservator, K.S.A. 2002 Supp. 59-3050 *et seq.*, which refers to an "adult with an impairment in need of a guardian or a conservator, or both" and defines such a person to be one

"whose ability to receive and evaluate relevant information, or to effectively communicate decisions, or both, even with the use of assistive technologies or other supports, is impaired such that the person lacks the capacity to manage such person's estate, or to meet essential needs for physical health, safety or welfare, and who is in need of a guardian or a conservator, or both." K.S.A. 2002 Supp. 59-3051(a).

Or, do we look at the rather minimal capacity needed to make a testamentary disposition? See *In re*

*Estate of Walter*, 167 Kan. 627, Syl. ¶ 3, 208 P.2d 262 (1949) ("to prove testatrix did not have testamentary capacity it must be established either that she did not know the amount of her property; that she did not know to whom she wished her property to go, or that she did not understand who were the natural objects of her bounty").

The jury was not instructed on the State's unique theory. Closing arguments do not appear in the record so that we do not know how the State's theory of unauthorized control was presented to the jury. On appeal, the State suggests that a theft conviction is appropriate "if a victim is incapable of giving a voluntary or intelligent consent to transfer money."

"All crimes in Kansas are statutory, and the elements necessary to constitute a crime must be gathered wholly from the statute." *State v. Christiansen*, 258 Kan. 465, 466, 904 P.2d 968 (1995). In gathering the requisite elements of a crime from a statute, we are not imbued with unlimited creativity.

"The fundamental rule of statutory construction is that a court should interpret a statute to give it the effect intended by the legislature. [Citation omitted.] In Kansas, all crimes are established by statute, and a court should not extend a criminal statute to embrace acts or conduct not clearly included within the statutory prohibitions. [Citations omitted.]" *State v. Arehart*, 19 Kan. App. 2d 879, 881, 878 P.2d 227 (1994).

The argument that the legislature intended felony theft, committed by obtaining or exerting unauthorized control over property, to be extended to embrace the act of obtaining a consensual transfer from a person with mental, emotional, or personality problems would be more persuasive if the legislature had not created the specific crime of mistreatment of a dependent adult to encompass that act. The State recognized that the mistreatment of a dependent adult crime applied to this scenario by prosecuting the Maxons for that crime for all of Bea's transfers, except for the two selected to be charged as felony thefts. Precedent teaches us that it is improper to prosecute a defendant for a general crime when the facts establish the violation of a specific statute. See, e.g., *Carmichael v. State*, 255 Kan. 10, Syl. ¶ 5, 872 P.2d 240 (1994) (specific offense of aggravated incest must be charged instead of general crime of rape); *State v. Wilcox*, 245 Kan. 76, 79, 775 P.2d 177 (1989) (welfare fraud must be prosecuted under the specific statute, K.S.A. 39-720, and not the general statute of making a false writing). ""A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special." *Seltmann v. Board of County Commissioners*, 212 Kan. 805, 810, 512 P.2d 334 (1973) (quoting 82 C.J.S., Statutes § 163, p. 277). *State v. Montgomery*, 14 Kan. App. 2d 577, 580, 796 P.2d 559 (1990). Obviously, the theft statute is general while the mistreatment of a dependent adult statute is specific. Therefore, we decline to find that the legislature intended to make those acts constituting the specific crime of mistreating a dependent adult part of the general theft statute definition of obtaining or exerting unauthorized control.

Even if we were to redefine the theft statute, we would require that the victim's impairment be more than the poor business judgment exhibited by those suffering from mild hypomania. The evidence presented does not support a finding that Bea lacked the capacity to contract, lacked testamentary capacity, or was amenable to an involuntary conservatorship as a disabled or impaired person. At best, there was substantial competent evidence that Bea suffered from emotional, mental, or personality disorders that made her vulnerable to the Maxons' influence.

During the time frame of the alleged thefts, Bea was conducting her own business and apparently entering into contracts, *e.g.* she executed a listing agreement on her house and leased an apartment. She made gifts to her daughter of approximately \$177,000 in 1999, as well as making substantial gifts to a granddaughter, a niece, and her son. None of these recipients were named as codefendants with the Maxons. Logically, if Bea had sufficient mental capacity to make gifts to her family, then she could consent to the transfers to the Maxons.

We are particularly concerned with the evidence to support the convictions for felony theft of the residential property. One of the State's own exhibits is the house deed, containing an acknowledgment which recites that Bea executed the document in the presence of the notary public and that the deed "was executed as a free and voluntary act and deed for the uses and purposes therein set forth." Further, the Maxons bought the property; they paid Bea \$100,000. The elements instruction told the jury that it had to find that the Maxons obtained or exerted unauthorized control over the entire property. At most, the Maxons cheated Bea out of the difference between the sale price and the value of the property, whatever that might have been. At what point is a purchase price so inadequate that a good deal becomes a felony? The evidence was insufficient to support the charge that the Maxons exerted or obtained unauthorized control over the entire residential property, as per the jury instructions.

The mistreatment of a dependent adult convictions are affirmed; the felony theft convictions are reversed. Given our decision on the theft convictions, we need not reach Christopher's issue regarding his upward dispositional departure sentence.

Affirmed in part and reversed in part.

END



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**HB 2693**  
**concerning crimes and punishment; relating to**  
**mistreatment of a dependent adult**  
**February 12, 2004**

Chairman Loyd and  
House Corrections and Juvenile Justice Committee Members:

Kansas Advocates for Better Care (KABC) supports HB 2693.

KABC is the statewide non-profit organization that promotes quality long-term care for residents of licensed adult care homes. By their nature, residents of long-term care homes are dependent adults who are easily susceptible to abuse, neglect and exploitation (ANE). They are susceptible in a similar manner that children are susceptible to ANE.

Dependent adults need legal protection which properly punishes ANE crimes against them. KABC is pleased and thankful that HB 2693 redefines the severity level to that of "felony" for most types of mistreatment of a dependent adult. The passage of this bill will demonstrate that Kansas is concerned about ANE crimes against dependent adults in a similar manner as ANE crimes against children.

KABC requests the Committee to favorably pass HB 2693.

Thank you for this opportunity to speak up for dependent adults.

Deanne Bacco, Executive Director



*A multidisciplinary community approach  
to breaking the cycle of violence*

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February 11, 2004

The Honorable Representative Ward Loyd  
Chairperson, Corrections & Juvenile Justice Committee  
Kansas House of Representatives

The Honorable Representative Thomas Owens  
Vice-Chairperson, Corrections & Juvenile Justice Committee  
Kansas House of Representatives

Members of the Corrections & Juvenile Justice Committee

Dear Chairperson Loyd, Vice Chairperson Owens and Members  
of the Committee:

I am writing this letter in support of **House Bill 2693** sponsored  
by Representatives Newton and Davis. I currently serve as  
chairperson of the Elder Abuse Committee—a standing  
committee of the Johnson County Community Violence Action  
Council (COMVAC). The Elder Abuse Committee advocates on  
behalf of older, dependent adults and serves at the community  
level to prevent and protect dependent older adults from abuse,  
neglect and exploitation.

Strengthening the sentencing of those who are found guilty of  
willfully mistreating a dependent person gives notice that acts  
such as taking a dependent person's money or other resources,  
inflicting physical harm or other mistreatment constitute serious  
criminal behavior in Kansas. Further, this bill will give  
dependent adults appropriate and equal status in our state's  
sentencing statutes and will affirm the value of vulnerable  
people in our state—people who deserve respect and  
protection.

The Elder Abuse Committee respectfully asks that you support  
this important bill. Thank you for the opportunity to comment.

Yours truly,

Linda Wright  
Chairperson, Elder Abuse Committee of COMVAC

c: Representative Dean Newton