

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 p.m. on February 2, 2004 in Room 313-S of the Capitol.

All members were present except:

- Representative Tom Klein- excused
- Representative Tim Owens- excused
- Representative Doug Patterson- excused
- Representative Dale Swenson- excused
- Representative Dan Williams- excused

Committee staff present:

- Jill Wolters, Revisor of Statutes
- Diana Lee, Revisor of Statues
- Jerry Ann Donaldson, Kansas Legislative Research Department
- Cindy O'Neal, Secretary

Conferees appearing before the committee:

- Judge Jerry Elliott, Kansas Judicial Council
- Kathy Olsen, Kansas Bankers Association
- Candy Shively, Deputy Secretary, Social and Rehabilitation Services
- Matt Goddard, Heartland Community Bankers Association
- Kirk Lowry, Kansas Advocacy & Protective Services

Hearings on **HB 2553 - relating to the time for filing claims against a municipality**, were opened.

Judge Jerry Elliott, Kansas Judicial Council, appeared as a proponent of the proposed bill which clarifies the relationship between the 120 day notice requirement and the two year statute of limitations for torts. If a claim is denied, or deemed denied after 120 days without a response, a claimant then has no less than 90 days in which to file a claim. (Attachment 1)

Written testimony in support of the bill was provided by the Kansas Bar Association. (Attachment 2)

Hearings on **HB 2553** were closed.

Hearings on **HB 2581 - reporting adult abuse to SRS**, were opened.

Kathy Olsen, Kansas Bankers Association, explained that the proposed bill addresses the reporting of adult abuse through bank accounts by:

- allowing SRS the ability to place a 10 day administrative hold on an account of a suspected victim of abuse by giving written notice to the bank
- requiring written notice from SRS that records being requested from the bank are in furtherance of an investigation being conducted before the records can be turned over
- clarifying that protection from liability making does include providing records upon the request of SRS as allowed by the act (Attachment 3)

Candy Shively, Deputy Secretary, Social and Rehabilitation Services, express the importance for SRS & banks to work with law enforcement as it relates to adult abuse. The proposed bill is a good step towards stopping the abuse. She requested two amendments:

- law enforcement agencies should be authorized to place a hold on any account for a period of ten days while they are investigating fiduciary abuse
- law enforcement agencies should be able to obtain financial records relevant to an investigation though a written request (Attachment 4)

Matt Goddard, Heartland Community Bankers Association, had concerns with section 4, where the notice falls upon financial institutions to notify the account holder of the possibility of abuse and with the account being frozen for 10 days. (Attachment 5)

CONTINUATION SHEET

MINUTES OF THE HOUSE JUDICIARY COMMITTEE at 3:30 p.m. on February 2, 2004 in Room 313-S of the Capitol.

Written testimony in support of HB 2581 was provided by the Kansas Department of Aging & Office of Attorney General (Attachment 6 & 7)

Kirk Lowry, Kansas Advocacy & Protective Services, appeared as an opponent to the bill, which he believes has substantial constitutional and civil rights of people with disabilities. Many people with disabilities live on SSI which is currently \$564 a month. A ten day freeze would imposed a hardship on a person. (Attachment 8)

Hearings on HB 2581 were closed.

Representative Pauls made the motion to approve the committee minutes from January 14, 20 & 21. Representative Crow seconded the motion. The motion carried.

The committee meeting adjourned at 5:15 p.m. The next meeting was scheduled for February 3, 2004.

Judicial Council Testimony on 2004 HB 2553

The proposed amendment to K.S.A. 12-105b(d) is intended to clarify the relationship between the 120 day notice requirement and the 2 year statute of limitations for torts. The statute of limitations is tolled to allow a claimant to comply with the notice provisions of the act. Claimants must file a notice of claim within the 2 year statute of limitations. If the claim is denied, or if it is deemed denied after 120 days without a response, a claimant then has no less than 90 day in which to file a claim. This amendment makes the tolling provision clear and removes the “trap” that has befallen other plaintiffs.

The Kansas Court of Appeals suggested in 1993 that changes needed to be made to K.S.A. 12-105b(d). See *Martin v. Board of Johnson County Comm'rs*, 18 Kan. App. 2d 149, 158, 848 P.2d 1000 (1993). The legislature did not respond at that time, and this year, two more cases were decided in which this statute was discussed. In the first of these cases, *Cummings v. City of Lakin*, 31 Kan. App. 2d 532, 67 P.3d 166 (2003), a separate concurrence emphasized that the statute contains traps that could easily be rectified by an statutory amendment. “It is for the legislature to address this problem, should they feel a need to do so.” 31 Kan. App. 2d at 535. The second case cites the concurrence in *Cummings* and once again suggests that the legislature amend the statute. *J.P. Asset Co., Inc. v. City of Wichita*, 31 Kan. App. 2d 650, 654-55, 70 P.3d 711 (2003).

The *Martin* court quoted Jerry R. Palmer and Martha M. Snyder, who predicted the problems with K.S.A. 12-105b(d) in the article *What Happened and What's Left after Judicial Scrutiny*, 57 J.K.B.A. 21 (Nov./Dec. 1998). Palmer and Snyder warned practitioners that a 1987 amendment to K.S.A. 12-105b(d) created two “traps for the unwary”:

“The first occurs when the claim is filed and the 120 days run shortly before the statute of limitations expires. . . . A second trap is where the 120 days run or the denial itself is made after the statute of limitations has expired. There is no time set for extension within which to file nor is a reasonable period even suggested. Certainly a filing on the same day as the denial would comply with the statute, but anything beyond that is going to create some jeopardy for the plaintiff and for plaintiff's counsel.” 57 J.K.B.A. at 28.

The three cases have shown that Mr. Palmer and Ms. Snyder were correct in their predictions. The consensus from the three cases is that K.S.A. 12-105b(d) should be amended to “clearly provide

a period for a claimant to file an action after a claim has been denied.” *Martin v. Board of Johnson County Comm’rs*, 18 Kan. App. 2d 149, 158, 848 P.2d 1000 (1993). “[A] statute which makes a clear provision for a period of time during which a claimant may file and action after notice of claim is denied would eliminate both traps...” *Cummings v. City of Lakin*, 31 Kan. App. 2d 532, 67 P.3d 166 (2003). “It would be helpful if K.S.A. 12-105b(d) were amended by the legislature to conform with the time frames in the Federal Tort Claims Act statute, 28 U.S.C. § 2675 (2000), so there would be uniformity in the time frames for filing tort claims against governmental entities in Kansas. *J.P. Assett Co., Inc. v. City of Wichita*, 31 Kan. App. 2d 650, 70 P.3d 711 (2003).

This bill makes the needed changes in K.S.A. 12-105b(d).



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February 2, 2004

TO: Members of the House Judiciary Committee

FROM: Jim Clark, KBA Legislative Counsel

RE: HB 2553

The Kansas Bar Association supports the Judicial Council in its effort to make more certain the procedure surrounding denial of a claim by a municipality. The uncertainty, or “traps” surrounding this procedure and the need for a legislative solution have been commented on in several appellate court decisions, as well as in an article in the Journal of the Kansas Bar Association back in 1998. The problem has now been addressed by the Judicial Council, and a solution has been proposed in amendments to K.S.A. 12-105b contained in HB 2553. We urge the Committee to recommend the bill favorably.

House Judiciary Committee
2-2-04
Attachment 2



February 2, 2004

To: House Committee on Judiciary

From: Kathleen Taylor Olsen, Kansas Bankers Association

Re: HB 2581: Reporting of Adult Abuse

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to present testimony in support of **HB 2581**, which makes several amendments to the act regulating the reporting of the abuse, neglect or exploitation of certain adults.

The legislature, in making bank officers mandatory reporters of fiduciary abuse or exploitation, has recognized that the banking industry is in a unique position when it comes to detecting the fiduciary abuse or exploitation of adults. The law also recognizes that the banking industry is instrumental in the investigation of a report of financial abuse. That is why the law provides for protections from liability for persons who hold records that are instrumental to the investigation of financial abuse or exploitation.

In our communications with KBA members, we have learned of a disturbing trend in the occurrence of the financial abuse of adults. The KBA's legal department fields at least one call a week from a banker who is trying to either comply with the reporting requirements of the law, or who is trying to comply with an SRS investigation into a report of adult abuse. As our members struggle with the requirements of the law, it is their unanimous desire to protect their customers that brings us here today.

The amendments we are suggesting in **HB 2581** all involve the investigation process once a report that indicates an adult is the victim of financial abuse or exploitation has been filed with the Department of Social and Rehabilitation Services and are described below:

Amendment to KSA 2003 Supp. 39-1433 (Page Four). In adding a new subsection (5) to this statute, we are attempting to resolve a problem that exists in the investigation of financial abuse or exploitation by the SRS. Frequently, our legal department will get calls from bankers who have been contacted by the SRS saying that they are investigating a report that one of the bank's customers is being taken advantage of. The investigation typically involves an account held by the adult at the bank through which funds are being siphoned out by the perpetrator. The problem is that neither the bank nor the SRS has had the authority to immediately freeze the account while the evidence is gathered and the SRS can get a court order. In other words, during the time that the SRS is gathering evidence to make its case in court, funds are continuing to be siphoned out of the adult's account.

House Judiciary Committee
2-2-04
Attachment 3

Our amendment would give the SRS the ability to place a 10-day administrative hold on the account of the suspected victim of abuse by giving written notice to the bank. We believe this will give the SRS time to make their case to a judge. We have attached to this testimony an amendment that would address the issue of what amount should be frozen with regard to joint accounts. This language requires the bank to freeze the entire amount of the account, a practice that mirrors the garnishment statutes. Such a practice would also seem to be consistent with the goals of the SRS, in that many times the joint tenant is the person who is mishandling the victim's funds.

Amendment to KSA 2003 Supp. 39-1436 (Page Five). Our amendments to this statute address the problem that occurs for the bank when the SRS requests records of the involved adult as part of the SRS' investigation of abuse. Currently, the statute requires the bank to obtain written consent of the involved adult or guardian before the bank can comply with the SRS' investigation request. While the statute is meant to protect the financial information of the involved adult, in practice, this is a procedure that is almost impossible with which to comply. The statute puts the banker in the middle of a very difficult situation – having to inform the suspected victim of abuse that someone is mishandling their account. Often, this person is a relative or a trusted friend of the adult, so that the adult will refuse to sign the consent. Our purpose in amending this statute is to take the burden off the bank to obtain the consent of the adult, but still safeguarding the customer's information in requiring written notice from the SRS that the records being requested are in furtherance of an investigation being conducted before the records can be turned over.

Amendment to KSA 2003 Supp. 39-1432(a) (Page Three). This section provides some protection from liability for persons making a report pursuant to this act, and to those persons participating in any follow-up activity to the report. Our amendment clarifies that this protection does include providing records upon the request of the SRS as allowed by the act.

In conclusion, it is not often that the KBA is an advocate of putting restrictions on customers' accounts, or of removing the requirement of prior consent of the customer before releasing information. But it is with alarming frequency that our bankers are put in the position of witnessing the financial abuse of the senior members of their community. It is with alarming frequency that the bankers call our office feeling utterly helpless as they see the result of years of hard work by their customers, or their customers' social security benefits being drained away by a desperate relative or friend. It is because of these gut wrenching experiences that we are here today to try to make this law work to protect those customers.

Thank you for your time today and we ask that you act favorably on HB 2581, as amended.

1 (A) Within 24 hours when the information from the reporter indi-
2 cates imminent danger to the health or welfare of the involved adult;

3 (B) within three working days for all reports of suspected abuse, when
4 the information from the reporter indicates no imminent danger;

5 (C) within five working days for all reports of neglect or exploitation
6 when the information from the reporter indicates no imminent danger.

7 (3) Complete, within 30 working days of receiving a report, a thor-
8 ough investigation and evaluation to determine the situation relative to
9 the condition of the involved adult and what action and services, if any,
10 are required. The evaluation shall include, but not be limited to, consul-
11 tation with those individuals having knowledge of the facts of the partic-
12 ular case. If the alleged perpetrator is licensed, registered or otherwise
13 regulated by a state agency, such state agency also shall be notified upon
14 completion of the investigation or sooner if such notification does not
15 compromise the investigation.

16 (4) Prepare, upon completion of the investigation of each case, a writ-
17 ten assessment which shall include an analysis of whether there is or has
18 been abuse, neglect or exploitation, recommended action, a determina-
19 tion of whether protective services are needed, and any follow-up.

20 (5) *With regard to a report that indicates that an adult is the victim*
21 *of fiduciary abuse or exploitation, the department of social and rehabili-*
22 *tation services may ~~also~~ hold an any account of the adult for a period*
23 *of 10 days by giving written notice of the hold to the bank, savings and*
24 *loan association, credit union or other financial institution in which the*
25 *account is located.*

request

26 (b) The secretary of social and rehabilitation services shall forward
27 any finding of abuse, neglect or exploitation alleged to have been com-
28 mitted by a provider of services licensed, registered or otherwise author-
29 ized to provide services in this state to the appropriate state authority
30 which regulates such provider. The appropriate state regulatory authority
31 may consider the finding in any disciplinary action taken with respect to
32 the provider of services under the jurisdiction of such authority.

The bank, savings and loan association, credit union or other financial institution shall withhold the entire amount of the account, regardless of whether the account is held in joint tenancy with one or more individuals.

33 (c) The department of social and rehabilitation services shall inform
34 the complainant, upon request of the complainant, that an investigation
35 has been made and if the allegations of abuse, neglect or exploitation have
36 been substantiated, that corrective measures will be taken, upon comple-
37 tion of the investigation or sooner, if such measures do not jeopardize
38 the investigation.

39 (d) The department of social and rehabilitation services may inform
40 the chief administrative officer of community facilities licensed pursuant
41 to K.S.A. 75-3307b and amendments thereto of confirmed findings of
42 resident abuse, neglect or exploitation.

43 Sec. 4. K.S.A. 2003 Supp. 39-1436 is hereby amended to read as

**Kansas Department of Social and Rehabilitation Services
Janet Schalansky, Secretary**

House Judiciary Committee
February 2, 2004

House Bill 2581 - Reporting Abuse of Certain Adults

Mr. Chairman and members of the Committee, thank you for the opportunity to appear on HB 2581. My name is Candy Shively, Deputy Secretary for the Department of Social and Rehabilitation Services.

HB 2581 would amend certain sections of the Adult Protective Services (APS) statute to permit SRS to place a hold on any account of an adult victim of fiduciary abuse or exploitation for ten days by providing written notice. The bill also allows banks, savings and loan associations, credit unions or other financial institutions to provide records to SRS upon receiving a written request for information, upon receiving a written notice that an investigation is being conducted by SRS and after sending written notice to the involved adult or the guardian.

This bill not only enables financial institutions to provide financial records to SRS without fear of liability, but also attempts to prevent/stop loss of finances to alleged victims through a ten day hold provision. As a result, it fosters greater cooperation between SRS and financial institutions in efforts to prevent financial exploitation and fiduciary abuse of vulnerable adults. Investigations of exploitation and fiduciary abuse of adults are increasing at a rate of 10% each year, since FY 2000. The complexity of investigations is also increasing. A coordinated and timely response from financial institutions, law enforcement and SRS is critical in responding to these situations.

The department supports this bill for the increased protections it offers the adult victim. This bill would help to prevent vulnerable adults from becoming dependent as a result of a loss of needed assets. Without a timely response and access to records to prevent such losses, some victims may never recover financially and may become dependent upon public benefits.

A revision to the APS statute, effective July 1, 2003, provides that law enforcement officers also have the duty to receive and investigate reports of adult abuse, neglect, exploitation or fiduciary abuse and that joint investigations may occur. In light of this revision, SRS recommends two changes to HB 2581: 1) Law enforcement agencies should also be authorized to place a hold on any account for a period of ten days when they are investigating fiduciary abuse or exploitation. 2) Law enforcement agencies should also be able to obtain financial records relevant to an investigation through a

written request for such information from the financial institution. Inclusion of law enforcement in both instances provides consistency and conforms with other provisions within KSA, 2003, Supp. 39-1433 and 39-1436.

Thank you for the opportunity to provide testimony on this issue. I am available to respond to questions.

To: House Committee on Judiciary

From: Matthew Goddard
Heartland Community Bankers Association

Date: February 2, 2004

Re: House Bill 2581

The Heartland Community Bankers Association appreciates the opportunity to appear before the House Committee on Judiciary to share several concerns we have with **House Bill 2581**.

House Bill 2581 deals with several aspects of fiduciary abuse of adults. HCBA has no concerns with Section 2 where the bill clarifies the protection from civil liability of anyone providing records in response to a request from the Department of Social and Rehabilitation Services.

HCBA's first real concern is with Section 4 of the bill. As drafted, this section would require a financial institution or other custodian of records to notify the subject of an investigation that SRS is being provided with access to any records relevant to the investigation that they may hold. HCBA does not understand why it should be the legal responsibility of the record holder to notify the subject of an investigation that he or she is the subject of an investigation.

If the subject of an investigation has accounts that are being examined by SRS at multiple institutions, then that person would receive multiple notices that SRS is examining relevant records. It would seem to streamline this process considerably if SRS simply notified the subject of an investigation that the agency would be examining records relevant to its investigation. HCBA does not understand the rationale for placing on the custodian the burden of notifying a customer that SRS is examining that customer's records rather than placing that burden on the investigating agency.

We are also concerned with the amendatory language in Section 3 of HB 2581. The new language allows SRS to place a 10-day hold on an account in response to a report that the adult is the victim of fiduciary abuse or exploitation. While HCBA is not opposed to this in concept, there are several practical concerns that should be brought to the Committee's attention. First and foremost, a "hold" is an administrative action that a financial institution takes to "freeze" either an entire account or a certain dollar amount. Unless SRS operates its own financial institution, we are unsure how the Department will be able to place a hold on anything. SRS could "order" a hold or "request" a hold, but it cannot place a hold itself.

In addition, it should be understood that if a hold is placed on an account then the customer would lose access to the funds in it for the duration of the hold. Not only could they not take cash out of the account, but outstanding checks would be returned unpaid, resulting in fees to the customer for returned checks.

We appreciate the consideration of these concerns by the House Committee on Judiciary.



K A N S A S

PAMELA JOHNSON-BETTS, SECRETARY

DEPARTMENT ON AGING

KATHLEEN SEBELIUS, GOVERNOR

February 2, 2004

Honorable Mike O'Neal
Chair, House Judiciary Committee
Room 170 West
State Capitol
Topeka, KS 66612

Dear Representative O'Neal:

The Kansas Department on Aging supports HB 2581, which amends the adult abuse, neglect and exploitation statute.

We are concerned about the financial exploitation of Kansas seniors. This bill would give SRS additional tools with which to investigate allegations of fiduciary abuse or exploitation by placing a hold on an adult victim's bank account.

Seniors are at risk for financial exploitation from caregivers, relatives, financial advisors, businesses and unscrupulous telemarketers. These scenarios have one common element, an attempt to access the senior's bank accounts or credit cards. Some perpetrators even go to great lengths to convince victims to authorize automatic monthly withdrawals.

A watchful banker may be the first person to detect financial fraud. We should not, however, rely only on watchful eyes. We agree with the need for SRS to place a hold on bank accounts in order to stop the clock, stop further transfer of money and thoroughly investigate the allegation of abuse.

We appreciate the opportunity to provide input on this measure that affords additional valuable protection for our vulnerable Kansas seniors.

Sincerely,

Pamela Johnson-Betts
Secretary of Aging

**Kansas Attorney General Phill Kline's Office
Consumer Protection/Antitrust Division**

House Judiciary Committee
Monday, February 2, 2004

House Bill 2581

Mr. Chairman and members of the Committee, thank you for the opportunity to submit written testimony in support of HB 2581.

This office implemented the Vulnerable Adults Task Force nearly a year ago with the mission of putting investigation and prosecution of those financial scam artists who prey upon elders or adults with disabilities on the front burner. Every week the Consumer Protection Division receives calls concerning a multitude of schemes designed to part vulnerable adults from their money.

We currently have no mechanism in the vast majority of Kansas counties for immediate intervention to stop financial loss to seniors and disabled citizens. We have reviewed many instances in which the perpetrators gain access to victims' funds by submitting unauthorized drafts to victims' banks, which may leave the banks holding the bag for such losses. Unscrupulous door-to-door salesmen may also take the checks written by victims in high-pressure sales directly to the seniors' banks for cashing.

Therefore we support HB 2581 and the changes recommended to the bill by SRS which would permit not only Adult Protective Service workers but also law enforcement agencies to place a 10-day hold on a potential victim's account when financial exploitation or fiduciary abuse is alleged. This freeze will allow APS workers and law enforcement agencies the time they need to investigate the legitimacy of withdrawals from the account.

Thank you for your attention to this important issue.



KANSAS ADVOCACY & PROTECTIVE SERVICES

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February 2, 2004

The Honorable Michael O'Neal
Chair, House Judiciary Committee
Kansas State Capitol
Room 313 South
Topeka, Kansas 66612

Re: HB 2581

Chairman O'Neal and Members of the Committee:

I submit this testimony on behalf of Kansas Advocacy & Protective Services (KAPS). I am the litigation director. KAPS is a private non-profit organization that is authorized and mandated by federal law to advocate on behalf of people with disabilities. Moreover, federal law authorizes KAPS to investigate complaints of abuse and neglect by obtaining access to the person, their records, and the facility or other place of residence. Finally, KAPS is authorized to advocate on behalf of an individual with a disability by writing demand letters, filing administrative complaints, or lawsuits.

The two primary pillars of the civil rights of people with disabilities are the right to self-determination and the right to choose where to live. The right to self-determination is based on both the common law right to informed consent and the Fourteenth Amendment right to liberty. In *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), the United States Supreme Court held that a person with capacity has the constitutional right to refuse medical care even to the point of death. The court based this holding on both the common law right to informed consent and the inherent constitutional right to liberty and self-determination. *Cruzan*, 497 U.S. at The second pillar is the right to choose where to live, including receiving necessary medical care in the most integrated setting. *Olmstead v. L.C.*, 527 U.S. 581 (1999).

These constitutional rights should frame the discussion and inform the proper limits for proposed state action limiting the rights of people with disabilities.

Adult Protective Services provides essential services to prevent abuse, neglect, or exploitation from occurring or investigating abuse, neglect, or exploitation that has already occurred. The State's *parens patriae* powers properly include state action to protect the health, safety, and welfare of its citizens. KAPS' position is that people with disabilities should be afforded the same civil rights and respect due to all citizens.

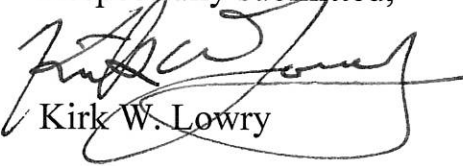
HB 2581 authorizes APS to place a hold on any account of an adult for ten days upon receiving a report that the person is a victim of fiduciary abuse or exploitation. If a person has the capacity to make and give informed consent, they should decide what do with their money. If a person has capacity, APS should limit their protective services to discussing the options available to the person, and respecting the decision of the person. It would be more appropriate to focus conduct on the alleged wrongdoer than punish a person with a disability by denying them access to their own money. Many people with disabilities live on SSI which is currently \$564 a month. A ten day freeze could impose a hardship on a person.

If a person does not have capacity, they cannot give informed consent. The best option would be to obtain or use a durable power of attorney or a representative payee. If that option were not available, a petition for conservatorship could be filed. If the situation was an emergency, an emergency *ex parte* petition for a conservatorship could be filed and the court could enter an order limiting the access of the alleged offender. Kan. Stat. Ann. § 59-3073.

People with disabilities have the constitutional and civil right to liberty, self-determination, and the right to control their money. If a person has capacity to make their own decisions about their money, APS should be limited to giving information and obtaining informed consent. If a person does not have capacity to make decisions about their money, least restrictive alternatives should be tried, like durable powers of attorney. If that is not possible, then a petition for a conservatorship should be filed, and if an emergency, an *ex parte* emergency petition and order can be obtained.

HB 2581 implicates serious and substantial constitutional and civil rights of people with disabilities. KAPS requests that this honorable committee consider the constitutional and civil rights of people with disabilities and less restrictive options.

Respectfully submitted,



Kirk W. Lowry