Approved: 3-22-05
Date

MINUTES OF THE HOUSE JUDICIARY COMMITTEE

The meeting was called to order by Chairman Mike O'Neal at 3:30 P.M. on March 8, 2005 in Room 313-S of the Capitol.

All members were present except:
Michael Peterson- excused
Ward Loyd- excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research
Jill Wolters, Office of Revisor of Statutes
Cindy O'Neal, Committee Secretary

Conferees appearing before the committee:
Brian Lowe, Citizen
Jennifer Roth, Citizen
Rocky Nichols, Kansas Disability Rights Center
Michael Donnelly, Kansas Disability Rights Center
Kevin Graham, Office of Attorney General
Kerrie Bacon, Kansas Commission on Disability Concerns
Barbara Helm, ARCare
Tom Laing, InterHab
John Carney, Center for Bioethics
Jean Krahn, Kansas Guardian Program
Randy Hearrell, Kansas Judicial Council

The hearing on **SB 7 - in child custody/residency issues, relevant factors include whether parent is residing with a registered offender or person convicted of child abuse**, was opened.

Brian Lowe, Citizen, requested the proposed bill because his children were living with his ex-wife and a registered sex offender. The judge in the case stated that there is no statute that addresses the issue of notifying the other parent when a child is living with a sex offender.

The bill would require, in the divorce code, a rebutable presumption that it is not in the best interest of the child to have custody or residency granted to a parent involved with someone who is registered under the Kansas Offender Registration Act. Failure to give notice would be considered an indirect civil contempt and the courts could impose reasonable attorney fees. Several other states have similar legislation. (Attachment 1)

Jennifer Roth, Citizen, expressed the following concerns with the proposed bill:
- it imposes a duty on any adult, whether they had custody or not, to inform a parent if someone was in their home who was listed on the Kansas Offender Registration Act.
- juveniles would be brought into the bill because they are required to register
- not every state has a registry, and how often does one have to check the registry for information

While the bill has good intentions, courts are already allowed to consider all relevant factors when determining issues of child custody, residency and parenting time. (Attachment 2)

Written testimony was provided by the Kansas Coalition Against Sexual & Domestic Violence which suggested that current law could be strengthened by merely including two additional factors on the list of factors the court may consider when deciding custody, residency and visitation. (Attachment 3)

The hearing on **SB 7** was closed.

The hearing on **HB 2307 - appointment of guardians, protection of rights of certain ward**, was opened.

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 8, 2005 in Room 313-S of the Capitol.

Rocky Nichols, Kansas Disability Rights Center, spoke as a proponent to the bill which reforms two problems with current law, it prevents financial and other conflicts of interests between guardians/conservators and people with disabilities who are their wards and it eliminates the current bias in state law that makes it easy to withhold/withdraw medical care.

The bill adopts a portion of the National Guardianship Association's 2002 Standards of Practice relating to conflicts of interest of guardians/conservators. They have received many complaints from those with disabilities about guardians and conservators with conflicts of interest which puts them at risk for abuse, neglect, and exploitation. (Attachment 4)

He proposed a balloon amendment which would clarify the prohibition of conflicts of interest for conservators, that the bill does not apply to families and that it applies to guardianships and conservators only. (Attachment 5)

Michael Donnelly, addressed the second problem of Kansas law which is providing due process in withholding or withdrawing medical care without formal inquiry into the intent of the person with a disability whose life will end when these decisions are made. The proposed bill would ensure that the rights and wishes of those with disabilities are protected and equal to others.

Kevin Graham, Office of Attorney General, stated that the goal was to increase protection under the law for those who have disabilities. (Attachment 6)

Kerrie Bacon, Kansas Commission on Disability Concerns, this bill is an important bill because it extends basic rights as other citizens to those with disabilities. (Attachment 7)

Written testimony in support of the bill was provided by NAMI (Attachment 8), Kansas Catholic Conference (Attachment 9), Kansas Mental Health Coalition (Attachment 10)

Tom Laing, InterHab, supported the concept of the proposed bill but suggested that it needed:

- to provide for recruitment and training of guardians
- to provide that family members be held to equal standards of scrutiny
- corporate guardianships should not be categorically invalidates (Attachment 11)

He had not seen the balloon amendment provided by Rocky Nichols and therefore had no comment on it.

Barbara Helm, ARCare, opposed the bill as currently written. She noted that the Kansas Judicial Council's Guardianship Committee meet on Friday and again opposed the bill. She supported the proposed amendment by Mr. Nichols which would allow corporate guardians to receive reasonable compensation for guardianship services. (Attachment 12)

John Carney, Center for Bioethics, explained that the Kansas Judicial Council crafted guardianship legislation three years ago with many of the individuals in the room. At the time, noone anticipated the complicating factor that the ambiguity of the disabled and disability would present. While he was supportive of the efforts to address the issue, he did not believe that the language fairly represented the clinical and medical interests and needs of those who are disabled and facing the end of life. He requested that the committee direct the Judicial Council to continue to study the language and address concerns. (Attachment 13)

Jean Krahn, Kansas Guardian Program, recruits, trains and monitors guardian volunteers who receive $20 per month to cover their out of pocket expenses. She was concerned that the proposed bill would make the $20 a fee for services, the term "...or is likely..." is open to conjecture, and proposed language on page 1, line 37 "...or anything of benefit to the incapacitated person" could be interpreted in such a way as to prohibit any type of pro bono service. (Attachment 14)

Randy Hearrell, Kansas Judicial Council, informed the committee that while the Guardianship Advisory Committee has met and has some possible language it would not be brought before the full Judicial Council until after the 2005 Legislative Session has adjourned.

MINUTES OF THE House Judiciary Committee at 3:30 P.M. on March 8, 2005 in Room 313-S of the Capitol.

Kansans for Life provided some proposed changes (Attachment 15)

The committee meeting adjourned at 5:30 p.m. The next meeting was scheduled for March 9, 2005 at 3:30 p.m. in room 313-S.

BRIAN LOWE

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March 8, 2005

The Honorable Representative Michael R. O'Neal and Members of the Judiciary Committee
300 SW 10th Avenue
Room 170-W
Topeka, KS 66612-1504

Regarding Senate Bill 7: In child custody/residency, relevant factors include whether parent is residing with registered offender or person convicted of child abuse; notification to other parent if parent is residing with such offender.

Dear Honorable Representatives:

I would like to take this opportunity to share my passion regarding Senate Bill 7. I testified before the Senate judiciary committee in January and appreciate the opportunity to speak today. The following is a review of my testimony, including additional details and supporting materials I hope you find helpful. I have included copies of statutes from other states that have already passed through their respective legislatures regarding this issue. Thank you for your sincere consideration of this extremely important safety bill.

BACKGROUND: My name is Brian Lowe, an elementary school principal in Olathe, Kansas and father of two wonderful children. I was divorced in November of 2001. Since then, I have remarried as well as my ex-wife Erin. The purpose of this communication is to seek your support for Senate Bill 7. The following is a quick review of my situation:

- I found out in October, 2003 that my children were living with a registered sex offender. I found out through my role as principal of Brougham Elementary in Olathe. As a principal, my primary role is to protect the safety and welfare of children. We regularly hold safety meetings for parents in which we talk about strategies to keep kids safe. We have had an extra emphasis at Brougham because a sex offender lives within our neighborhood and my Parent Teacher Organization requested additional programs aimed at keeping kids safe. I found out about the sex offender by surfing the accesskansas website. My ex-wife, Erin, did not disclose this information to me. She had been dating this man for over 8 months. She married him in December of 2003.
- An emergency hearing was held in late October with Judge Larry McClain. Judge McClain did not grant me immediate custody (basically just said we need to get along), and sent us to mediation. The legal process is still continuing to this day, complicated by the fact our judge

House Judiciary
3-8-05
Attachment 1

retired, our guardian ad litem is moving on to a new position, and the fact there is no statute that addresses such an issue.

- We conducted depositions on March 8th, 2004 involving my ex-wife and the registered sex offender (her new husband). Shortly after March 8th, 2004 the severity of the case increased. It was at that time I discovered that he was a REPEAT sex offender. I learned he abused a 12 year-old girl at Oceans of Fun. I have confirmed the 1988 case is on microfilm at the Clay County, MO Courthouse in Liberty. I couldn't gain access to that file as it is a closed case. I do have newspaper articles from that arrest. He is obviously a repeat sex offender in my mind. Our guardian ad litem investigated these concerns and ruled that the sex offender should undergo an evaluation to determine if he is a pedophile and to assess his risk factor. My concern is that even if that evaluation turns out to be "low risk" that is not good enough. His past behavior is strong evidence of his criminal tendencies. My children, or any child, shouldn't have to be in the presence of a convicted sex offender in my opinion. The Supreme Court has ruled that sex offenders, in essence, aren't allowed to a hearing to determine if they are at low risk. He has yet to take the test.

CONCLUSION: I've spent the last fourteen months researching sex offenders. As Supreme Court Justice Anthony M. Kennedy has said, "Sex offenders are a serious threat in this nation." Research suggests sex offenders are more likely to repeat offenses more than any other type of crime. Other states have passed legislation aimed at protecting children from these dangerous individuals relating to child custody situations. I have one around my children on a daily basis. I am at a loss to explain why it has to take so much for me to get my children. I am an elementary school principal that dedicates my life to children. My wife is an award-winning fourth-grade teacher in Olathe. We must do everything we can in the state of Kansas to protect children, especially from convicted child molesters. This situation will happen again, and it can be prevented with the passage of this bill.

Thank you so much for your time. We share a common concern: the safety and welfare of children. Thank you for serving on a daily basis and I thank you for your support of this vital bill. Please let me know if I can be of any further assistance. I will eagerly follow the status of this bill and urge you to give it your highest consideration.

Sincerely yours,

B. Lowe

Brian Lowe

(enclosures)

Oklahoma

§43-112.2. Evidence of ongoing domestic abuse or child abuse - Determinations relating to convicted sex offenders - Presumption.

A. In every case involving the custody of, guardianship of or visitation with a child, the court shall consider for determining the custody of, guardianship of or the visitation with a child:

1. Evidence of ongoing domestic abuse which is properly brought before it. If the occurrence of ongoing domestic abuse is established by clear and convincing evidence, there shall be a rebuttable presumption that it is not in the best interests of the child to have custody, guardianship or unsupervised visitation granted to the abusive person;

2. Evidence of child abuse as such term is defined by the Oklahoma Child Abuse Reporting and Prevention Act pursuant to this paragraph. If the parent requesting custody of a child has been convicted of any crime defined by the Oklahoma Child Abuse Reporting and Prevention Act or the child has been adjudicated deprived pursuant to the provisions of the Oklahoma Children's Code as a result of the acts of the parent requesting custody and the requesting parent has not successfully completed the service and treatment plan required by the court, there shall be a rebuttable presumption that it is not in the best interests of the child for such parent to have sole custody, guardianship or unsupervised visitation; and

3. Whether any person seeking custody or who has custody of, guardianship of or visitation with a child:

a. is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state,

b. is residing with an individual who is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state, or

c. is residing with a person who has been previously convicted of a crime listed in Section 582 of Title 57 of the Oklahoma Statutes.

B. There shall be a rebuttable presumption that it is not in the best interests of the child to have custody, guardianship or unsupervised visitation granted to a person who is:

1. Subject to or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state;

2. Residing with a person who is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state; or

3. Residing with a person who has been previously convicted of a crime listed in Section 582 of Title 57 of the Oklahoma Statutes.

[1]Added by Laws 1991, c. 113, § 2, eff. Sept. 1, 1991. Amended by Laws 2002, c. 445, § 19, eff. Nov. 1, 2002; Laws 2003, c. 3, § 25,

§10-21.1. Custody or guardianship - Order of preference - Death of custodial parent - Preference of child - Evidence of domestic abuse - Registered sex offenders.

A. Custody should be awarded or a guardian appointed in the following order of preference according to the best interests of the child to:

1. A parent or to both parents jointly except as otherwise provided in subsection B of this section;

2. A grandparent;

3. A person who was indicated by the wishes of a deceased parent;

4. A relative of either parent;

5. The person in whose home the child has been living in a wholesome and stable environment including but not limited to a foster parent; or

6. Any other person deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.

B. Subject to subsection E of this section, when a parent having physical custody and providing support to a child becomes deceased or when the custody is judicially removed from such parent, the court may only deny the noncustodial parent custody of the child or guardianship of the child if:

1. a. For a period of at least twelve (12) months out of the last fourteen (14) months immediately preceding the determination of custody or guardianship action, the noncustodial parent has willfully failed, refused, or neglected to contribute to the child's support:

(1) in substantial compliance with a support provision or an order entered by a court of competent jurisdiction adjudicating the duty, amount, and manner of support, or

(2) according to such parent's financial ability to contribute to the child's support if no provision for support is provided in a decree of divorce or an order of modification subsequent thereto, and

b. The denial of custody or guardianship is in the best interest of the child;

2. The noncustodial parent has abandoned the child as such term is defined by Section 7006-1.1 of this title;

3. The parental rights of the noncustodial parent have been terminated;

4. The noncustodial parent has been convicted of any crime defined by the Oklahoma Child Abuse Reporting and Prevention Act or any crime against public decency and morality pursuant to Title 21 of the Oklahoma Statutes;

5. The child has been adjudicated deprived pursuant to the Oklahoma Children's Code as a result of the actions of the noncustodial parent and such parent has not successfully completed any required service or treatment plan required by the court; or

6. The court finds it would be detrimental to the health or

guardianship or unsupervised visitation granted to the abusive person.

E. 1. In every case involving the custody of, guardianship of or visitation with a child, the court shall determine whether any individual seeking custody or who has custody of, guardianship of or visitation with a child:

a. is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state,

b. is residing with a person who is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state, or

c. is residing with a person who has been previously convicted of a crime listed in Section 582 of Title 57 of the Oklahoma Statutes.

2. There shall be a rebuttable presumption that it is not in the best interests of the child to have custody, guardianship or unsupervised visitation granted to:

a. a person who is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state,

b. a person who is residing with an individual who is or has been subject to the registration requirements of the Oklahoma Sex Offenders Registration Act or any similar act in any other state, or

c. a person who is residing with a person who has been previously convicted of a crime listed in Section 582 of Title 57 of the Oklahoma Statutes.

[1]Added by Laws 1983, c. 269, § 2, operative July 1, 1983. Amended by Laws 1988, c. 238, § 5, emerg. eff. June 24, 1988; Laws 1991, c. 113, § 1, eff. Sept. 1, 1991; Laws 1997, c. 386, § 1, emerg. eff. June 10, 1997; Laws 2001, c. 141, § 1, emerg. eff. April 30, 2001; Laws 2002, c. 445, § 1, eff. Nov. 1, 2002; Laws 2003, c. 3, § 3, emerg. eff. March 19, 2003.

NOTE: Laws 2002, c. 413, § 1 repealed by Laws 2003, c. 3, § 4, emerg. eff. March 19, 2003.

[2]

Texas

FAMILY CODE

CHAPTER 153. CONSERVATORSHIP, POSSESSION, AND ACCESS

SUBCHAPTER A. GENERAL PROVISIONS

§ 153.001. PUBLIC POLICY. (a) The public policy of this state is to:

(1) assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the child;

(2) provide a safe, stable, and nonviolent environment for the child; and

(3) encourage parents to share in the rights and duties of raising their child after the parents have separated or dissolved their marriage.

(b) A court may not render an order that conditions the right of a conservator to possession of or access to a child on the payment of child support.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 25, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 787, § 2, eff. Sept. 1, 1999.

§ 153.002. BEST INTEREST OF CHILD. The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 153.003. NO DISCRIMINATION BASED ON SEX[0] OR MARITAL STATUS. The court shall consider the qualifications of the parties without regard to their marital status or to the sex[0] of the party the child in determining:

(1) which party to appoint as sole managing conservator;

(2) whether to appoint a party as joint managing conservator; and

(3) the terms and conditions of conservatorship and possession of and access to the child.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

1-4

§ 153.004. HISTORY OF DOMESTIC VIOLENCE. (a) In determining whether to appoint a party as a sole or joint managing conservator, the court shall consider evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suit or during the pendency of the suit.

(b) The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child, including a sexual assault in violation of Section 22.011 or 22.021, Penal Code, that results in the other parent becoming pregnant with the child. A history of sexual abuse includes a sexual assault that results in the other parent becoming pregnant with the child, regardless of the prior relationship of the parents. It is a rebuttable presumption that the appointment of a parent as the sole managing conservator of a child or as the conservator who has the exclusive right to determine the primary residence of a child is not in the best interest of the child if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

(c) The court shall consider the commission of family violence in determining whether to deny, restrict, or limit the possession of a child by a parent who is appointed as a possessory conservator.

(d) The court may not allow a parent to have access to a child for whom it is shown by a preponderance of the evidence that there is a history or pattern of committing family violence during the two years preceding the date of the filing of the suit or during the pendency of the suit, unless the court:

(1) finds that awarding the parent access to the child would not endanger the child's physical health or emotional welfare and would be in the best interest of the child; and

(2) renders a possession order that is designed to protect the safety and well-being of the child and any other person who has been a victim of family violence committed by the parent and that may include a requirement that:

(A) the periods of access be continuously supervised by an entity or person chosen by the court;

(B) the exchange of possession of the child occu in a protective setting;

(C) the parent abstain from the consumption of alcohol or a controlled substance, as defined by Chapter 481, Health and Safety Code, within 12 hours prior to or during the period of access to the child; or

(D) the parent attend and complete a battering intervention and prevention program as provided by Article 42.141, Code of Criminal Procedure, or, if such a program is not available, complete a course of treatment under Section 153.010.

(e) It is a rebuttable presumption that it is not in the best interest of a child for a parent to have unsupervised visitation with the child if credible evidence is presented of a history or pattern of past or present child neglect or physical or sexual abuse by that parent directed against the other parent, a spouse, or a child.

(f) In determining under this section whether there is credible evidence of a history or pattern of past or present child neglect or physical or sexual abuse by a parent directed against the other parent, a spouse, or a child, the court shall consider whether a protective order was rendered under Chapter 85, Title 4, against the parent during the two-year period preceding the filing of the suit or during the pendency of the suit.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1999, 76th Leg., ch. 774, § 1, eff. Sept. 1, 1999; Acts 1999, 76th Leg., ch. 787, § 3, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 586, § 1, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 642, § 1, eff. Sept. 1, 2003.

§ 153.005. APPOINTMENT OF SOLE OR JOINT MANAGING CONSERVATOR. (a) In a suit, the court may appoint a sole managing conservator or may appoint joint managing conservators. If the parents are or will be separated, the court shall appoint at least one managing conservator.

(b) A managing conservator must be a parent, a competent adult, an authorized agency, or a licensed child-placing agency.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 153.006. APPOINTMENT OF POSSESSORY CONSERVATOR. (a) If a managing conservator is appointed, the court may appoint one or more possessory conservators.

(b) The court shall specify the rights and duties of a person appointed possessory conservator.

(c) The court shall specify and expressly state in the order the times and conditions for possession of or access to the child, unless a party shows good cause why specific orders would not be in the best interest of the child.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 153.007. AGREEMENT CONCERNING CONSERVATORSHIP. (a) To promote the amicable settlement of disputes between the parties to a suit, the parties may enter into a written agreement containing provisions for conservatorship and possession of the child and for modification of the agreement, including variations from the standard possession order.

(b) If the court finds that the agreement is in the child's best interest, the court shall render an order in accordance with

(5) to consult with school officials concerning the child's welfare and educational status, including school activities;

(6) to attend school activities;

(7) to be designated on the child's records as a person to be notified in case of an emergency;

(8) to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the child; and

(9) to manage the estate of the child to the extent the estate has been created by the parent or the parent's family.

(b) The court shall specify in the order the rights that a parent retains at all times.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 29, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 1036, § 6, eff. Sept. 1, 2003.

§ 153.074. RIGHTS AND DUTIES DURING PERIOD OF POSSESSION. Unless limited by court order, a parent appointed as a conservator of a child has the following rights and duties during the period that the parent has possession of the child:

(1) the duty of care, control, protection, and reasonable discipline of the child;

(2) the duty to support the child, including providing the child with clothing, food, shelter, and medical and dental care not involving an invasive procedure;

(3) the right to consent for the child to medical and dental care not involving an invasive procedure; and

(4) the right to direct the moral and religious training of the child.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 30, eff. Sept. 1, 1995; Acts 2003, 78th Leg., ch. 1036, § 7, eff. Sept. 1, 2003.

§ 153.075. DUTIES OF PARENT NOT APPOINTED CONSERVATOR. The court may order a parent not appointed as a managing or a possessory conservator to perform other parental duties, including paying child support.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995.

§ 153.076. DUTY TO PROVIDE INFORMATION. (a) The court shall order that each conservator of a child has a duty to inform the other conservator of the child in a timely manner of significant information concerning the health, education, and welfare of the child.

(b) The court shall order that each conservator of a child has the duty to inform the other conservator of the child if the

conservator resides with for at least 30 days, marries, or intends to marry a person who the conservator knows:

(1) is registered as a sex[0] offender[0] under Chapter Code of Criminal Procedure; or

(2) is currently charged with an offense for which on conviction the person would be required to register under that chapter.

(c) The notice required to be made under Subsection (b) must be made as soon as practicable but not later than the 40th day after the date the conservator of the child begins to reside with the person or the 10th day after the date the marriage occurs, as appropriate. The notice must include a description of the offense that is the basis of the person's requirement to register as a sex[0] offender[0] or of the offense with which the person is charged.

(d) A conservator commits an offense if the conservator fails to provide notice in the manner required by Subsections (b) and (c). An offense under this subsection is a Class C misdemeanor.

Added by Acts 1995, 74th Leg., ch. 751, § 31, eff. Sept. 1, 1995. Amended by Acts 1999, 76th Leg., ch. 330, § 1, eff. Sept. 1, 1999; Acts 2003, 78th Leg., ch. 1036, § 8, eff. Sept. 1, 2003.

SUBCHAPTER C. PARENT APPOINTED AS SOLE OR JOINT MANAGING CONSERVATOR

§ 153.131. PRESUMPTION THAT PARENT TO BE APPOINTED MANAGING CONSERVATOR. (a) Subject to the prohibition in Section 153.004, unless the court finds that appointment of the parent or parents would not be in the best interest of the child because the appointment would significantly impair the child's physical health or emotional development, a parent shall be appointed sole managing conservator or both parents shall be appointed as joint managing conservators of the child.

(b) It is a rebuttable presumption that the appointment of the parents of a child as joint managing conservators is in the best interest of the child. A finding of a history of family violence involving the parents of a child removes the presumption under this subsection.

Added by Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Amended by Acts 1995, 74th Leg., ch. 751, § 32, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1193, § 20, eff. Sept. 1, 1997.

§ 153.132. RIGHTS AND DUTIES OF PARENT APPOINTED SOLE MANAGING CONSERVATOR. Unless limited by court order, a parent appointed as sole managing conservator of a child has the rights and duties provided by Subchapter B and the following exclusive rights:

(1) the right to designate the primary residence of the child;

Nebraska

29-4002
Legislative findings.

The Legislature finds that sex offenders present a high risk to commit repeat offenses. The Legislature further finds that efforts of law enforcement agencies to protect their communities, conduct investigations, and quickly apprehend sex offenders are impaired by the lack of available information about individuals who have pleaded guilty to or have been found guilty of sex offenses and who live, work, or attend school in their jurisdiction. The Legislature further finds that state policy should assist efforts of local law enforcement agencies to protect their communities by requiring sex offenders to register with local law enforcement agencies as provided by the Sex Offender Registration Act.

Source:
Laws 1996, LB 645, § 2; Laws 2002, LB 564, § 2.
Effective date July 20, 2002.

CALIFORNIA CODES
FAMILY.CODE
SECTION 3020-3032

3020. (a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.

(b) The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011.

(c) Where the policies set forth in subdivisions (a) and (b) of this section are in conflict, any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all **family** members.

3021. This part applies in any of the following:

(a) A proceeding for dissolution of marriage.

(b) A proceeding for nullity of marriage.

(c) A proceeding for legal separation of the parties.

(d) An action for exclusive custody pursuant to Section 3120.

(e) A proceeding to determine physical or legal custody or for visitation in a proceeding pursuant to the Domestic Violence Prevention Act (Division 10 (commencing with Section 6200)).

In an action under Section 6323, nothing in this subdivision shall be construed to authorize physical or legal custody, or visitation rights, to be granted to any party to a Domestic Violence Prevention Act proceeding who has not established a parent and child relationship pursuant to paragraph (2) of subdivision (a) of Section 6323.

(f) A proceeding to determine physical or legal custody or visitation in an action pursuant to the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12).

(g) A proceeding to determine physical or legal custody or visitation in an action brought by the district attorney pursuant to Section 17404.

3022. The court may, during the pendency of a proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper.

3022.5. A motion by a parent for reconsideration of an existing child custody order shall be granted if the motion is based on the fact that the other parent was convicted of a crime in connection

with falsely accusing the moving parent of child abuse.

3023. (a) If custody of a minor child is the sole contested issue, the case shall be given preference over other civil cases, except matters to which special precedence may be given by law, for assigning a trial date and shall be given an early hearing.

(b) If there is more than one contested issue and one of the issues is the custody of a minor child, the court, as to the issue of custody, shall order a separate trial. The separate trial shall be given preference over other civil cases, except matters to which special precedence may be given by law, for assigning a trial date.

3024. In making an order for custody, if the court does not consider it inappropriate, the court may specify that a parent shall notify the other parent if the parent plans to change the residence of the child for more than 30 days, unless there is prior written agreement to the removal. The notice shall be given before the contemplated move, by mail, return receipt requested, postage prepaid, to the last known address of the parent to be notified. A copy of the notice shall also be sent to that parent's counsel of record. To the extent feasible, the notice shall be provided within a minimum of 45 days before the proposed change of residence so as to allow time for mediation of a new agreement concerning custody. This section does not affect orders made before January 1, 1989.

3025. Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including, but not limited to, medical, dental, and school records, shall not be denied to a parent because that parent is not the child's custodial parent.

3026. **Family** reunification services shall not be ordered as a part of a child custody or visitation rights proceeding. Nothing in this section affects the applicability of Section 16507 of the Welfare and Institutions **Code**.

3027. (a) If allegations of child sexual abuse are made during a child custody proceeding and the court has concerns regarding the child's safety, the court may take any reasonable, temporary steps as the court, in its discretion, deems appropriate under the circumstances to protect the child's safety until an investigation can be completed. Nothing in this section shall affect the applicability of Section 16504 or 16506 of the Welfare and Institutions **Code**.

(b) If allegations of child sexual abuse are made during a child custody proceeding, the court may request that the local child welfare services agency conduct an investigation of the allegations pursuant to Section 328 of the Welfare and Institutions **Code**. Upon completion of the investigation, the agency shall report its findings to the court.

3027.1. (a) If a court determines, based on the investigation described in Section 3027 or other evidence presented to it, that an accusation of child abuse or neglect made during a child custody proceeding is false and the person making the accusation knew it to be false at the time the accusation was made, the court may impose reasonable money sanctions, not to exceed all costs incurred by the party accused as a direct result of defending the accusation, and reasonable attorney's fees incurred in recovering the sanctions, against the person making the accusation. For the purposes of this section, "person" includes a witness, a party, or a party's attorney.

(b) On motion by any person requesting sanctions under this section, the court shall issue its order to show cause why the requested sanctions should not be imposed. The order to show cause shall be served on the person against whom the sanctions are sought and a hearing thereon shall be scheduled by the court to be conducted at least 15 days after the order is served.

(c) The remedy provided by this section is in addition to any other remedy provided by law.

3027.5. (a) No parent shall be placed on supervised visitation, or be denied custody of or visitation with his or her child, and no custody or visitation rights shall be limited, solely because the parent (1) lawfully reported suspected sexual abuse of the child, (2) otherwise acted lawfully, based on a reasonable belief, to determine if his or her child was the victim of sexual abuse, or (3) sought treatment for the child from a licensed mental health professional for suspected sexual abuse.

(b) The court may order supervised visitation or limit a parent's custody or visitation if the court finds substantial evidence that the parent, with the intent to interfere with the other parent's lawful contact with the child, made a report of child sexual abuse, during a child custody proceeding or at any other time, that he or she knew was false at the time it was made. Any limitation of custody or visitation, including an order for supervised visitation, pursuant to this subdivision, or any statute regarding the making of a false child abuse report, shall be imposed only after the court has determined that the limitation is necessary to protect the health, safety, and welfare of the child, and the court has considered the state's policy of assuring that children have frequent and continuing contact with both parents as declared in subdivision (b) of Section 3020.

3028. (a) The court may order financial compensation for periods when a parent fails to assume the caretaker responsibility or when a parent has been thwarted by the other parent when attempting to exercise custody or visitation rights contemplated by a custody or visitation order, including, but not limited to, an order for joint physical custody, or by a written or oral agreement between the parents.

(b) The compensation shall be limited to (1) the reasonable expenses incurred for or on behalf of a child, resulting from the other parent's failure to assume caretaker responsibility or (2) the reasonable expenses incurred by a parent for or on behalf of a child, resulting from the other parent's thwarting of the parent's efforts to exercise custody or visitation rights. The expenses may include the value of caretaker services but are not limited to the cost of services provided by a third party during the relevant period.

(c) The compensation may be requested by noticed motion or an

order to show cause, which shall allege, under penalty of perjury, (1) a minimum of one hundred dollars ($100) of expenses incurred or (2) at least three occurrences of failure to exercise custody or visitation rights or (3) at least three occurrences of the thwarting of efforts to exercise custody or visitation rights within the six months before filing of the motion or order.

(d) Attorney's fees shall be awarded to the prevailing party upon a showing of the nonprevailing party's ability to pay as required by Section 270.

3029. An order granting custody to a parent who is receiving, or in the opinion of the court is likely to receive, assistance pursuant to the **Family** Economic Security Act of 1982 (Chapter 2 (commencing with Section 11200) of Part 3 of Division 9 of the Welfare and Institutions **Code**) for the maintenance of the child shall include an order pursuant to Chapter 2 (commencing with Section 4000) of Part 2 of Division 9 of this **code**, directing the noncustodial parent to pay any amount necessary for the support of the child, to the extent of the noncustodial parent's ability to pay.

3030. (a) No person shall be granted physical or legal custody of, or unsupervised visitation with, a child if the person is required to be registered as a **sex** offender under Section 290 of the Penal **Code** where the victim was a minor, or if the person has been convicted under Section 273a, 273d, or 647.6 of the Penal **Code**, unless the court finds that there is no significant risk to the child and states its reasons in writing or on the record.

(b) No person shall be granted custody of, or visitation with, a child if the person has been convicted under Section 261 of the Penal **Code** and the child was conceived as a result of that violation.

(c) No person shall be granted custody of, or unsupervised visitation with, a child if the person has been convicted of murder in the first degree, as defined in Section 189 of the Penal **Code**, and the victim of the murder was the other parent of the child who is the subject of the order, unless the court finds that there is no risk to the child's health, safety, and welfare, and states the reasons for its finding in writing or on the record. In making its finding, the court may consider, among other things, the following:

(1) The wishes of the child, if the child is of sufficient age and capacity to reason so as to form an intelligent preference.

(2) Credible evidence that the convicted parent was a victim of abuse, as defined in Section 6203, committed by the deceased parent. That evidence may include, but is not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of domestic abuse.

(3) Testimony of an expert witness, qualified under Section 1107 of the Evidence **Code**, that the convicted parent suffers from the effects of battered women's syndrome.

Unless and until a custody or visitation order is issued pursuant to this subdivision, no person shall permit or cause the child to visit or remain in the custody of the convicted parent without the consent of the child's custodian or legal guardian.

(d) The court may order child support that is to be paid by a person subject to subdivision (a), (b), or (c) to be paid through the local child support agency, as authorized by Section 4573 of the **Family Code** and Division 17 (commencing with Section 17000) of this

code.

(e) The court shall not disclose, or cause to be disclosed, the custodial parent's place of residence, place of employment, or the child's school, unless the court finds that the disclosure would be in the best interest of the child.

3031. (a) Where the court considers the issue of custody or visitation the court is encouraged to make a reasonable effort to ascertain whether or not any emergency protective order, protective order, or other restraining order is in effect that concerns the parties or the minor. The court is encouraged not to make a custody or visitation order that is inconsistent with the emergency protective order, protective order, or other restraining order, unless the court makes both of the following findings:

(1) The custody or visitation order cannot be made consistent with the emergency protective order, protective order, or other restraining order.

(2) The custody or visitation order is in the best interest of the minor.

(b) Whenever custody or visitation is granted to a parent in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the custody or visitation order shall specify the time, day, place, and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all **family** members. Where the court finds a party is staying in a place designated as a shelter for victims of domestic violence or other confidential location, the court's order for time, day, place, and manner of transfer of the child for custody or visitation shall be designed to prevent disclosure of the location of the shelter or other confidential location.

(c) When making an order for custody or visitation in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the court shall consider whether the best interest of the child, based upon the circumstances of the case, requires that any custody or visitation arrangement shall be limited to situations in which a third person, specified by the court, is present, or whether custody or visitation shall be suspended or denied.

3032. (a) The Judicial Council shall establish a state-funded one-year pilot project beginning July 1, 1999, in at least two counties, including Los Angeles County, pursuant to which, in any child custody proceeding, including mediation proceedings pursuant to Section 3170, any action or proceeding under Division 10 (commencing with Section 6200), any action or proceeding under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12), and any proceeding for dissolution or nullity of marriage or legal separation of the parties in which a protective order as been granted or is being sought pursuant to Section 6221, the court shall, notwithstanding Section 68092 of the Government **Code**, appoint an interpreter to interpret the proceedings at court expense, if both of the following conditions are met:

(1) One or both of the parties is unable to participate fully in the proceeding due to a lack of proficiency in the English language.

(2) The party who needs an interpreter appears in forma pauperis,

pursuant to Section 68511.3 of the Government **Code**, or the court otherwise determines that the parties are financially unable to pay the cost of an interpreter. In all other cases where an interpreter is required pursuant to this section, interpreter fees shall be paid as provided in Section 68092 of the Government **Code**.

(3) This section shall not prohibit the court doing any of the following when an interpreter is not present:

(A) Issuing an order when the necessity for the order outweighs the necessity for an interpreter.

(B) Extending the duration of a previously issued temporary order if an interpreter is not readily available.

(C) Issuing a permanent order where a party who requires an interpreter fails to make appropriate arrangements for an interpreter after receiving proper notice of the hearing, including notice of the requirement to have an interpreter present, along with information about obtaining an interpreter.

(b) The Judicial Council shall submit its findings and recommendations with respect to the pilot project to the Legislature by January 31, 2001. Measurable objectives of the program may include increased utilization of the court by parties not fluent in English, increased efficiency in proceedings, increased compliance with orders, enhanced coordination between courts and culturally relevant services in the community, increased client satisfaction, and increased public satisfaction.

House Judiciary Committee
Senate Bill 7
Opponent
March 8, 2005

Chairman O'Neal and Members of the House Judiciary Committee:

My name is Jennifer Roth. I live in Lawrence and work in Topeka as a public defender. I have been a public defender for over five years. I also have about five years of experience as an advocate (both volunteer and paid) at the shelter in Lawrence for battered women and children. All of my experience brings me to oppose this Bill.

I am aware of the concerns one of the other opponents has expressed to the Committee. In addition to these concerns, here are some other problems/questions posed by Senate Bill 7:

- This Bill requires information from not only the custodial parent, but also from any parent who is entitled to residency or parenting time. As a practical matter, this Bill requires information from any parent who plans on spending any time whatsoever in their home with their child(ren). Therefore, the impossibility of compliance with this Bill affects not only custodial parents, but almost all parents.

- This Bill requires a parent to find out if a person he/she is residing with is on any state's registry or has been convicted of felony child abuse in Kansas. This person "residing with" a parent could include a new spouse, partner, roommate, stepchild, foster child or biological child. Because the registry includes juveniles under 18, the person on the registry who is residing with a parent could be the parent's own biological child. Juveniles over 10 and under 18 can be prosecuted for offenses. Juveniles as young as 11 are on the registry. In short, this Bill could prevent children from living with their parents, as well as their other siblings.

- The Bill gives no guidance on how a parent can be sure he/she is in compliance. How often does a parent have to check the registries? How often does a parent have to conduct a criminal records check? According to the KBI's website, "a record check has a very limited useful life." (No. 15 on the Frequent Questions, Criminal History Record Checks).

- If a parent does do a KBI record check on a person residing with him/her, that record check could reveal information that goes beyond what is required by this Bill. For example, it will reveal convictions that are not for felony child abuse or for crimes that require registration. This impacts a person's privacy.

- On the other hand, a record check through KBI does not reveal juvenile adjudications, expungements or successfully completed diversions. If a parent conducts a check and finds nothing, but the person has an expunged conviction for felony child abuse, can the parent be held in contempt?

- The registry contains no facts about a person's convictions. The registry gives no background about a person. In other words, the registry gives no insight, but under this Bill, a parent's presence on the registry would impact his/her ability to be a parent to his/her child(ren). This Bill, in many ways, threatens a defendant's ability - and his/her right - to parent their children and to have their children be with their father/mother.

- This Bill includes situations that it probably does not intend, which could hurt children. For example, people convicted of voluntary manslaughter and involuntary manslaughter are on the offender registry. Say a parent has provided a good, safe home for his children for a number of years. That parent has had trouble with people trying to break into the house. The parent has a gun for protection. One day, the parent shoots and kills a person he believes is trying to break into the house. The person turned out to be a person with innocent intentions. The parent is charged and pleads to voluntary manslaughter. The court understands the situation and places the parent on probation. That parent now has to register. Should the parent lose custody? What if the children do not live with that parent but that parent has frequent visitation? Should the parent lose out on his parenting time?

  Say a parent has provided her children with a good, safe home for a number of years. This parent gets into her car to pick up the children from school. It is snowy and icy and the parent does not do a good job of scraping her windows. She hits and kills a pedestrian. The prosecutors take a firm position and charge the parent with involuntary manslaughter for her reckless behavior. The parent has to register. Should she lose custody? How does a court decide?

- K.S.A. 2004 Supp. 60-1610 contains no other presumptions. The factor that a parent or a person living with the parent is on the registry or has a conviction for felony child abuse will be the only factor that results in a rebuttable presumption that the child(ren)'s best interest is not served by living with that parent. This sends a strong message to the courts, but is not accompanied by any guidance to the courts.

I understand that this Bill has good intentions. However, the law already allows a court to consider all relevant factors (including those not specifically mentioned in K.S.A. 60-1610(a)(3)(B)(i)-(xi)) when determining issues of child custody, residency and parenting time. There are other ways to protect children and passing this new law would do much more harm than good. Thank you for your consideration.

Sincerely,

Jennifer Roth

Jennifer Roth

KANSAS COALITION AGAINST SEXUAL AND DOMESTIC VIOLENCE

UNITED AGAINST VIOLENCE

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House Judiciary Committee
Senate Bill 7
Opponent

Chairman O'Neal and Members of the House Judiciary Committee:

The Kansas Coalition Against Sexual and Domestic Violence (KCSDV) is a statewide non-profit organization whose membership is the 30 sexual assault and domestic violence programs serving victims across the state.

You may be surprised to see that KCSDV is submitting written testimony in opposition to SB7. While on its face, SB7 may seem deceptively simple and a good idea, there are clearly some problems with the Bill that need to be considered and addressed before it is passed and signed into law.

Ending domestic violence and sexual assault in the lives of women and their children is a major part of our mission. It may seem that SB7 is designed to do so. However, I suggest that SB7 potentially causes many more problems than it would resolve for children and their non-violent/non-offending parent.

The Bill requires that the custodial parent notify the other parent if she/he is or moves in with an offender registered under the Kansas Offender Registration Act or any other similar registry in the United States, or is or moves in with a convicted child abuser. This fact then becomes a rebuttable presumption against that parent having custody, residency or visitation. Here are some of the questions that arise:

- Not all offenders are registered for sex crimes or for crimes against children. This may or may not protect children.
- The custodial parent has a duty to find out if the new spouse or partner is on the Kansas Offender Registry OR ON ANY REGISTRY IN ANY OTHER STATE. How will the custodial parent accomplish this? Some state registries are on the web, others are not. Some registries are only available through the local law enforcement agency where the offender lives. What about names of offenders in another state that may be similar to the spouse or partner who is moving in with the custodial parent? Should the custodial parent have a nationwide background check done on each person he/she dates?
- This Bill requires the custodial parent to prove a negative, something that is virtually impossible to do.
- This Bill does not consider the weight to be given to this as compared to other factors the court is directed to consider when deciding custody, residency and visitation.
- This Bill does not give the court guidance on how the custodial parent may overcome the rebuttable presumption.

- This Bill does not give proper consideration to domestic violence. Take, for example, the case of a custodial parent who was a victim of domestic violence in the marriage. Later, she moves in with her new husband, who has not told her about his conviction for child abuse in another state and she did not discover it. She has been a good parent and she and the children have a good, safe relationship. The non-custodial parent, on the other hand, has beaten the mother in front of the children and now only uses the children to continue to harass the mother. Now, the non-custodial parent discovers that the mother's new spouse has been convicted of child abuse. Should the current custodial parent now lose custody to someone who has committed this kind of violence in front of the children? How should the court weigh these two issues? SB7 gives no guidance on this issue.
- This Bill may provide a venue for perpetrators of domestic violence to harass and abuse through continued litigation, whether or not the custodial parent has done anything in violation of this Bill. The propensity of the worst domestic violence perpetrators is to harass through litigation and some of the worst examples of this are seen in family law cases. This Bill does nothing to protect domestic violence victims from this type of harassment.
- Living with a child abuser or sex offender would likely be a material change in circumstance in most courts now, so this type of protection for children is already available. Passing this new law based on what appears to be one person's experience is not good public policy.

KCSDV supports protecting children. I believe the law already allows for such protections and for consideration of the factors outlined in SB7. That said, current law could be strengthened merely by including these two additional factors on the list of factors a court may consider when deciding issues of custody, residency, and visitation. Thus, these issues are flagged for the court's consideration. The judge can then decide what weight to give these factors while at the same time considering all of the other factors the legislature has deemed important.

I urge you to consider these questions and concerns when you debate SB7. While on its face it may seem like a good idea, I suggest that there are many more problems it will create. It is for these reasons KCSDV opposes this Bill.

Sandy Barnett
Executive Director

DISABILITY RIGHTS CENTER of KANSAS
EQUALITY ♦ LAW ♦ JUSTICE

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Testimony in Support of HB 2307, Kansas House Judiciary Committee March 8, 2005

Chairman O'Neal and the honorable members of the committee, my name is Rocky Nichols. I am the Executive Director of the Disability Rights Center of Kansas, formerly Kansas Advocacy and Protective Services (KAPS). The Disability Rights Center of Kansas (DRC) is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for Kansans with disabilities. As such, DRC is the officially designated protection and advocacy system for Kansans with disabilities. DRC is a private, 501(c)(3) nonprofit corporation, organizationally independent of both state government and disability service providers. As the federally designated protection and advocacy system for Kansans with disabilities our task is to advocate for the legal and civil rights of persons with disabilities as promised by federal, state and local laws, including representing persons with disabilities to amend, reduce, or terminate unnecessary guardianship and conservatorships.

HB 2307 reforms two problems with the current Kansas law: 1) It prevents financial and other service conflicts of interests between guardians/conservators and people with disabilities who are their wards. These conflicts of interest make Kansans with disabilities far more vulnerable to abuse, neglect and exploitation. 2) Eliminates the current bias in state law that makes it far too easy to withhold/withdraw medical care (including food and water).

Historical Background

Guardianship law in Kansas was substantially unchanged from 1965 until 2002. In 1997, the Kansas Judicial Council advisory committee on guardianship and conservatorship started to review and draft an entire new code. The advisory committee's proposal was adopted by the Judicial Council and introduced in 2001 in the House Judiciary Committee as HB 2469. The bill was over 110 pages long. There were many opponents to the bill, including the Disability Rights Center of Kansas, then known

Advocacy & Protective Services. The bill was referred for an interim study. No changes were proposed by the interim committee. The Judicial Council proposed some changes. Once again, even though everyone agreed that overall the changes were positive, many opponents testified. After much debate, all the parties agreed that it was better to have the bill pass in that session and for advocates and other interested parties to come back with changes individually in succeeding years.

Preventing Conflicts of Interest that Make Kansans with Disabilities More Vulnerable:

Kansas Attorney General Phill Kline and the DRC propose to amend K.S.A. 59-3068 and 59-3075 to bring Kansas law substantial into conformity with the National Guardianship Association's 2002 Standards of Practice regarding conflict of interest of an un-related, non-family member guardian/conservator. This proposal will help reform the systemic and inherent problems with Kansas conflict of interest of guardians/conservators, problems that make Kansans with disabilities more vulnerable. We used the National Guardianship Association standards as the model and the starting point for HB 2307. The National Guardianship Association standards preventing service conflict of interest focus on unrelated, non-family members (from providing direct services to the ward, etc.), which is one reason why our bill focuses on preventing conflicts of interests for unrelated, non-family guardians and conservators. Current Kansas law, Kan. Stat. Ann. § 59-3068(b), requires the court, in appointing a guardian, to only "consider" the "potential conflicts of interest" of the proposed guardian or conservator. Kansas law does not prohibit appointment of a guardian or conservator with conflicts. Moreover, once a guardian or conservator is appointed, real conflicts of interest can arise where no "potential" conflict existed. KSA § 59-3075(a)(2) requires a guardian to always act in the best interests of the ward. The best way to act in the best interests of the ward is to not have conflicts of interest.

The Disability Rights Center of Kansas receives many complaints from people with disabilities about guardians and conservators with conflicts of interest. Current law is not working. The most public of these recent complaints involved a ward of Arlan Kaufman; however I want to stress that this is not the only example of conflict of interest involving Kansas guardians and conservators that we receive. It does, however, vividly expose the systemic and inherent problems with our lack conflict of interest provisions. The Kaufman House case, in Newton Ks, has brought the wrong kind of national attention to Kansas. Kansas policy makers need to learn from this case and change Kansas law to eliminate conflicts of interests of Guardianship/Conservatorship and better protect persons with disabilities from abuse, neglect and exploitation. Arlan and Linda Kaufman have been arrested and indicted by a federal grand jury with 34 counts of criminal charges, from compelling involuntary servitude/slavery to defrauding taxpayers by

billing Medicare for therapy sessions never provided. These 34 counts carry a cumulative charge of 325 years in prison and $8.5 million in damages.

Kansas State Board of Nursing and Behavioral Science Regulator Board reports (public documents that I have attached to my testimony) tell about the over 30 videotapes that were seized from Mr. and Mrs. Kaufman's private bedroom. According to the government reports, these videotapes vividly shows Mr. Kaufman sexually "touching the genitals of both male and female patients" of his, including a woman with mental illness for whom he was court appointed Guardian & Conservator. Mr. Kaufman was the: 1) Guardian/Conservator, 2) so-called therapist, 3) landlord and provider of other "therapeutic" services, and 4) alleged sexual abuser of the woman for whom he was appointed to protect. These are clear conflicts of interests, but these conflicts are allowed under state law. In fact, up until the alleged sexual abuse … the rest is allowed and legal under Kansas law.

HB 2307 addresses the concerns of many in the disability community and the Kansas Attorney General to prevent these conflicts of interest from recurring.

Allowing for these conflicts of interests creates a systemic and inherent problem that puts persons with disabilities at risk for abuse neglect and exploitation. The guardian and conservator must always be in a position to zealously advocate on behalf of the ward. For example, when the guardian or conservator is also the service provider for a ward or an employee of a service provider for the ward, who is he or she likely going to support in a dispute, the ward or their employer? Many, if not most people, are going to be significantly affected by their own monetary and employment concerns. This creates a conflict of interest. Kansas law should be strengthened and clearly prohibit conflicts of interest. Non-family guardians and conservators choose which role they prefer: guardian?, conservator?, or provider?

DRC also proposes a balloon amendment to clearly include the prohibition of conflicts of interest for conservators. When the bill was drafter preventing these conflicts of interests for conservators was inadvertently omitted (specifically for unrelated, non-family conservators). Additionally, we have been working proactively with the guardianship community to address and resolve potential issues (including issues addressed by the Kansas Guardianship Program, Arcare, etc.). Because we have compromised with these parties, and the amendments carries out the policy intent of preventing conflict of interests for non-family guardians and conservators, we ask that you consider the balloon amendment version of the bill.

The bill and balloon amendment also deals with guardians and conservators who have already been appointed by adding prohibitions and duties (KSA. § 59-3075(a)(2), and 59-3078). These provisions prohibit conflicts of interest by unrelated, non-family member guardians and conservators. The conflicts of interest include being independent of service providers, not representing a service provider, not employing family or friends for a fee, and not providing direct services for a fee. Moreover, the proposed amendment requires the guardian to petition or assist the ward to petition for limitation, termination or restoration when the ward is no longer a person with a disability in need of a guardian, or when there are effective, available, reasonable alternatives to guardianship.

Providing for Due Process in Withholding or Withdrawing Medical Care

The second issue addressed in HB 2307 eliminates two biases in current state law that: 1) the bias that makes it far to easy to withhold/withdraw medical care (including food and water) for persons with disabilities (when these things are withheld or withdraw it is tantamount to life and death decisions), 2) the bias in the law that focuses on the persons disability and condition which needs "artificial means," instead of the individual's wishes. This issue also involves the constitutional rights of people with disabilities to due process before medical care, food, and water are withheld or withdrawn. DRC's proposed amendments attempt to eliminate these biases and address the constitutional due process rights of Americans, including Kansans with disabilities, under the 14th Amendment to give informed consent to refuse medical care, or to continue receiving care.

The primary problem with current law is that subsection (e)(7)(C) allows for the withholding or withdrawing of medical care without formal inquiry into the intent of the person with a disability whose life will end when these decisions are made. The intent of the person with a disability is a central concern of DRC … but it is absent from current law. Second, but no less important, current law not provide for constitutional due process: notice, appointment of counsel, or hearing. Current law allows for medical care, including food and water, to be withheld or withdrawn from a Kansas citizen with disabilities based on their disability alone, without due process. Although that may not have been the intent of the drafters, it is the unfortunate reality.

Consider a situation where the spouse is the guardian. His wife has been non-verbal and substantially disabled for 10 years. The husband is living with another woman. No divorce has been obtained. He has two children by his cohabitant. Further, he will inherit a million dollar medical malpractice award that belongs to the wife when she dies. Should that woman's death be quickened because she is non-verbal,

has no living will, no health care directive, and can not say what she wants, just on the word of the husband (who stands to gain a million dollars when she dies) because he says that she would not have wanted to live like this? We must confront the history of discrimination of people with disabilities. We must confront head-on the utterly wrong notion that it is better to be dead than disabled. Every study about people with disabilities shows that in the first year after substantial disability, many people are depressed and may consider suicide. But after that first year, people come to accept their disability and consider their own life very worth living.

Subsection (e)(7)(C) does not just deal with people in "a persistent vegetative state" who are seriously terminally ill. Any Kansan with a disability who is certified to meet the statutory definition of disability or "condition" and who has a guardian, can have their life taken from this earth … simply because of their disability or condition. The definition in the law is extremely broad and troubling, and would include numerous persons with disabilities. The law reads: "suffering from an illness or other condition for which further treatment, other than for the relief of pain, would not likely prolong the life of the ward other than by artificial means, nor would likely restore to the ward any significant degree of capabilities beyond those the ward currently possesses." Everyone who has permanent disability, and who relies on any artificial means to live, like oxygen, a tracheotomy, or a gastronomy tube, is potentially subject to the exercise of this provision's overbroad language.

Adding insult is the language in current law that says that the court "shall" approve the guardians petition to withhold/withdraw, if it is certified that the person has a particular type of disability that needs "artificial means." So, not only is their not due process, there is no discretion by the court.

HB 2307 seeks to rebalance this by establishing a due process and shifting the focus of that proceeding on the wishes of the individual, and eliminating the bias in law that says if you have a certain type of disability that your life is not as equal as others. This is a bias against disability and bias that perpetuates bigoted sentiments like "why would anyone want to live like that." A final point on due process – it is odd that before a guardian sterilizes their ward, state law grants the person with a disability due process rights. However, before end of life decisions are made, the focus is on the person's state or disability – not their wishes or intent – and no due process is required.

Quite simply, death is different. The state has a legitimate interest in preserving the health, welfare, safety and life of its citizens. This state interest must include all people with disabilities, regardless of

their label or "condition" that needs "artificial means." The proposed amendment includes a burden of proof on the person who wants to withhold medical care, notice, hearing, jury trial, unanimous verdict, appointment of counsel, and a presumption in favor of continued treatment. The bill attempts to respect the constitutional right to refuse medical care while at the same time ensuring the fullest measure of due process before the state sanctions the death of a person with a disability.

Conclusion

One of the most fundamental duties of society is to ensure that the rights of people with disabilities are protected. The most fundamental right of all is the right to life. If the state is going to sanction the death of a person with a disability, it owes people with disabilities the fullest measure of due process. This bill does that, and nothing more.

Finally, a guardian should always act in the best interests of the person with a disability they have been appointed to protect, advocate for and represent. Prohibiting conflict of interest insures that guardians will not have to choose between their jobs, or money, or any other thing of value and leaves them free to advocate the best interests of the person with a disability.

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THE HUTCHINSON NEWS
online edition

Couple accused of enslaving mentally ill

Operators of Newton group home charged with forcing residents to work on farm, often in the nude

By Jessica Self

NEWTON - A Newton couple who allegedly operated an unlicensed group home for the mentally ill made a first appearance Wednesday in federal court, charged with forcing the residents to work on their farm, often in the nude.

Arlan D. Kaufman, 68, and Linda J. Kaufman, 61, were arrested Tuesday after 20 FBI agents - from Wichita, Kansas City and Dodge City - served search warrants on two Newton group homes that served residents with mental illnesses.

Six adults were removed from the home and are in the care of Kansas social service workers, FBI spokesman Jeff Lanza said.

In November 1999, Butler County Sheriff's deputies were called to a rural residence owned by Arlan Kaufman on reports individuals were working outdoors in the nude, according to a criminal complaint and affidavit by investigators filed in federal court.

According to the complaint:

Officers arrived on the scene and found four naked individuals removing nails from wood that was lying near a bar.

Arlan Kaufman told officers the individuals were residents of the Kaufman Treatment Center and they were members of a therapy group.

Neighbors were contacted by law enforcement officials and they reported on more than one occasion they had witnessed the Kaufmans bringing individuals to the farm near Potwin, in northwest Harvey County, to perform manual labor, including carpentry work, in the nude.

Later that month, deputies spoke with the residents, who said Arlan Kaufman does not pay them for their work and that he receives many of their Social Security Disability and Medicare benefits.

An unidentified female resident told deputies the Kaufmans took her and other residents on a trip to Florida and they were "having to pay off the cost of the trip."

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Deputies reported Linda Kaufman was present for the interviews, and the individuals "would look at Linda Kaufman, as if seeking approval, prior to answering each question."

In June 2001, officials interviewed Linda Kaufman and she said the patients do not work for the Kaufmans to pay off expenses, but she did verify the patients had worked without clothing on the farm.

Ryan Filson, a special agent with the U.S. Department of Health and Human Services who filed the affidavit, said that based on the investigation the Kaufmans on more than one occasion used a stun gun to "shock one resident on his stomach, testicles and feet," punished individuals for violating rules by taking away their clothes, directed residents to work the nude, discouraged residents from contacting their families and friends and controlled the residents' finances and prescription medicines.

Investigators also believe no doctors or other mental health professionals provided any treatment to the residents of the home for the past 15 years.

In court Wednesday, the Kaufmans are charged under a law that makes it illegal to hold or sell another person into "any condition of involuntary servitude," which is prohibited by the 13th Amendment banning slavery.

Violators can be sentenced to up to 20 years in prison.

The Kaufmans have been operating "Kaufman House Residential Group Treatment Center, Inc." in Newton since about 1985, the complaint says.

Many of the residents, placed in the facility by their legal guardians, suffer from a mental illnesses that "significantly impaired their ability to make competent decisions."

The alleged treatment center is not licensed by the state, Lanza said.

According to the Associated Press, Rocky Nichols, executive director of Kansas Advocacy and Protective Services, a federally funded protection and advocacy organization, said the agency received a report in May from a mentally disabled woman in her 50s who claimed her guardian and therapist had sexually abused her for more than 20 years.

The agency got an emergency order the same day to suspend the Kaufmans' guardianship authority and removed the woman from the home, Nichols said.

The agency then worked with federal authorities to get the rest of the adults out of the home, Nichols said.

Arlan Kaufman was a licensed social worker but his license lapsed in 2002.

According to the Associated Press, the state's Behavioral Sciences Regulatory Board suspended Arlan Kaufman's clinical social worker license in an emergency order dated Aug. 9, 2001. The order includes allegations of sexual exploitation by Kaufman of dependent adults who had been paying room and board to the couple for years.

The Associated Press also reported the Kansas State Board of Nursing suspended Linda Kaufman's nursing license Feb. 18. That emergency order says 30 videotapes recording what the couple called "nude therapy" were seized from Linda Kaufman's bedroom.

In the sessions, Arlan Kaufman is shown encouraging adults to masturbate before the group and shave each other's pubic hair, among other acts. The videotapes also depict instances in which he touches the genitals of both male and female patients, the order states.

The emergency order suspending Arlan Kaufman's license also details similar incidents, based on videos dated to 1998 and 2001.

A detention hearing for the Kaufmans is scheduled for 1:30 p.m. Wednesday, followed by a preliminary hearing Nov. 10.

- *The Associated Press contributed to this story.*

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Kansas.com

Posted on Fri, Oct. 29, 2004

Couple will face no state charges

State and local authorities failed to file charges three years ago. Now, Kansas' statute of limitations has run out.

BY STEVE PAINTER
Eagle Topeka Bureau

TOPEKA - State officials said Thursday that they could not prosecute a Newton couple for sex crimes and abuse because the evidence they had was too old to bring state charges.

However, records indicate that state and local authorities missed an opportunity to bring charges three years ago following an investigation by social services officials.

Arlan and Linda Kaufman were charged Wednesday in federal court with forcing mentally ill people to work for them against their will -- in effect, slavery.

The couple's fight with the state Department of Social and Rehabilitation Services stretches over nearly two decades and includes a Kansas Supreme Court decision that the Kaufmans ignored and that SRS says it could not enforce.

Advocates for the mentally ill said the case illustrates the state's lack of attention to the issue.

"It's tragic. I don't know how it could have happened," said Judy Staton, head of the Wichita chapter of the National Association for the Mentally Ill.

The Kaufmans' group home is "probably one of the worst, and it's been bad for years and years," she said.

Added Karen Manza, executive director of the National Association for the Mentally Ill-Kansas: "It's taken five years for any significant action to happen to protect these individuals who didn't know their rights, who didn't know their housing options and who were being preyed upon."

Attorney General Phill Kline turned the matter over earlier this year to a federally funded advocacy group because the videotaped evidence the state had was more than two years old. State law requires that charges be filed within two years on most crimes.

The federal charges have a five-year statute of limitations.

According to state records from the suspension of the couple's licenses -- his for clinical social work, hers for nursing -- videotapes showed "nude therapy" sessions. The records say Arlan Kaufman is shown on the tape touching the genitals of male and female patients.

The Kansas Behavioral Science Board's order of Aug. 9, 2001, suspending his license cites tapes dated 1998 and April 2001.

A letter from a top SRS official in April 2004 says the agency's Adult Protective Services division investigated the Kaufmans' group home in 2001.

"At that time, there was an expectation that criminal prosecution would occur which could have led to closure of the Kaufman residences and alternative placement of the residents," Candace Shively, deputy SRS secretary, wrote to Betty Wright, an assistant attorney general assigned to the Kansas State Board of Nursing.

"Regretfully, to our knowledge, nothing was done, and the statute of limitations may now have expired," she wrote.

She said in the letter that the results of the investigation were turned over to the federal Office of Inspector General, which in turn sent its report to the Harvey County attorney.

County Attorney David Yoder did not return a phone message Thursday.

SRS investigators returned to the Kaufman facility on Feb. 25 this year, accompanied by a Newton police detective, but found no new evidence of abuse or neglect, the letter said.

Some lawmakers said the case shows a lack of information-sharing among state agencies.

"There's three opportunities here by state agencies to find wrongdoing and report it and fix it," said Sen. Susan Wagle, R-Wichita, who chairs the Health and Human Services Committee.

"We've got several people that dropped the ball," added Rep. Brenda Landwehr, R-Wichita, who chairs the House Social Services Budget Committee.

"We let bureaucratic systems get in the way of common sense and the well-being of families," she said.

John Badger, chief counsel at SRS, said the agency had no legal authority to shut down the group home despite a 1991 Supreme Court ruling that said the Kaufman facility was subject to state licensing.

Gov. Kathleen Sebelius appeared shocked when asked about the Kaufman case Thursday, saying it was the first she had heard about their history of alleged abuse.

"If they're under the umbrella of SRS we'll look into it and very quickly," she said. "I don't know what the specifics are... but it is certainly something I will take very seriously."

The Kaufmans' facility received no Medicaid or Medicare funds, SRS spokesman Mike Deines said. If they had, he said, SRS would have some leverage over conditions at the home.

Some residents at the home may have received money through those programs, he said.

Rocky Nichols, executive director of Kansas Advocacy and Protective Services, said the mentally ill adults living at the home ranged from their 40s to their 80s. Some had lived there for as few as five years, others more than 20, he said.

Kline intends to ask the Legislature to extend to five years the statute of limitations for prosecuting crimes, said spokesman Whitney Watson.

No time limit is placed on prosecuting someone for murder. Sex crimes against children can generally be prosecuted for up to five years after the occurrence.

Contributing: Alan Bjerga of The Eagle and Associated Press
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THE HUTCHINSON NEWS
online edition

Newton group home eluded officials

By Jason Probst

Two days after federal officials shuttered a group home for the mentally ill in Newton, state officials are struggling to determine how the operation - and the alleged abuses that happened there - slipped through the regulatory cracks.

Arlan D. Kaufman, 68, and Linda J. Kaufman, 61, were arrested Tuesday after an investigation that revealed patients at group homes run by the couple allegedly were held in an involuntary state of servitude, were forced to work in the nude and at least one was shocked repeatedly with a stun gun.

An FBI spokesman said Tuesday that the group home operation was not licensed or regulated by a state agency at the time of Tuesday's arrests. In 1986, the Kansas Department of Social and Rehabilitation Services instructed the Kaufmans to obtain a state license to continue operating as a "residential care facility."

Despite a ruling from the Kansas State Supreme Court in 1991 that ordered the Kaufmans to obtain the license from SRS, the couple never did.

Instead, SRS officials think changes were made to the group homes that allowed the center to avoid SRS regulation.

According to Mike Deines, SRS spokesman, one part of being a regulated residential care facility is that it consists of five to 40 beds.

The Kaufmans operated two separate homes - one with two beds and one with four, according to court documents.

"There wasn't a classification for this home," Deines said. "We were well aware of what was going on, and we worked with local law enforcement. SRS doesn't have any legal authority to go into a house and shut it down."

As the FBI and U.S. Department of Health and Human Services continue to investigate allegations of abuse and torture at the Kaufman operation, details of the state's efforts leading up to the federal case are beginning to come into focus.

1985 to 2001

For about 17 years, Arlan and Linda Kaufman owned and operated the Kaufman Treatment Center or Kaufman House Residential Group Treatment Center Inc., according to an affidavit from an agent with

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the Department of Heath and Human Services.

Arlan was a licensed social worker who was responsible for the daily care of the residents, and authorities think Linda distributed medication and provided other caretaking obligations for the residents of the Kaufman House.

Arlan Kaufman

The Kansas Behavioral Sciences Regulatory Board suspended Arlan Kaufman's social work license Aug. 9, 2001, after it reviewed videotapes from a Kaufman home showing him practicing beyond the scope of that license, said Roger Scurlock, an investigator with the KBSRB.

"We didn't have any witnesses and found it difficult to do anything in the investigation," Scurlock said. "But the tapes graphically showed what was happening."

According to The Associated Press, the videotapes showed Arlan Kaufman encouraging adults to masturbate before the group and shave one another's pubic hair, among other acts. The videotapes also depict instances where he touched the genitals of male and female residents.

Scurlock said the tapes showed Kaufman was becoming a danger to his clients, and after a review by staff counsel, the KBSRB drafted an emergency order for the suspension of Kaufman's license.

A day after watching the tapes, Scurlock called the SRS, and other agencies became involved in the investigation, including the inspector general with the Department of Health and Human Services.

Although Arlan Kaufman lost his license, authorities believe the Kaufmans continued to run the group homes for mentally ill in Newton.

Linda Kaufman

On Feb. 18, 2004, the Kansas State Board of Nursing suspended the nursing license of Linda Kaufman based on the videotapes. A member of the board then contacted the Kansas Attorney General's Office, spokesman Whitney Watson said.

"We faced a two-year statute of limitations," he said of the 1999 videotape incident. "We were not able to take any action, but we immediately started to look for any possible way to do something."

The attorney general's office contacted SRS, the Harvey County Attorney's Office and Kansas Advocacy and Protective Services, a federally funded protection and advocacy organization.

Watson said that a member of the SRS office and a Newton Police Department detective went to the Kaufmans' group homes Feb. 25 and reported "no indication of abuse that would substantiate an investigation."

Judge's order

After an investigation by KAPS, a judge ordered May 19 that a mentally disabled woman in her 50s be removed from the Kaufman homes after she claimed her guardian and therapist - Arlan Kaufman - had sexually abused her for years.

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"We got her out of there - far, far away from there," said Rocky Nichols, executive director for KAPS. "She didn't want to be there. She confirmed the abuse was taking place."

The agency then worked with federal authorities to attempt to remove the remaining adults in the home, he said.

The Kaufmans were arrested Tuesday by FBI agents and charged under a law that makes it illegal to hold or sell another person into "any condition of involuntary servitude." They could face 20 years in prison if convicted.

The remaining adults in the homes were appointed new guardians, Nichols said, and his agency remains the guardian for court proceedings.

"We strive to have people with disabilities treated with respect," he said. "The things we found during the investigation were really concerning, amazingly concerning."

The Kaufmans remain in jail, awaiting a detention hearing Wednesday, to be followed by a preliminary hearing Nov. 10.

Following the Kaufmans' arrests, advocacy groups are expressing outrage at the state's alleged slow pace in investigating and removing individuals from the home.

"Everyone should live with dignity, and there was an enormous lack of that in this case," said Karen Manza, executive director of the National Alliance for the Mentally Ill.

"We think it's absolutely disgusting that so many organizations knew what was going on and did nothing to stop it."

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Rocky Nichols

Session of 2005

HOUSE BILL No. 2307

By Committee on Appropriations

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AN ACT concerning appointment of guardians and conservators; amending K.S.A. 2004 Supp. 59-3068 and 59-3075 and repealing the existing sections.

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

Section 1. K.S.A. 2004 Supp. 59-3068 is hereby amended to read as follows: 59-3068. (a) The court in appointing a guardian or conservator shall give priority in the following order to:

(1) The nominee of the proposed ward or proposed conservatee, if such nomination is made within any durable power of attorney;

(2) the nominee of a natural guardian;

(3) the nominee of a minor who is the proposed ward or proposed conservatee, if the minor is over 14 years of age;

(4) the nominee of the spouse, adult child or other close family member of the proposed ward or proposed conservatee; or

(5) the nominee of the petitioner.

(b) *(1)* The court, in appointing a guardian or conservator, shall consider the workload, capabilities and potential conflicts of interest of the proposed guardian or conservator, or both, before making such appoint ment, and the court shall give particular attention in making such ap pointment to the number of other cases in which the proposed guardian or conservator, other than a corporation, is currently serving as guardian or conservator, or both, particularly if that number is more than 15 or more wards or conservatees, or both.

(2) The court shall not appoint an unrelated person, institution, as sociation, or corporation to be the guardian ~~of an incapacitated person~~ if the unrelated person, institution, association, or corporation:

(A) provides~~, or is likely to provide~~ during the guardianship goods or services for a fee ~~or anything of benefit to the incapacitated person~~ in the professional or business capacity;

(B) is ~~or is likely to become~~ during the guardianship period a creditor of the ~~incapacitated person~~;

(C) has ~~or is likely to have~~ during the guardianship period interests that may conflict with interests of the ~~incapacitated person~~;

(D) is an employee of a treatment or residential facility where a ward

or conservator of a ward or conservatee

Or conservatorship

to the ward or conservatee

Or conservatorship

ward or conservatee

Or conservatorship

Ward or conservatee

or conservatee

is an inpatient in or resident of the facility; or
(E) is employed by an unrelated person, institution, association, or corporation who or which would be disqualified under paragraphs (A) through (D).
(c) In appointing a guardian for a person who is an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing, the court shall consider, but shall not be limited to, the appointment of an individual as guardian who is sympathetic to and willing to support this system of healing.
Sec. 2. K.S.A. 2004 Supp. 59-3075 is hereby amended to read as follows: 59-3075. (a) (1) The individual or corporation appointed by the court to serve as the guardian shall carry out diligently and in good faith, the general duties and responsibilities, and shall have the general powers and authorities, provided for in this section as well as any specific duties, responsibilities, powers and authorities assigned to the guardian by the court. In doing so, a guardian shall at all times be subject to the control and direction of the court, and shall act in accordance with the provisions of any guardianship plan filed with the court pursuant to K.S.A. 2004 Supp. 59-3076, and amendments thereto. The court shall have the authority to appoint counsel for the guardian, and the fees of such attorney may be assessed as costs pursuant to K.S.A. 2004 Supp. 59-3094, and amendments thereto.
(2) A guardian shall become and remain personally acquainted with the ward, the spouse of the ward and with other interested persons associated with the ward and who are knowledgeable about the ward, the ward's needs and the ward's responsibilities. A guardian shall exercise authority only as necessitated by the ward's limitations. A guardian shall encourage the ward to participate in making decisions affecting the ward. A guardian shall encourage the ward to act on the ward's own behalf to the extent the ward is able. A guardian shall encourage the ward to develop or regain the skills and abilities necessary to meet the ward's own essential needs and to otherwise manage the ward's own affairs. In making decisions on behalf of the ward, a guardian shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian shall strive to assure that the personal, civil and human rights of the ward are protected. A guardian shall at all times act in the best interests of the ward and shall exercise reasonable care, diligence and prudence. *A guardian who is not a family member shall not provide direct services for a fee or for anything of benefit to the ward. The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward. Impropriety or conflict of interest occurs where the guardian has some personal or agency interest that can be perceived as self serving or adverse to the position or best*

Insert new section 3:
Nothing in this section shall prohibit a guardian or conservator from collecting a reasonable fee, as approved by the court, for carrying out the duties of a guardian or conservator. Nothing in this section shall prohibit a guardian or conservator from collecting a stipend from the Kansas Guardianship Program.

Insert new section 4:
This section shall not apply to a guardian or conservator of a minor appointed pursuant to K.S.A. 2004 Supp. 59-3059.

Insert new section 5:
This section shall not apply to a financial institution serving as a conservator.

Replace with new # (3):
(3) A guardian who is an unrelated person shall avoid a conflict of interest or even the appearance of a conflict of interest. Impropriety or conflict of interest occurs where the guardian has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the ward. The guardian who is an unrelated person shall:
(A) not provide direct services for a fee, except as provided in K.S.A. 59-3068(b)(3);
(B) be independent from all providers of services to the ward to ensure that the guardian remains free to challenge inappropriate or poorly delivered services and to advocate vigorously on behalf of the ward;
(C) not concurrently represent both the ward and the service provider;
(D) not employ such guardian's friends or family to provide services for a profit or fee unless no alternative is available and the guardian discloses this arrangement to the court;
(E) petition or assist the ward to petition the court for limitation or termination of the guardianship when the ward is no longer a person with a disability in need of a guardian, or when there are effective alternatives available;
(F) assist the ward in preparing and filing a petition for restoration upon request.

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~~1. interest of the ward. The guardian shall be independent from all providers~~
~~2. of services to the ward to ensure that the guardian remains free to challenge~~
~~3. inappropriate or poorly delivered services and to advocate vigorously~~
~~4. on behalf of the ward. The guardian shall not concurrently represent~~
~~5. both the ward and the service provider. The guardian shall not employ~~
~~6. such guardian's friends or family to provide services for a profit or fee~~
~~7. unless no alternative is available and the guardian discloses this arrangement~~
~~8. to the court. A guardian who is also an attorney shall not provide~~
~~9. legal services to the ward for a fee. The guardian shall petition or assist~~
~~10. the ward to petition the court for limitation or termination of the guardianship~~
~~11. when the ward is no longer a person with a disability in need of~~
~~12. a guardian, or when there are effective alternatives available. The guardian~~
~~13. shall assist the ward in preparing and filing a petition for restoration~~
~~14. upon request.~~

15. (b) A guardian shall have the following general duties, responsibilities,
16. powers and authorities:
17. (1) If the ward is a minor, to have the custody and control of the
18. minor, and to provide for the minor's care, treatment, habilitation, education,
19. support and maintenance;
20. (2) if the ward is an adult, to take charge of the person of the ward,
21. and to provide for the ward's care, treatment, habilitation, education,
22. support and maintenance;
23. (3) to consider and either provide on behalf of the ward necessary or
24. required consents or refuse the same;
25. (4) to assure that the ward resides in the least restrictive setting appropriate
26. to the needs of the ward and which is reasonably available;
27. (5) to assure that the ward receives any necessary and reasonably
28. available medical care, consistent with the provisions of K.S.A. 2004 Supp.
29. 59-3077, and amendments thereto, when applicable, and any reasonably
30. available nonmedical care or other services as may be needed to preserve
31. the health of the ward or to assist the ward to develop or retain skills and
32. abilities;
33. (6) to promote and protect the comfort, safety, health and welfare of
34. the ward;
35. (7) to make necessary determinations and arrangements for, and to
36. give the necessary consents in regard to, the ward's funeral arrangements,
37. burial or cremation, the performance of an autopsy upon the body of the
38. ward, and anatomical gifts of the ward, subject to the provisions and
39. limitations provided for in K.S.A. 65-2893 and 65-3210 and K.S.A. 65-
40. 1734, and amendments thereto; and
41. (8) to exercise all powers and to discharge all duties necessary or
42. proper to implement the provisions of this section.
43. (c) A guardian shall not be obligated by virtue of the guardian's ap

Insert New:
(4) K.S.A. 2004 Supp. 59-3078 is hereby amended to read as follows: A conservator who is an unrelated person shall avoid a conflict of interest or even the appearance of a conflict of interest. Impropriety or conflict of interest occurs where the conservator has some personal or agency interest that can be perceived as self-serving or adverse to the position or best interest of the conservatee. The conservator who is an unrelated person and who is not a financial institution serving as a conservator, shall:
(A) not provide direct services for a fee, except as provided in K.S.A. 59-3068(b)(3);
(B) be independent from all providers of services to the conservatee to ensure that the conservator remains free to challenge inappropriate or poorly delivered services and to advocate vigorously on behalf of the conservatee;
(C) not concurrently represent both the conservatee and the service provider;
(D) not employ such conservator's friends or family to provide services for a profit or fee unless no alternative is available and the conservator discloses this arrangement to the court;
(E) petition or assist the conservatee to petition the court for limitation or termination of the conservatorship when the conservatee is no longer a person with a disability in need of a conservator, or when there are effective alternatives available;
(F) assist the conservatee in preparing and filing a petition for restoration upon request.

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pointment to use the guardian's own financial resources for the support of the ward.

(d) A guardian shall not be liable to a third person for the acts of the ward solely by virtue of the guardian's appointment, nor shall a guardian who exercises reasonable care in selecting a third person to provide any medical or other care, treatment or service for the ward be liable for any injury to the ward resulting from the wrongful conduct of that third person.

(e) A guardian shall not have the power:

(1) To prohibit the marriage or divorce of the ward;

(2) to consent, on behalf of the ward, to the termination of the ward's parental rights;

(3) to consent to the adoption of the ward, unless approved by the court;

(4) to consent, on behalf of the ward, to any psychosurgery, removal of any bodily organ, or amputation of any limb, unless such surgery, removal or amputation has been approved in advance by the court, except in an emergency and when necessary to preserve the life of the ward or to prevent serious and irreparable impairment to the physical health of the ward;

(5) to consent, on behalf of the ward, to the sterilization of the ward, unless approved by the court following a due process hearing held for the purposes of determining whether to approve such, and during which hearing the ward is represented by an attorney appointed by the court;

(6) to consent, on behalf of the ward, to the performance of any experimental biomedical or behavioral procedure on the ward, or for the ward to be a participant in any biomedical or behavioral experiment, without the prior review and approval of such by either an institutional review board as provided for in title 45, part 46 of the code of federal regulations, or if such regulations do not apply, then by a review committee established by the agency, institution or treatment facility at which the procedure or experiment is proposed to occur, composed of members selected for the purposes of determining whether the proposed procedure or experiment

(A) Does not involve any significant risk of harm to the physical or mental health of the ward, or the use of aversive stimulants, and is intended to preserve the life or health of the ward or to assist the ward to develop or regain skills or abilities; or

(B) involves a significant risk of harm to the physical or mental health of the ward, or the use of an aversive stimulant, but that the conducting of the proposed procedure or experiment is intended either to preserve the life of the ward, or to significantly improve the quality of life of the ward, or to assist the ward to develop or regain significant skills or abilities,

and that the guardian has been fully informed concerning the potential risks and benefits of the proposed procedure or experiment or of any aversive stimulant proposed to be used, and as to how and under what circumstances the aversive stimulant may be used, and has specifically consented to such;

(7) to consent, on behalf of the ward, to the withholding or withdrawal of life-saving or life sustaining medical care, treatment, services or procedures, except:

(A) In accordance with the provisions of any declaration of the ward made pursuant to the provisions of K.S.A. 65-28,101 through 65-28,109, and amendments thereto; or

(B) if the ward, prior to the court's appointment of a guardian pursuant to K.S.A. 2004 Supp. 59-3067, and amendments thereto, shall have executed a durable power of attorney for health care decisions pursuant to K.S.A. 58-629, and amendments thereto, and such shall not have been revoked by the ward prior thereto, and there is included therein any provision relevant to the withholding or withdrawal of life-saving or life-sustaining medical care, treatment, services or procedures, then the guardian shall have the authority to act as provided for therein, even if the guardian has revoked or otherwise amended that power of attorney pursuant to the authority of K.S.A. 58-627, and amendments thereto, or the guardian may allow the agent appointed by the ward to act on the ward's behalf if the guardian has not revoked or otherwise amended that power of attorney; or

~~(C) in the circumstances where the ward's treating physician shall certify in writing to the guardian that the ward is in a persistent vegetative state or is suffering from an illness or other medical condition for which further treatment, other than for the relief of pain, would not likely prolong the life of the ward other than by artificial means, nor would be likely to restore to the ward any significant degree of capabilities beyond those the ward currently possesses, and which opinion is concurred in by either a second physician or by any medical ethics or similar committee to which the health care provider has access established for the purposes of reviewing such circumstances and the appropriateness of any type of physician's order which would have the effect of withholding or withdrawing life-saving or life sustaining medical care, treatment, services or procedures. Such written certification shall be approved by an order issued by~~ ~~the court~~ *when the guardian can prove beyond a reasonable doubt the ward's intent, after full informed consent, to withhold or withdraw health care or food and water in the current circumstances. The ward shall be afforded full and complete due process including, but not limited to, the right to court appointed counsel, notice, hearing, subpoena power, discovery, payment of costs for experts if such ward is deemed indigent and*

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right to a jury trial. In making this determination, there shall be a presumption in favor of the continued treatment of the ward. If the ward is not able to communicate or give informed consent, the court appointed counsel shall make decisions on behalf of the ward in order to zealously represent the ward and protect such ward's constitutional rights. If the ward, or court appointed attorney on behalf of a non-communicative ward, elects a jury trial, the panel shall consist of 12 members and render a unanimous verdict. The court should appoint an attorney from the protection and advocacy system for the state of Kansas if they are able to serve. Health care shall not include food and water. Food and water shall not be withheld or withdrawn without express written intent of the ward. Non-terminal physical or mental disability alone shall not be a rational reason for withholding or withdrawing medical treatment. People with non-terminal physical or mental disabilities who express an interest in withholding or withdrawing medical care should be treated the same as people without disabilities and be referred for appropriate support and services;

(8) to exercise any control or authority over the ward's estate, except if the court shall specifically authorize such. The court may assign such authority to the guardian, including the authority to establish certain trusts as provided in K.S.A. 2004 Supp. 59-3080, and amendments thereto, and may waive the requirement of the posting of a bond, only if:

(A) Initially, the combined value of any funds and property in the possession of the ward or in the possession of any other person or entity, but which the ward is otherwise entitled to possess, equals $10,000 or less; and

(B) either the court requires the guardian to report to the court the commencement of the exercising of such authority, or requires the guardian to specifically request of the court the authority to commence the exercise of such authority, as the court shall specify; and

(C) the court also requires the guardian, whenever the combined value of such funds and property exceeds $10,000, to:

(i) File a guardianship plan as provided for in K.S.A. 2004 Supp. 59-3076, and amendments thereto, which contains elements similar to those which would be contained in a conservatorship plan as provided for in K.S.A. 2004 Supp. 59-3078, and amendments thereto;

(ii) petition the court for appointment of a conservator as provided for in K.S.A. 2004 Supp. 59-3058, 59-3059 or 59-3060, and amendments thereto; or

(iii) notify the court as the court shall specify that the value of the conservatee's estate has equaled or exceeded $10,000, if the court has earlier appointed a conservator but did not issue letters of conservatorship pending such notification; and

(9) to place the ward in a treatment facility as defined in K.S.A. 2004 Supp. 59-3077, and amendments thereto, except if authorized by the court as provided for therein.

(f) The guardian shall file with the court reports concerning the status of the ward and the actions of the guardian as the court shall direct pursuant to K.S.A. 2004 Supp. 59-3083, and amendments thereto.

Sec. 3. K.S.A. 2004 Supp. 59-3068 and 59-3075 are hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

PHILL KLINE
ATTORNEY GENERAL

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(785) 296-2215 • FAX (785) 296-6296
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March 8, 2005

HOUSE JUDICIARY COMMITTEE

Testimony in Support of
House Bill No. 2307
by
Kevin A. Graham
Office of the Attorney General

Dear Chairman O'Neal and Members of the Committee:

Thank you for allowing me to appear before you on behalf of Attorney General Phill Kline and offer testimony in support of HB 2307. This bill was introduced at the request of the Attorney General and the Disability Rights Center for Kansas. HB 2307 seeks to provide an increased level of protection under the law for persons with disabilities. Simply put, the bill is intended to provide a higher level of protection for people who have the least ability to protect themselves. The very public news coverage and criminal prosecution of the Kaufman House case has brought these issues needed attention and HB 2307 is one step in preventing future cases of abuse, manipulation and degradation of vulnerable Kansans.

Section 1 of the bill amends KSA 2004 Supp. 59-3086 with new language at subsection (b)(2) designed to prevent conflicts of interest when an unrelated, non-family member is appointed by the court to serve as a guardian/conservator for a ward. This amendment to the statute has been worded in a manner that brings Kansas law substantially into conformity with the National Guardianship Association's 2002 Standards of Practice regarding conflicts of interest for guardian/conservator's. The proposed bill language would prevent the court from appointing an unrelated person, institution, association or corporation to be the guardian of an incapacitated person if one of the listed direct or potential conflicts of interest exists. [See Section 1. KSA 2004 Supp. 59-3068(b)(2) (A) thru (E)].

Section 2 of the bill amends KSA 2004 Supp. 59-3075 to provide that a guardian who is not a family member shall not provide direct services for a fee or for anything of benefit to the ward and the bill requires "The guardian shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ward." The new language added by the bill strives to instruct and require guardians to not place

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themselves in a position where they will be directly engaged in the provision or services to the ward (such as an attorney serving as a guardian providing legal advice to the ward for a fee), or where they will appear to be engaged in the provision of services to the ward (such as hiring a friends or family members to care for the ward.) The bill seeks to confirm that guardians are at all times to be advocates and protectors of their wards - not profiteers.

A third subject area of the bill seeks to address another serious issue affecting the relationship between certain guardian/conservators and their wards. The language proposed in this section would impose significant new restrictions on the ability to withhold/withdraw medical care (including food and water) from persons with disabilities. The proposed changes to current law would also increase the focus on the individual person's own wishes in regard to continued medical care. Under current law subsection (e)(7)(C) allows for the withholding or withdrawing of medical care without formal inquiry into the intent of the person with a disability whose life will end when these decisions are made. The bill would shift that focus in large part back to the wishes of the ward, and force an analysis of the wishes and desires of the ward before medical care could be terminated.

A society may be judged by the manner in which it protects the rights of the weakest and least powerful of its members. HB 2307 seeks to serve the best interests of the disabled and incapacitated of our State by strengthening Kansas laws regarding the guardian/ward relationship. On behalf of Attorney General Phill Kline, I encourage the Committee to support HB 2307 and to recommend the bill favorably for passage.

Respectfully,

Kevin A. Graham
Assistant Attorney General
Director of Governmental Affairs

Testimony to the House Judiciary Committee
HB 2037; concerning appointment of guardians and conservators.
March 8, 2005

Chairperson O'Neal and committee members, I am Kerrie Bacon, Legislative Liaison for the Kansas Commission on Disability Concerns (KCDC). We are charged with providing information to the Governor, the Legislature, and to State agencies about issues of concern to Kansans with disabilities (K.S.A. 74-6706).

The appointing of a guardian or conservator in Kansas needs to have clear guidelines. Children, youth and adults in need of a guardian deserve access to the same basic rights as other citizens: life, liberty, and the pursuit of happiness. Defining the guardianship process will set up the structure to ensure those rights are available to the vulnerable people in our society.

It is important this bill includes:

1. Who can be appointed as a guardian or conservator.
2. That the guardian shall not have a conflict of interest.
3. An outline of the responsibilities of a guardian.
4. An outline of what the guardian does not have the power to do.

The commission is supportive of this bill and encourages you to recommend it favorably for passage to the full House.

Thank you for your time.

Kansas Commission on Disability Concerns
1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1819
Voice: (785) 296-1722 Fax: (785) 296-0466
Toll-Free Voice: 1-800-295-5232 Toll-Free TTY 1-877-340-5874
TTY: (785) 296-5044

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NAMI Kansas

Kansas' Voice on Mental Illness

February 8, 2005

NAMI Kansas is a not-for-profit, grassroots, self-help, support and advocacy organization of ***consumers, families, and friends of people with severe mental illnesses***, such as schizophrenia, major depression, bipolar disorder, obsessive-compulsive disorder, and anxiety disorders. NAMI Kansas is dedicated to improving the quality of life for all whose lives are affected by these diseases.

We know that Kansas' most vulnerable citizens need protection from individuals and businesses that seek to abuse, neglect and exploit them. Reasonable strategies must include at a minimum:

1) Changing the laws of guardianship to eliminate conflicts of interest for non-family guardians;
2) Kansas needs an abuse, neglect exploitation unit, independent of the agency responsible for services; and,
3) Group homes must be licensed, regardless of the number of residents.

NAMI Kansas urges expediency in enacting these changes so that Kansans with disabilities are secure in their rights and protections.

Karen Ford Manza, Executive Director of NAMI Kansas states:

"Kansas must take steps toward ensuring the rights and protections of Kansas' most vulnerable citizens, including those with severe, biological disorders of the brain. We are reminded that individuals with severe mental illness are more likely to be victims of crime than the general public, and that protecting individuals with disabilities has to be a priority in Kansas. The Kansas legislature now has a clear path toward enacting changes in Kansas laws that will better protect people with disabilities from abuse, neglect and exploitation."

In Our Own Voice

"The presentations that NAMIKansas did for our staff and consumers featuring ***In Our Own Voice*** *were powerful, impacting, and re-energizing. I would recommend the presentation for any group, community, provider, and consumer."*

--Walt Hill, Executive Director High Plains Mental Health Center, Hays

Family-to-Family

"The main difference before and after we had NAMI was like night and day. It was through ***Family-to-Family*** *that we got our information. Before that, we were blindfolded and we were trying to get our information in the dark.*

--Susan Reynolds, Program Director

Empowerment

"NAMI has changed my life. It has brought me in touch with others who have mental illnesses so I don't feel so alone. It gives me a way to advocate for myself and my peers. I want others to know there's a resource for them. ***In Our Own Voice*** *has really been empowering for me.*

--Susan Bernstein Washburn University student and peer support group leader

NAMI *Kansas*
112 SW 6th Ave., Suite 505
Topeka, KS 66603
(800) 539-
www.nam

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Kansas Catholic Conference

6301 ANTIOCH • MERRIAM, KANSAS 66202 • PHONE/FAX 913-722-6633 • WWW.KSCATHCONF.ORG

TESTIMONY IN SUPPORT OF H.B. 2307

Chairman O'Neal and members of the Committee:

Thank you for the opportunity to testify in support of H.B. 2307, concerning the appointment of guardians and conservators, in particular, for the purpose of making health care decisions. My name is Mike Farmer and I am the Executive Director of the Kansas Catholic Conference the public policy office of the Catholic Church in Kansas.

In our view H.B. 2307 affirms the dignity of the human person no matter how diminished or weakened. It proposes to strengthen the law regulating who shall make life and death decisions for an incapacitated person, and what boundaries govern such decisions.

The bill clearly states with new language what might constitute a conflict of interest or impropriety on the part of a guardian. New language also gives further protection to a person who has been determined to be in a so-called "persistent vegetative" state or who is suffering from a terminal illness, facing imminent death.

When advance directives are not present indicating wishes for the withdrawal of medical treatment, H.B. 2307 stipulates, "... there shall be a presumption in favor of the continued treatment of the ward." Other positive aspects of this bill are stated in the following: "Health care shall not include food and water. Food and water shall not be withheld or withdrawn without express written intent of the ward. Non-terminal physical or mental disability alone shall not be a rational reason for withholding or withdrawing medical treatment."

Pope John Paul II in an address to the participants in the International Congress on "Life-Sustaining Treatments and Vegetative State: Scientific Advances and Ethical Dilemmas" March 20, 2004, emphasized that the provision of food and water should be "considered, in principle, ordinary and proportionate, and as such, morally obligatory, insofar as and until it is seen to have attained its proper finality, which in the present case consists in providing nourishment to the patient and alleviation of his suffering."

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Further, H.B. 2307 protects people with mental and physical handicaps who are particularly prone to having their humanity denied. It prevents health care decisions from being made on the perceived basis of the "quality of life" rationale alone.

Discussions of life and death issues in our society are difficult at best. There is a great deal of confusion as to what constitutes killing and permitting death. The Terry Schiavo case in Florida, human cloning, and embryonic cell research are perfect examples of the dilemmas we face. Our technology in the medical field has far outpaced our ability to keep up with sound, ethical, moral judgment.

In these times of uncertainty, good public policy is essential in protecting the rights of individuals and contributing to the common good as demonstrated in the provisions of H.B. 2307. In your deliberations I would ask you to consider additional words from Pope John Paul's address mentioned above.

"... the intrinsic value and personal dignity of every human being do not change, no matter what the concrete circumstances of his or her life. A man, even if seriously ill or disabled in the exercise of his highest functions, is and always will be a man, and he will never become a "vegetable" or an "animal."

Even our brothers and sisters who find themselves in the clinical condition of a "vegetative state" retain their human dignity in all its fullness. The loving gaze of God the Father continues to fall upon them, acknowledging them as his sons and daughters, especially in need of help.

Medical doctors and health-care personnel, society, and the Church have moral duties toward these persons from which they cannot exempt themselves without lessening the demands both of professional ethics and human and Christian solidarity."

Please consider H.B. 2307 on its merits and support its passage.

Thank you,

Mike Farmer

Michael P. Farmer
Executive Director

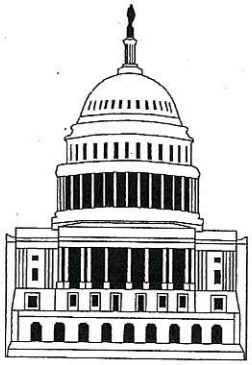
Kansas Mental Health Coalition

"People who experience mental illness are not second class citizens and should not be treated as such. The state of Kansas must take every step necessary to ensure that all of its citizens are kept free from abuse, neglect and exploitation. I support these two efforts to make sure that Kansas' citizens with mental illness are afforded those protections." Dr. Roy Menninger, Chairman, Kansas Mental Health Coalition

The Kaufman house case in Newton, Kansas is not the first time persons with mental illness have been abused in Kansas. Unfortunately, people with mental illness are often forced to live in sub-standard situations and are vulnerable to abuse, neglect and exploitation. The members of the Kansas Mental Health Coalition work hard to improve access to community services and supports that would keep this kind of abuse from occurring. But the Coalition can not do it alone.

The Kansas Mental Health Coalition (KMHC) supports the efforts of Kansas Attorney General Phill Kline and the Disability Rights Center of Kansas to prohibit the appointment of a guardian whose personal interests conflict with the interests of the person for whom they are appointed guardian. Current law should be amended to clarify that a guardian should avoid even the appearance of a conflict of interest, and absolutely avoid any interest that inhibits them from making decisions that are best for their ward. A guardian's first and most important role is to enforce the rights of their ward, and to ensure their safety and security. Being free from conflicts empowers the guardian to do that.

Kansans with disabilities, including persons with mental illness need access to expert advice and advocacy. The Protection and Advocacy For Kansans With Disabilities Fund will give Kansans with mental illness additional resources to ensure that they are not subjected to abuse, neglect or exploitation, and access to professional advocacy services to enforce their rights under state and federal law. KMHC supports the establishment and implementation of the Protection and Advocacy For Kansans With Disabilities Fund.



Roy W. Menninger MD
Chairman, Kansas Mental Health Coalition
February 8, 2005

785-266-6100, fax:785-266-9004, kmhc@amycampbell.com

.....Speaking with one voice to meet the critical needs of people with mental illness

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InterHab
The Resource Network for Kansans with Disabilities

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

February 17, 2005

TO: Representative Michael O'Neal and Members,
House Judiciary Committee
FROM: Tom Laing, Executive Director, InterHab
RE: House Bill 2307

House Bill 2307 addresses issues illustrated graphically in a Harvey County case regarding allegations of abuse by a local family against persons made vulnerable by mental illness, and it addresses issues which arose there. The bill also involves guardianships for persons with developmental disabilities who are served by members of our organization. We support the initiative of the Attorney General's office and the Disability Rights Center to address the challenges we face as a State in protecting the rights of persons who are vulnerable.

Among the principles we embrace in the community is that we promote the involvement of multiple individuals and entities in the lives of persons served. This is a major component of individual consumer safeguards. In other words, to have a person's life dominated by a single person or small number of persons (as was apparently the case in the Harvey County incidents) places the vulnerable person at a disadvantage. Most persons live their lives engaged with many others, in considering and making little and big life decisions. Ideally, this is how it should be for persons with disabilities.

Additionally, we are moving toward a system in which service providers fill less of a fiduciary role for individuals enrolled in services. In the past, it was not unusual for families to ask our members to help fill such roles. Others we served or supported had no circle of friends or families, and it was necessary for us to assist in those ways. Today, as the system of supports has become more comprehensive, and as communities have become more supportive, the goal is to help the persons who are served to secure fiduciary assistance from others, rather than from the service provider.

Regarding HB 2307, we direct the committee's attention to the following issues, some of which I believe may be addressed in balloon amendments to be offered today:

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March 8, 2005

TO: House Judiciary Committee
FR: InterHab
RE: HB 2307

1. Persons who need guardians will benefit from systemic efforts to provide independent and competent guardianship. We support the initiative to eliminate guardians whose conflict of interest is likely to impair their ability to assist in decision making for their wards. We also urge the following be noted: many guardians are excellent advocates who work diligently on behalf of their wards, but some guardians are inadequate in their efforts. The causes are many. Some guardians do not have sufficient time or may lack understanding of important person-centered issues. The vulnerability of a ward may invite a guardian to exert undue influence or pressure rather then actively seek and listen to the preferences of the ward. The bill broadly addresses the conflict of interest issue, but we must also continue to pursue ways to improve guardianship competence in the State.

2. We must prepare for the impact of this bill if adopted into law, and provide for the recruitment and training of replacement guardians. We need an estimate of how many persons with a disability will be required to secure a new guardian. If the number is significant, the Courts and the Kansas Guardianship Program will need a plan to secure satisfactory new guardians. Some very good guardians may be forced to relinquish their guardianship under the bill; replacing them will not be easy.

3. Efforts by families to arrange long term guardianship answers, via corporate guardianships, should not be categorically invalidated. Corporate guardians in existence should be allowed to follow through with commitments they have made to families on behalf of family members, subject to the necessary review of such guardianships by the Court(s) of jurisdiction, and other appropriate authorities.

4. Family members who are guardians should be held to equal standards of scrutiny that are proposed in this bill. To leave family members exempt would be a major gap if the bill's goal is a state policy regarding conflicts of interest. Increasingly, in the diversification of the service field, family members are taking on paid roles in serving their children's needs. For some families, such service income becomes a significant portion of their household family income, and in some instances has created conflicts between the needs or wishes of an adult child and the parent.
5. In addition to guardianships, we urge an examination of the roles of conservators, payees and the uses of durable powers of attorney, which in the view of our members, are being inappropriately employed to limit the civil rights of persons we support in the community, contrary to the bests interests of those persons.

March 8, 2005

TO: House Judiciary Committee
FR: InterHab
RE: HB 2307

Summary:

Persons who rely on the assistance and protection of the Courts and the Courts' appointed guardians should not be compromised by those assigned to assist them. That is the focus of HB 2307, and we support it.

In addition, we pledge to work with DRC, the Attorney General's office and with you as this bill is considered, and in the Senate and in conference committee as needed, to address the additional issues we raised.

In addition, we urge a more comprehensive look at guardianship issues. Society needs to confront the reality that competent decision making and life skills are demonstrated daily by men and women with developmental disabilities. When they are allowed to learn and exercise their civil rights, they live more independently, make better decisions and become better citizens. Safeguards once considered necessary must be reevaluated, and where such safeguards constrict too tightly, they must be relaxed. A discussion of guardianship must always be a comprehensive

I thank the Committee for their thoughtful consideration of these issues.

March 8, 05
Testimony on HB2307
By: Barb Helm, Executive Director, ARCare, Inc.

The purpose of my testimony is to oppose HB 2307 as currently written and explain the adverse effect it would have on corporate guardianship programs like ARCare. Corporate guardianship is a certification available only to not for profit organizations. The certification is approved by SRS under K.S.A. 59-3070. ARCare charges a fee for this service. The fee is approved by Johnson County District Court, Probate Division.

If HB 2307 is passed as currently written, it will prohibit a corporation from being one's guardian if the corporation provides or is likely to provide services for a fee to the incapacitated person. This is stated on page 1, lines 33-43, page 2 lines 38-43 and page 3 lines 1-8. Obviously, this would prevent ARCare from acting as a corporate guardian.

ARCare is a grass roots organization founded by a group of parents whose primary concern was, "Who is going to be there for my child with a disability when I am deceased or simply unable to assist them any longer?" While not all individuals who have a disability need a guardian, many of them do and this usually is a task for parents. After the parent's death, a void is created. With the mobility of our society, parents cannot always look to other family members to fill this void.

ARCare offers parents a solution to this problem. Through the ARCare Plan Program, parents contract with ARCare to provide future services for their child. Guardianship, Representative Payee, Trustee and advocacy are often part of the requested services. These services are usually paid for by an estate planning mechanism the parents have set up.

ARCare currently serves as a Corporate Guardian for six individuals. There are approximately 40 families requesting ARCare's future services. Many of these parents have expressed a desire for ARCare to become their child's guardian after they are deceased.

I want to emphasize that ARCare does not provide any residential or vocational services. The Probate Code specifically disallows a corporate guardian from providing "care, treatment or housing." Our services are intended to work together with such providers and insure a continuum of support for individuals with disabilities after their parents are deceased.

It is my opinion that there are many problems with HB2307. I had a long conversation with Judge Sam Bruner yesterday and he pointed out several reasons he and his committee also oppose the bill.

According to Rocky Nichols there is a balloon amendment being introduced on this bill. The amendment would be helpful since it would allow a corporate guardian to receive reasonable compensation for guardianship services.

If the bill passes without the amendment it would be detrimental to the individuals we serve and plan to serve in the future. The bill would actually take away protection of individuals with disabilities by eliminating guardians such as ARCare. The amendment addresses my primary concerns regarding corporate guardians; therefore, I am supporting the balloon amendment to HB 2307.

Thank you.

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Testimony to House Judiciary Committee
House Bill No. 2307
John G. Carney, Vice President Aging and End of Life
Center for Practical Bioethics
Member of the Board, LIFE Project Foundation
Tuesday, March 8, 2005

For more than two decades the Center for Practical Bioethics has worked to protect the rights and interests of the vulnerable, especially those facing the end of life in this state. Three years ago our staff actively participated in the Guardianship and Conservatorship Advisory Committee of the Kansas Judicial Council process in crafting the statutory language that you now are reconsidering.

In addition, the LIFE Project Foundation in Kansas has committed itself for the last seven years to improving quality of life for those dealing with advanced, chronic and terminal illness. It too was involved in the creation of the statute under consideration today.

While HB 3027 deals with both conflict of interest and due process issues, I will limit my comments to the latter.

Three years ago, the Judicial Council worked diligently to include input from a variety of advocacy groups and special interests in its attempt to draft language that was acceptable to all in guiding surrogate decision makers for wards of the state when facing the difficult decisions regarding the care and treatment of disabled persons at the end of life. At that time, no one anticipated the complicating factor that the ambiguity of the term disabled and disability may present. Though we are sensitive to and supportive of the efforts to address the protection issues raised by the language suggested to replace section (c)(7)(C) of 59-3075 KSA, we do not believe that the revised language fairly represents the clinical and medical interests and needs of those who are both disabled and face the end of life. While due process is an essential and integral component of good decision making in the care of those who are disabled, the medical and clinical interests of those who disabled and dying are just as necessary.

Our request is simple. With its proven track record, the Judicial Council is particularly well suited to the task of constructing acceptable substitute language for this section. It is essential that we draft language that fairly represents and protects both those who are disabled and those who are dying. Please refer this bill to the Judicial Council for its review and consideration. Both the Center for Practical Bioethics and the LIFE Project commit our resources to this end.

KANSAS GUARDIANSHIP PROGRAM KGP

Main Office
3248 Kimball Avenue
Manhattan KS 66503-0353
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1-800-672-0086 www.ksgprog.org

Area Office
1333 N. Broadway
Suite B
Wichita, KS 67214
(316) 269-2525

To: House Judiciary Committee, Representative O'Neal Chair
Fr: Jean Krahn, Executive Director
Dt: March 08, 2005
Re: HB 2307

The Kansas Guardianship Program recruits, trains and monitors community volunteers to serve as court appointed guardians or conservators for program eligible individuals. The individuals have limited financial resources (medicaid recipients) and do not have family members willing, able or appropriate to assume guardianship or conservatorship responsibilities. Currently the KGP serves approximately 1500 wards or conservatees through the efforts of more than 830 volunteers.

The KGP was initiated in 1979 under the administration of Kansas Advocacy and Protective Services, Inc. The 1995 Kansas Legislature established the program as a separate public instrumentality pursuant to K.S.A. 74-9601 et seq., as amended. The program is governed by a seven member board of directors, six of whom are appointed by the Governor and one by the Chief Justice. The KGP is funded through State General Funds.

Persons served by the KGP are identified by SRS Adult Protective Services and State Hospital social workers who make formal requests to the KGP for an approved volunteer to be nominated to the court for appointment as guardian or conservator. The needs of the potential ward and conservatee are matched with the abilities and interests of the volunteer.

After a volunteer is appointed as the guardian or conservator, the KGP contracts with the volunteer, requires written monthly reports of activities undertaken on behalf of the person, provides a $20 per month stipend to the volunteer to offset out-of-pocket expenses (volunteers do not receive a fee for services from the individual's resources), and provides ongoing monitoring, training of and support to the volunteer in order to enhance the quality of life of the persons they serve.

KGP Conflict of Interest Guideline
The KGP, for more than twenty years, has had in place a conflict of interest guideline. The program does not initiate the nomination of a volunteer who directly provides or is employed by a program, facility or an organization providing services and supports to the ward or conservatee.

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We have several concerns with the proposed language in HB 2307 regarding conflict of interest.

1. We would not want the stipend provided to KGP volunteers for out-of-pocket expenses to be viewed as a fee for services.

2. The phrase "... or is likely..." used at several points would establish too difficult a standard and is open to conjecture. What one person might judge as "is likely," another might believe otherwise. The KGP recruits volunteers from all walks of life including many individuals who work in a wide array of social and human services settings. We believe the "...or is likely" phrase is unnecessary.

3. On Page 1, Line 37, the proposed language "...or anything of benefit to the incapacitated person" could be interpreted in such a way as to prohibit any type of pro bono or in-kind service.

We request your consideration in these matters.

Kansans for Life

State Affiliate of National Right to Life

Written Testimony from Kansans for Life
In Support of House Bill 2307
House Judiciary Committee
March 8, 2005

Chairman O'Neal and Members of the Committee:

Kansans for Life supports HB 2307. Because we have only recently become aware of the bill, we sought advice from Burke Balch, National Right to Life Committee's Director of Medical Ethics, who is an expert in these matters.
Mr. Balch suggested that the language would be improved from his perspective with these few changes. We would appreciate your attention to his suggestions.

Jeanne Gawdun
Kansans for Life Lobbyist

NEW LANGUAGE PROPOSED IN HB 2307 beginning p. 5, l. 38

when the guardian can prove beyond a reasonable doubt the ward's intent, after full informed consent, to withhold or withdraw health care or food and water in the current circumstances. The ward shall be afforded full and complete due process including, but not limited to, the right to court appointed counsel, notice, hearing, subpoena power, discovery, payment of costs for experts if such ward is deemed indigent and right to a jury trial. In making this determination, there shall be a presumption in favor of the continued treatment of the ward. If the ward is not able to communicate or give informed consent, the court appointed counsel shall make decisions on behalf of the ward and protect such ward's constitutional rights. If the ward, or court appointed attorney on behalf of a non-communicative ward, elects a jury trial, the panel shall consist of 12 members and render a unanimous verdict. The court should appoint an attorney from the protection and advocacy system for the state of Kansas if they are able to serve. Health care shall not include food and water. Food and water shall not be withheld or withdrawn without express written intent of the ward. Non-terminal physical or mental disability alone shall not be a rational reason for withholding or withdrawing medical treatment. People with non-terminal physical or mental disabilities who express and interest in withholding or withdrawing medical care should be treated the same as people without disabilities and be referred for appropriate support and services;

LANGUAGE SHOWING PROPOSED CHANGES

when the guardian can prove beyond a reasonable doubt the ward's intent, after full informed consent, to withhold or withdraw health care or <u>medically assisted</u> food and water in the current circumstances. The ward shall be afforded full and complete due process including, but not limited to, the right to court appointed counsel <u>with the duty</u>

929A S Kansas Ave Topeka, KS 66612 785-234-2998 Fax 785-23.
www.kfl.org kansansforlifetp@aol.com

and opportunity to make the case for provision of health care or medically assisted food and water necessary to sustain life, notice, hearing, subpoena power, discovery, payment of costs for experts if such ward is deemed indigent and right to a jury trial. In making this determination, there shall be a presumption in favor of the continued treatment of the ward. If the ward is not able to communicate or give informed consent, the court appointed counsel shall make decisions on behalf of the ward and protect such ward's constitutional rights. If the ward, or court appointed attorney on behalf of a non-communicative ward, elects a jury trial, the panel shall consist of 12 members and render a unanimous verdict. The court should appoint an attorney from the protection and advocacy system for the state of Kansas if they are able to serve. Health care shall not include food and water. Medically assisted f~~F~~ood and water shall not be withheld or withdrawn without express written intent of the ward. Non-terminal physical or mental disability alone shall not be a rational reason for withholding or withdrawing medical treatment. People with non-terminal physical or mental disabilities who express and interest in withholding or withdrawing medical care should be treated the same as people without disabilities and be referred for appropriate support and services;

LANGUAGE INCORPORATING PROPOSED CHANGES:

when the guardian can prove beyond a reasonable doubt the ward's intent, after full informed consent, to withhold or withdraw health care or medically assisted food and water in the current circumstances. The ward shall be afforded full and complete due process including, but not limited to, the right to court appointed counsel with the duty and opportunity to make the case for provision of health care or medically assisted food and water necessary to sustain life, notice, hearing, subpoena power, discovery, payment of costs for experts if such ward is deemed indigent and right to a jury trial. In making this determination, there shall be a presumption in favor of the continued treatment of the ward. If the ward is not able to communicate or give informed consent, the court appointed counsel shall make decisions on behalf of the ward and protect such ward's constitutional rights. If the ward, or court appointed attorney on behalf of a non-communicative ward, elects a jury trial, the panel shall consist of 12 members and render a unanimous verdict. The court should appoint an attorney from the protection and advocacy system for the state of Kansas if they are able to serve. Health care shall not include food and water. Medically assisted food and water shall not be withheld or withdrawn without express written intent of the ward. Non-terminal physical or mental disability alone shall not be a rational reason for withholding or withdrawing medical treatment. People with non-terminal physical or mental disabilities who express and interest in withholding or withdrawing medical care should be treated the same as people without disabilities and be referred for appropriate support and services;