

**REPORT OF JUDICIAL COUNCIL JUVENILE OFFENDER/
CHILD IN NEED OF CARE ADVISORY COMMITTEE
ON PROBABLE CAUSE DETERMINATIONS IN JUVENILE OFFENDER CASES**

DECEMBER 2, 2011

In July 2011, Sen. Tim Owens requested that the Judicial Council study and make recommendations on the issue of probable cause determinations in juvenile offender cases. The Judicial Council agreed to undertake the study and assigned the task to the Juvenile Offender/Child in Need of Care (JO/CINC) Advisory Committee.

COMMITTEE MEMBERS

Honorable Maritza Segarra, Chair, Junction City. Judge Segarra is a district judge, is a member of the Judicial Council, and handles family court matters in Geary County.

Wade H. Bowie, Jr., Topeka. Mr. Bowie is an assistant district attorney in Douglas County who works exclusively in the juvenile area.

Charlene Brubaker, Hays. Ms. Brubaker is an assistant county attorney in Ellis County who works exclusively in child in need of care and juvenile offender matters.

Bradley Burke, Topeka. Mr. Burke is chief counsel for the Kansas Juvenile Justice Authority.

Kathryn Carter, Concordia. Ms. Carter is a practicing attorney and former district magistrate judge.

Honorable Timothy H. Henderson, Wichita. Judge Henderson is a district judge in Sedgwick County.

Donald W. Hymer, Olathe. Mr. Hymer is an assistant district attorney in Johnson County.

Honorable Jeffry L. Jack, Parsons. Judge Jack is a district judge in Labette County.

Professor Richard E. Levy, Lawrence. Professor Levy is a professor at the University of Kansas School of Law.

Rachel Y. Marsh, Halstead. Ms. Marsh is an attorney with Saint Francis Community Services and a contract provider for family preservation, reintegration, and adoption services with the Kansas Department of Social and Rehabilitation Services.

Roberta Sue McKenna, Topeka. Ms. McKenna is Assistant Director of Children and Family Services of the Kansas Department of Social and Rehabilitation Services responsible for legal services including liaison with the judicial branch and coordination with the legislature.

Sen. Tim Owens, Overland Park. Sen. Owens is an attorney, a state senator, Chair of the Senate Judiciary Committee, and a member of the Kansas Judicial Council.

Representative Janice L. Pauls, Hutchinson. Representative Pauls is an attorney, a state representative, and is the ranking minority member of the House Judiciary Committee.

Lois Rice, Overland Park. Ms. Rice serves as the Executive Director of CASA of Johnson and Wyandotte Counties.

Honorable Steven M. Roth, Westmoreland. Judge Roth is an attorney and is a district magistrate judge in Pottawatomie County.

BACKGROUND

In response to two recent Kansas appellate court decisions, *In re D.E.R.*, 290 Kan. 306, 225 P.3d 1187 (2010), and *In re H.N.*, 45 Kan. App. 2d 1059, 257 P.3d 821 (2011), Sen. Tim Owens asked the Judicial Council to study the issue of probable cause determinations in juvenile offender cases and to recommend amendments to the Revised Kansas Juvenile Justice Code to establish procedures for such determinations.

In *In re D.E.R.*, 290 Kan. 306, 225 P.3d 1187 (2010), the Kansas Supreme Court held that K.S.A. 22-2902 — the provision in the adult criminal code that governs preliminary hearings — does not apply to juvenile offender cases, but juveniles do have a constitutional right to have a judicial determination of probable cause before an extended restraint of liberty. D.E.R. was not in custody when he requested a preliminary hearing, and the court declined to decide what procedure would have been required — short of a full-blown preliminary examination under K.S.A. 22-2902 — to satisfy the requirement of a judicial determination of probable cause.

The Kansas Court of Appeals, in *In re H.N.*, 45 Kan. App. 2d 1059, 257 P.3d 821 (2011), upheld a trial court's reliance on an affidavit to make the probable cause determination, but also called on the legislature to provide further guidance concerning the nature and conduct of proceedings to determine probable cause. "The legislature should address when a probable cause hearing must be held, whether affidavits or other hearsay evidence can be considered by the district court, and whether the district court must allow the juvenile respondent to present additional evidence at the hearing." *Id.*, 45 Kan. App. 2d at 1073-74.

DISCUSSION

A subcommittee was formed to prepare a preliminary report. The subcommittee, composed of Judge Timothy Henderson, Prof. Richard Levy, and Donald Hymer, drafted a preliminary report which the full Committee considered when it met on September 30, 2011.

The Committee began its discussion by agreeing with the subcommittee's premise that the determination of probable cause should be made at the detention hearing that is already required by statute because under *D.E.R.* and *H.N.*, it is the detention that triggers the due process requirement of a judicial probable cause determination. In adapting this hearing to include a determination of probable cause, the Committee agreed with two general principles stated by the subcommittee. First, it was agreed that a full evidentiary hearing similar to that required under K.S.A. 22-2902 was undesirable and might further obscure important differences between the adult and juvenile systems. Second, the Committee recognized that detention hearings for juvenile offenders operate differently than preliminary hearings for adults because detention requires a finding that the juvenile is a danger to self or others or is unlikely to appear for further proceedings. The Committee agreed that the revised detention hearing should serve two distinct functions: (1) a determination of probable cause; and (2) a determination of whether detention is warranted.

COMMITTEE RECOMMENDATIONS

After extended discussion of how to incorporate the concept of probable cause determinations into the existing juvenile code, the Committee agreed to recommend changes to several statutes. Set forth below are the Committee's recommended amendments, with explanatory comments following each amended section.

38-2331. Criteria for detention of juvenile in detention facility.

(b) Except as provided in subsection (c), a juvenile may be placed in a juvenile detention facility pursuant to subsection (c) or (d) of K.S.A. 2010 Supp. 38-2330 or subsection (e) of K.S.A. 2010 Supp. 38-2343, and amendments thereto, if one or more of the following conditions are met:

(1) There is oral or written verification that the juvenile is a fugitive sought for an offense in another jurisdiction, that the juvenile is currently an escapee from a juvenile detention facility or that the juvenile has absconded from a placement that is court ordered or designated by the juvenile justice authority.

(2) ~~The juvenile is alleged to have committed~~ There is probable cause to believe that the juvenile has committed an offense which if committed by an adult would constitute a felony or any crime described in article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.

Comment

This is a conforming amendment to require probable cause, rather than a mere allegation, that the juvenile committed an offense that would be a felony if committed by an adult.

38-2343. Detention hearing; waiver; notice; procedure; removal from custody of parent; audio-video communications. (a) *Length of detention.* Whenever a juvenile is taken into custody, the juvenile shall not remain in detention for more than 48 hours, excluding Saturdays, Sundays, legal holidays, and days on which the office of the clerk of the court is not accessible, from the time the initial detention was imposed, unless the court determines after hearing, within the 48-hour period, that further detention is necessary because (1) detention is warranted in light of all relevant factors, including, but not limited to, the criteria listed in K.S.A. 2010 Supp. 38-2331, and amendments thereto; and (2) the juvenile is dangerous to self or others or is not likely to appear for further proceedings.

(A) If the juvenile is in custody on the basis of a new offense which would be a felony or misdemeanor if committed by an adult and no prior judicial determination of probable cause has been made, the court shall determine whether there is probable cause to believe that the juvenile has committed the alleged offense.

(B) If the court finds the juvenile is dangerous to self or others, the juvenile may be detained in a juvenile detention facility or youth residential facility which the court shall designate.

(C) If the court finds the juvenile is not likely to appear for further proceedings, the juvenile may be detained in a juvenile detention facility or youth residential facility which the court shall designate or may be released upon the giving of an appearance bond in an amount specified by the court and on the conditions the court may impose, in accordance with the applicable provisions of article 28 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto.

(D) In the absence of the necessary findings, the court shall order the juvenile released or placed in temporary custody as provided in subsection (g).

Comment

Subsection (a) includes new language concerning the probable cause finding and incorporates current language, moved from former subsection (e), providing for the determination of whether detention is warranted.

(b) *Waiver of detention hearing.* The detention hearing may be waived in writing by the juvenile and the juvenile's attorney with approval of the court. The right to a detention hearing may be reasserted in writing by the juvenile or the juvenile's attorney or parent at anytime not less than 48 hours prior to trial.

Comment

No changes to this subsection are suggested.

(c) *Notice of hearing.* Whenever it is determined that a detention hearing is required the court shall immediately set the time and place for the hearing. Except as otherwise provided by subsection (c)(1) of K.S.A. 2010 Supp. 38-2332, and amendments thereto, notice of the detention hearing shall be given at least 24 hours prior to the hearing, unless waived. ~~(d) Oral notice.~~ When there is insufficient time to give written notice, oral notice may be given and is completed upon filing a certificate of oral notice with the clerk.

Comment

The only change is that subsections (c) and (d) have been combined.

~~(e d) *Hearing, finding, bond Attorney for juvenile.* At the time set for the detention hearing if no retained attorney is present to represent the juvenile, the court shall appoint an attorney, and may recess the hearing for 24 hours, excluding Saturdays, Sundays and legal holidays, to obtain attendance of the attorney appointed. At the detention hearing, if the court finds the juvenile is dangerous to self or others, the juvenile may be detained in a juvenile detention facility or youth residential facility which the court shall designate. If the court finds the juvenile is not likely to appear for further proceedings, the juvenile may be detained in a juvenile detention facility or youth residential facility which the court shall designate or may be released upon the giving of an appearance bond in an amount specified by the court and on the conditions the court may impose, in accordance with the applicable provisions of article 28 of chapter 22 of the Kansas Statutes Annotated, and amendments thereto. In the absence of either finding, the court shall order the juvenile released or placed in temporary custody as provided in subsection (f).~~

~~In determining whether to place a juvenile in a juvenile detention facility pursuant to this subsection, the court shall consider all relevant factors, including, but not limited to, the criteria listed in K.S.A. 2010 Supp. 38-2331, and amendments thereto.~~

Comment

The language that has been stricken was moved to subsection (a).

(e) *Hearing.* The detention hearing is an informal procedure to which the ordinary rules of evidence do not apply. The court may consider affidavits, professional reports, and representations of counsel to make the necessary findings, if the court determines that these materials are sufficiently reliable. If probable cause to believe that the juvenile has committed an alleged offense is contested, the court shall allow the opportunity to present contrary evidence or information upon request. If the court orders the juvenile to be detained in a juvenile detention facility, the court shall record the specific findings of fact upon which the order is based.

Comment

New language was added concerning the procedures for the detention hearing, including the court's ability to consider affidavits and other matter that would not be admissible as evidence. The language is intended to maintain the informal nature of these hearings, but allow for an opportunity to contest the existence of probable cause in the unusual case where there is a significant basis for doing so.

(f) Rehearing. (1) If detention is ordered and the parent was not notified of the hearing and did not appear and later requests a rehearing, the court shall rehear the matter without unnecessary delay.

(2) Within 14 days of the detention hearing, if the juvenile had not previously presented evidence regarding the determination of probable cause to believe that the juvenile has committed an offense, the juvenile may request a rehearing to contest the determination of probable cause to believe that the juvenile has committed an offense. The rehearing request shall identify evidence or information that the juvenile could not reasonably produce at the detention hearing. If the court determines that the evidence or information could not reasonably be produced at the detention hearing, the court shall rehear the matter without unnecessary delay.

Comment

The language in subsection (f)(1) was moved down from former subsection (e).

New subsection (f)(2) allows for a rehearing of the probable cause determination if there is a basis for contesting it that could not reasonably have been presented at the initial detention hearing. This new language is intended to be a compromise between competing concerns. It allows the court to make a probable cause determination promptly and without any interruption of detention when continued detention is warranted. It also provides an opportunity for a juvenile to contest the determination if, within 14 days, the juvenile presents to the court information that was not reasonably discoverable before the initial determination.

(f g) Temporary custody. If the court determines that detention is not necessary but finds that release to the custody of a parent is not in the best interests of the juvenile, the court may place the juvenile in the temporary custody of ~~a youth residential facility~~, some other suitable person willing to accept temporary custody or the commissioner. Such finding shall be made in accordance with K.S.A. 2010 Supp. 38-2334 and 38-2335, and amendments thereto.

Comment

“Youth residential facility” was deleted from this subsection to more accurately reflect actual practice. A juvenile placed in a residential facility is generally in the custody of the commissioner. Residential facilities accept placements, but not custody.

(g h) *Audio-video communications.* Detention hearings may be conducted by two-way electronic audio-video communication between the juvenile and the judge in lieu of personal presence of the juvenile or the juvenile's attorney in the courtroom from any location within Kansas in the discretion of the court. The juvenile may be accompanied by the juvenile's attorney during such proceedings or the juvenile's attorney may be personally present in court as long as a means of confidential communication between the juvenile and the juvenile's attorney is available.

Comment

The only change is that the section was renumbered.

38-2354. Rules of evidence. Except as provided in K.S.A. 38-2343 and 38-2360, and amendments thereto. ~~In all hearings pursuant to the code,~~ the rules of evidence of the code of civil procedure shall apply in all hearings pursuant to the code. The presiding judge shall not consider, read or rely upon any report not properly admitted according to the rules of evidence.

Comment

The amendment to this section is intended to clarify that the rules of evidence do not apply in detention hearings. The rules of evidence are relaxed in preliminary hearings under the adult criminal code, and probable cause hearings for juveniles should be similarly exempt from the strict application of evidentiary rules. Dispositional hearings under K.S.A. 38-2360 are exempted as well, to ensure consistency with current practice and prevent a negative inference from being drawn.

CONCLUSION

The Kansas Supreme Court has held that juveniles have a constitutional right to a judicial determination of probable cause before an extended restraint of liberty. *In re D.E.R.*, 290 Kan. 306, 225 P.3d 1187 (2010). The Revised Kansas Juvenile Justice Code already requires a detention hearing before a juvenile may be held for more than 48 hours. The Committee recommends proposing amendments to the code, as set forth in this report, to incorporate into the detention hearing a judicial determination of probable cause.