

Criminal Law Advisory Committee Regarding 1999 House Bills 2376 and 2081

On February 18, 1999, the House Judiciary Committee requested the Judicial Council study 1999 H.B. 2081 and H.B. 2376. By letter of February 22, 1999, Representative Michael O'Neal communicated this request noting "the committee's concern over broad new definitions of 'abuse' both adult and child . . ." The Judicial Council assigned the requested study to its Criminal Law Advisory Committee.

The Committee met with and received written materials from Secretary of Social and Rehabilitation Services Rochelle Chronister, Attorney General Carla Stovall, Deputy Attorney General Martha Hodgesmith, Assistant Attorney General Jane Nohr, Staff Counsel for SRS Lloyd Hall, and Assistant to Attorney General Nancy Lindberg.

The Judicial Council Criminal Law Advisory Committee shares the concerns of the House Judiciary Committee that the proposed definitions of abuse contained in 1999 H.B. 2081 and H.B. 2376 are overly broad.

The Criminal Law Advisory Committee has historically been opposed to the creation of specialized crimes where general, codified common law crimes are sufficient to cover the alleged criminal activity. This historical philosophy is based upon the premises that (1) all facets of the criminal justice system are better served when applying statutes which have been litigated and tested; (2) disproportionality of sentencing arises when crimes are fragmented and specialized; and (3) unforeseen results and injustices arise when courts are compelled to apply the rule of statutory construction that a more specific statute controls over a general statute dealing with the same subject.

Generally, existing statutory crimes against persons cover situations which are generically referred to as "abuse." For example, rather than charge a defendant solely with child abuse, a prosecutor may charge endangering a child, battery, aggravated battery, sex crimes, murder or other crimes as appropriate. Recently, the Kansas Court of Appeals ruled that child abuse is a separate crime from aggravated battery, and not a more specific version of aggravated battery. Thus, a defendant may be convicted of both crimes. *State v. Riles*, 24 Kan. App. 2d 827, 829 (1998). Passage of H.B. 2376 would again cloud this issue because the specific elements of aggravated battery are included in the definition of abuse contained in the bill.

H.B. 2376

Committee member Debra Peterson of the Sedgwick County District Attorney's office prepared an analysis of the provisions of H.B. 2376 to determine whether its provisions were covered by existing statutes. She concluded, and the Committee agreed, that current statutes are generally sufficient to cover the circumstances H.B. 2376 was intended to address. No amendment to the child abuse statute is necessary.

In addition, the Committee believes that additional sentencing penalties are unnecessary because of the availability of statutory aggravating factors in support of an upward departure in circumstances where "the victim was particularly vulnerable due to age" K.S.A. 21-4716(b)(2)(A). Other aggravating factors such as excessive brutality may also be utilized. See K.S.A. 21-4716(b)(2)(B). Application of aggravating factors is more appropriate than attempting distinctions based upon age or type of injury. The application of aggravating factors allows the court to exercise discretion in fitting the sentence to the facts of the crime.

However, because aggravating factors do not apply to sentencing in misdemeanor cases, the Committee recommends the following amendment to the severity level of the crime of endangering a child:

21-3608. Endangering a child.

(a) Endangering a child is intentionally and unreasonably causing or permitting a child under the age of 18 years to be placed in a situation in which the child's life, body or health may be injured or endangered.

(b) Nothing in this section shall be construed to mean a child is endangered for the sole reason the child's parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child.

(c) Endangering a child is a class A person misdemeanor if no physical harm results. Endangering a child is a severity level 7 person felony if physical harm results.

The Committee also recommends the repeal of subsection (b) of K.S.A. 21-3608.

Another reason articulated for the need for H.B. 2376 was a concern that a parent or other caretaker who allows abuse to occur might not be criminally liable. Under the rationale of *State v. Parker*, 22 Kan. App. 2d 206, 208, 913 P.2d 1236 (1996), and *State v. Wakefield*, 267 Kan. 116, 977 P.2d 941 (1999), a person with parental or care responsibility who causes or permits another to commit crimes against a child could be charged as an aider and abettor. Therefore, no additional language is necessary.

H.B. 2081

The Committee expressed many of the same concerns about H.B. 2081, specifically that the definitions were overly broad and that current law already allowed prosecution in nearly every factual situation. The rationale for the legislation was, in large part, a desire to have consistency between the reporting statute of K.S.A. 39-1401, et seq., and criminal provisions. The Committee suggests that such consistency is not sound policy because a reporting statute should mandate reporting of incidents which may not rise to the level of criminal conduct.

However, the Committee does recommend the following amendments:

21-3425. Mistreatment of a confined person.

Mistreatment of a confined person is the intentional abuse, neglect or ill-treatment of any person, who is detained or confined and who is physically disabled, mentally ill or mentally retarded or whose detention or confinement is involuntary, by any law enforcement officer or by any person in charge of or employed by the owner or operator of any correctional institution or any public or private hospital or nursing home.

Mistreatment of a confined person is a class A person misdemeanor.

21-3437. Mistreatment of a dependent adult.

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

- (1) Infliction of physical injury, upon a dependent adult;
- (2) Unreasonable confinement of a dependent adult by physical or chemical means; or
- (3) Cruel punishment upon a dependent adult, including through use of medication or isolation;
- (4) Assault as defined in K.S.A. 21-3408 upon a dependent adult;
- (35) omitting or depriving treatment, goods or services by a caretaker or another person which are necessary to maintain physical or mental health of a dependent adult; or
- (26) taking unfair advantage of a dependent adult's physical or financial resources for another individual's personal or financial advantage by the use of undue influence, coercion, harassment, duress, deception, false representation or false pretense by a caretaker or another person; or.

(b) No dependent adult is considered to be mistreated for the sole reason that such dependent adult relies upon or is being

The purpose of striking this language is to eliminate concern that this is a more specific crime than K.S.A. 21-3437 under which crimes committed against those in nursing homes and medical care facilities can be prosecuted and more severely penalized.

This language covers only intentional acts and would be an additional crime to be charged along with battery, aggravated battery or any other appropriate crime. See *State v. Riles*, 24 Kan. App. 2d 827 (1998). Reckless acts would not be charged under this section, but could be charged under other provisions such as reckless aggravated battery.

Language was added to clarify that chemical means may result in confinement.

Adding this provision in this section increases the penalty provision from the usual class C misdemeanor of assault to the level which was provided in H.B. 2081.

This provision cover situations where the elements of theft cannot be established.

furnished treatment by spiritual means through prayer in lieu of medical treatment in accordance with the tenets and practices of a recognized church or religious denomination of which such dependent adult is a member or adherent.

(c) For purposes of this section: 'Dependent adult' means an individual 18 years of age or older who is unable to protect their such individual's own interest. Such term shall include, including:

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

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

(3) any individual kept, cared for, treated, boarded or otherwise accommodated in a medical care facility;

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

(5) any individual with a developmental disability receiving services provided by a community service provider as provided in the developmental disability reform act; or

(6) any individual kept, cared for, treated, boarded or otherwise accommodated in a state psychiatric hospital or state institution for the mentally retarded.

(d)(1) Mistreatment of a dependent adult as defined in subsection (a)(1), (a)(2) or (a)(3) is a severity level 6, person felony.

(2) Mistreatment of a dependent adult as defined in subsection (a)(2) and (a)(3)(6) is a class A person misdemeanor: (A) a severity level 7, person felony if the value of the physical or financial resources is \$25,000 or more; (B) a severity level 9, person felony if the value of the physical or financial resources is at least \$500 but less than \$25,000; (C) except as provided in subpart (D), a class A

Limiting the scope of facilities to K.S.A. 39-923(a) broadens coverage to all facilities.

Subparagraph (b) excludes from the definition facilities operated by federal or state governments, psychiatric facilities, or other facilities.

misdemeanor if the value of the physical or financial resources is less than \$500; (D) a severity level 9, person felony if the value of the physical or financial resources is less than \$500 and committed by a person who, within five years immediately preceding commission of the crime, has been convicted two or more times of mistreatment of a dependent adult as defined in subsection (a)(6).

(3) Mistreatment of a dependent adult as defined in subsection (a)(4) or (a)(5) is a class A person

misdemeanor.

(4) Provisions of K.S.A. 21-4716(b)(3) shall not prevent the application of K.S.A. 21-4716(b)(2)(A) to crimes covered by this section.

The intent of this provision is to clarify that being a dependent adult should not foreclose the aggravating factor of vulnerability due to age. Not all adults who would otherwise meet the definition of dependent adult are vulnerable.