

Approved by the Judicial Council December 3, 2010

**REPORT OF THE JUDICIAL COUNCIL  
CRIMINAL LAW ADVISORY COMMITTEE  
ON 2010 HB 2502**

**(December 3, 2010)**

In May, 2010, the House Committee on Corrections and Juvenile Justice requested that the Judicial Council study and make recommendations on 2010 House Bill 2502 which attempts to create a child witness protection act. The study was assigned to the Criminal Law Advisory Committee and the Committee's final report was reviewed by the Juvenile Offender \ Child in Need of Care Advisory Committee (JOCINC) and the Family Law Advisory Committee. JOCINC concurred with the Criminal Law Advisory Committee's report and the Family Law Advisory Committee concurred with the conclusion of the report with one member opposing.

**COMMITTEE**

The members of the Committee taking part in this study are as follows:

1. **Hon. Nancy L. Caplinger, Chair**, Topeka; Appellate Court Judge and member of the Judicial Council.
2. **James W. Clark**, Lawrence; attorney for the Health Care Stabilization Fund.
3. **Edward G. Collister**, Lawrence; practicing attorney.
4. **Representative Pat Colloton**, Leawood; Kansas State Legislator.
5. **Jim D. Garner**, Coffeyville; Secretary, Kansas Department of Labor.
6. **Deborah Hughes**, Topeka; staff attorney for the Kansas Supreme Court.
7. **Patrick M. Lewis**, Olathe; practicing attorney.
8. **Hon. Michael Malone**, Lawrence; District Judge in the 7<sup>th</sup> Judicial District.
9. **Joel Meinecke**, Topeka; practicing attorney.
10. **John M. Settle**, Larned; Pawnee County Attorney.
11. **Prof. Thomas Stacy**, Lawrence; Professor at the University of Kansas School of

Law

12. **Ann Swegle**, Wichita; Sedgwick County Deputy District Attorney.
13. **Loren L. Taylor**, Kansas City; Attorney and Police Trainer.
14. **Hon. John White**, Bella Vista, AR; retired District Judge.
15. **Debra J. Wilson**, Topeka; Capital Appeals and Conflicts Office.
16. **Ron Wurtz**, Topeka; Federal Public Defender's Office.

## **DISCUSSION**

The Criminal Law Advisory Committee met in July, September and October, 2010 and discussed 2010 House Bill 2502 in those meetings. The committee considered the terms of the proposed Child Witness Protection Act legislation, reviewed written testimony provided to the House Corrections and Juvenile Justice Committee, and reviewed current case law. In addition, Representative Annie Tietze attended the October, 2010, meeting to explain to the committee the impetus for the bill and ensure that the Attorney General's office had vetted the bill for any constitutional issues.

HB 2502 attempts to create a child witness protection act and provides that the court shall:

- ensure that any oaths are given to children in such a manner that the child would fully understand his or her duty to tell the truth;
- ensure that questions are stated in a form that is age appropriate;
- explain to the child that if he or she does not understand the question, he or she has the right to say so and the right to have the question restated so that he or she does understand;

- ensure that questions are phrased or rephrased to prevent intimidation of the child insofar as it is consistent with the constitutional right to confront and cross-examine adverse witnesses.

If requested by the child, the child's attorney or guardian ad litem (GAL), and the court determines it would not prejudice the adverse party, the court would be required to:

- allow the child to have a comfort item while testifying; and
- designate a support person to be present in the courtroom, in view of the child and, if necessary, in close proximity to the child during the child's testimony. Such support person may be excluded and a new person assigned if there is any attempt to influence the testimony of the child.

On its own motion, or the motion of any party at least 30 days in advance, and provided that such measures are consistent with the rights of all parties under the constitution and the laws of the United States and the state of Kansas, the court may order such accommodations appropriate under the circumstances to ensure the comfort of the child, including:

- adjusting the layout of the courtroom;
- conducting the proceedings outside the courtroom; or
- relaxing the formalities of the proceeding, including but not limited to, allowing recording of the child's testimony in lieu of the child's actual in-person testimony during the proceeding as provided in K.S.A. 22-3434, 38-2249 and 38-2359.

In short, the legislation proposes to direct judges in hearings in which there is a child witness to provide specific aids and specific rules that the court must follow in eliciting child

testimony. The committee unanimously voted to not recommend adoption of the proposed legislation. Among the reasons offered are the following:

1. The separation of powers doctrine is still alive and well in Kansas. That means, among other things, that the courts are the responsibility of judges. The proposed legislation mandates, inter alia, the methods in which a judge handles the presentation of child witness evidence. Operating the judicial system in the courtroom is the unique responsibility of the judicial officer. The legislation therefore arguably violates the separation of power doctrine and would be unconstitutional.

2. It was observed that several other states had adopted comparable legislation. It was also observed that those decisions occurred prior to several decisions affecting a criminal defendant's constitutional right to confront the witnesses against the defendant. The result of those decisions, *Crawford v. Washington* and *Melendez-Diaz v. Massachusetts*, mean just what they say: there are constitutional limitations that guide what may or may not be accomplished concerning the obtaining of evidence in criminal cases from all witnesses, including child witnesses. No comparable child witness protection act has been adopted since those confrontation U.S. Supreme court decisions have been effective. It appears those decisions would prohibit such regulation. In addition, there is a unique provision in the Kansas Constitution which mandates that a criminal defendant has the right to face-to-face confrontation with the victim or witness. That further limits the acts proposed to allegedly protect child witnesses.

3. If in fact it is alleged and proven in a court hearing that requiring testimony of a child witness would be injurious to the child, there are established protections in K.S.A. 22-3434, 38-2249 and 38-2359. In addition, several members of the committee indicated they had surveyed

some judges and observed that in such cases, judges are aware of concerns about child testimony and take precautions concerning such witnesses to assist the child consistent with constitutional requirements. These judges do not need new legislation that may or may not be constitutional.

4. It was also observed that the adoption of legislation such as suggested on this issue could well provide a new arena of appeal fodder for the criminal justice system.

5. Last, although Representative Tietze discussed the concerns of a constituent, and representative for an advocacy center regarding at least one instance in which a prosecutor had difficulty persuading a judge to permit a child witness to have a comfort item, the committee received no evidence of a state-wide problem requiring statutory correction. The committee agreed that absent demonstrable evidence of a state-wide problem with the manner in which courts address child witness situations, any local problems could better be addressed via training or judicial reprimand rather than blanket legislation.

## **CONCLUSION**

The committee recognizes that proceedings involving child witnesses should be handled with the utmost care in order to ensure the child's well-being is not compromised. However, the committee also recognizes that the courts currently have authority to provide any necessary accommodations within constitutional limits without a need for new legislation. For the reasons outlined above, the committee unanimously recommends against passage of HB 2502 or a similar bill and encourages state-wide judicial training regarding the authority of the courts to accommodate child-witnesses to preserve their well-being.