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January 2, 2013

ATTORNEY GENERAL OPINION NO. 2013-1

Evan C. Watson
Sumner County Attorney
501 North Washington
Wellington, KS 67152

Re: Probate Code—Care and Treatment Act for Mentally Ill Persons—
Definitions; Investigation; Emergency Detention, Authority and Duty of
Law Enforcement Officers

Synopsis: K.S.A. 59-2953(a) authorizes a law enforcement officer to take a person into custody without a warrant and to transport such person to a treatment facility for a mental evaluation if the officer forms a reasonable belief based upon an investigation that the person is a mentally ill person and such person's mental illness is likely to cause harm to self or others if allowed to remain at liberty. Although the definition of a "treatment facility" in K.S.A. 59-2946(n) creates an ambiguity regarding the location for performing the mental evaluation, the legislative intent is that the physician or psychologist performing the evaluation determines the location to conduct the mental evaluation based upon the welfare of the detained person; however, such location may not include a non-medical facility used to detain persons charged with or convicted of a crime such as a jail or a law enforcement patrol vehicle. Cited herein: K.S.A. 59-2945, 59-2946; 59-2953, 59-2958; 59-2960; 59-2961; 65-425; K.S.A. 1977 Supp. 65-4027 (Repealed); 65-4031 (Repealed); K.S.A. 75-704.

* * *

Dear Mr. Watson:

As Sumner County Attorney, you ask whether the detention of a person in a non-medical facility for the purpose of a mental evaluation violates the Care and Treatment Act for Mentally Ill Persons (the Act), K.S.A. 59-2945 *et seq.* In your letter, you indicate

law enforcement officers in your area have taken a person for a mental evaluation to the emergency room at Sumner Regional Medical Center (SRMC), but SRMC has refused to admit such persons to the emergency room unless they are experiencing a medical emergency other than a mental health crisis.¹ Consequently, you ask if the required evaluation can occur in a room at the jail that is not enclosed by jail-cell bars and not exposed to inmates by sight and sound or in the back of a police vehicle; and if not, where such persons may be taken for evaluation.

Your letter refers to K.S.A. 59-2953(b), which pertains to persons who have been evaluated by a physician or psychologist and such physician or psychologist has opined that the person is likely to be a mentally ill person subject to involuntary commitment for care treatment but the treatment facility will not admit the person. Upon further consultation with you, we have determined that your question concerns subsection (a), which governs the initial detention for performing the evaluation.

K.S.A. 59-2953(a), in pertinent part, states:

Any law enforcement officer who has a reasonable belief formed upon investigation that a person is a mentally ill person and because of such person's mental illness is likely to cause harm to self or others if allowed to remain at liberty may take the person into custody without a warrant. *The officer shall transport the person to a treatment facility where the person shall be examined by a physician or psychologist on duty at the treatment facility*, except that no person shall be transported to a state psychiatric hospital for examination, unless a written statement from a qualified mental health professional authorizing such an evaluation at a state psychiatric hospital has been obtained. If no physician or psychologist is on duty at the time the person is transported to the treatment facility, the person shall be examined within a reasonable time not to exceed 17 hours.²

The above-italicized language is clear and unambiguous. A police officer must take the person to a "treatment facility" for the evaluation. K.S.A. 59-2946(n) defines a "treatment facility" as "any mental health center or clinic, psychiatric unit of a medical care facility, state psychiatric hospital, psychologist, physician or other institution or person authorized or licensed by law to provide either inpatient or outpatient treatment to any patient."

¹ We do not address whether SRMC, or any treatment facility, is required to admit the person as such questions involve factual determinations. See K.S.A. 75-704 (Attorney General provides written opinions "upon all questions of law") and Attorney General's Statement of Policy Relating to the Furnishing of Written Legal Opinions, ¶ 8 (only questions of law will be answered).

² Emphasis added.

Even if SRMC meets the definition of a medical care facility for licensing and regulation purposes,³ it is not a treatment facility pursuant to the above statutory definition unless it has a psychiatric unit. Under this broad definition, even if SRMC lacks a psychiatric unit, a physician or psychologist who is at SRMC also qualifies as a "treatment center." If SRMC does not have a psychiatric unit or a physician or psychologist at SRMC refuses to conduct the evaluation, the officer can transport the person to another treatment facility.⁴

Although the language in K.S.A. 59-2953(a) is clear that the officer takes the person to a "treatment facility where the person shall be examined," the definition of a "treatment facility" creates ambiguity. The definition of a "treatment facility" in K.S.A. 59-2946(n) includes not only physical structures, but also *psychologists, physicians, or other persons licensed to provide inpatient or outpatient treatment*. Thus, it is not clear whether these professionals must perform the mental evaluation in a psychiatric unit of a medical care facility, a mental health facility, or a facility that provides outpatient or inpatient treatment. To resolve that ambiguity, our analysis follows the rules of statutory construction used by courts.

The fundamental rule of statutory construction is that the intent of the legislature governs if that intent can be ascertained.⁵ The first step to ascertain legislative intent is through the language of the statutory scheme enacted.⁶ When a statute is plain and unambiguous, we neither speculate as to the legislative intent behind it nor read into the statute something not readily found in it.⁷ If the statute is ambiguous or lacks clarity, statutory construction is appropriate, and we examine other evidence of legislative intent such as legislative history and canons of statutory construction.⁸ One such canon is the provisions of an act should be considered *in pari materia*, rather than as isolated parts, with a view of reconciling and bringing the provisions into a workable harmony if possible.⁹

K.S.A. 59-2958 governs the issuance of an ex parte order after the filing of a petition for an involuntary commitment. In such instance, the court may direct any law enforcement officer to "transport the person to a designated treatment facility or other suitable place willing to receive and detain the person" as well as authorize "any named treatment facility or other place to detain or continue to detain the person" until further order of the court or the expiration of the ex parte emergency custody order.¹⁰ However, the ex

³ See K.S.A. 65-425(h) ("Medical care facility" means a hospital, ambulatory surgical center or recuperation center, but shall not include a hospice" participating in the Medicare program and providing services only to hospice patients).

⁴ We recognize that not all "treatment facilities" may be open 24 hours or on weekends and holidays; however, the Act does not have a provision prohibiting the county from contracting with a treatment facility to provide the requisite mental evaluations during such periods.

⁵ *State v. Comprehensive Health of Planned Parenthood*, 291 Kan. 322, 357 (2010).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Southwestern Bell Tel. Co. v. Beachner Constr. Co.*, 289 Kan. 1262, 1270 (2009).

¹⁰ K.S.A. 59-2958(a).

parte emergency custody order cannot "provide for the detention of any person in a non-medical facility used for the detention of persons charged with or convicted of a crime."¹¹

K.S.A. 59-2953(b) governs the detention of a person after the physician, psychologist, or other qualified person concludes that the person is likely to be a mentally ill person subject to involuntary commitment but the treatment facility refuses admission. It expressly prohibits the law enforcement officer from detaining the person "in a non-medical facility used for the detention of persons charged with or convicted of a crime."¹²

K.S.A. 59-2960 governs the issuance of a pre-trial order after the filing of a petition for an involuntary commitment. Such order must require a mental evaluation.¹³ That mental evaluation "may be conducted at a treatment facility, the home of the proposed patient or any other suitable place that the court determines is not likely to have a harmful effect on the welfare of the proposed patient."¹⁴

We next review the legislative history of the Act. It shows that the Senate Committee on Judiciary heard testimony that the Act provided for patient rights in a treatment facility, but "Christian Science Practitioners can provide treatment without actually being in the facility."¹⁵ This supports the view that the mental evaluation need not occur in a psychiatric unit of a hospital, a mental health facility, or a facility that provides outpatient or inpatient treatment.

We note that in Attorney General Opinion No. 78-70, Attorney General Curt Schneider opined that an officer may detain a person in jail when a public treatment facility refused to admit the person and there was no private treatment facility, emergency medical service or other like facility that would accept such person for care. However, the applicable detention statute, K.S.A. 1977 Supp. 65-4027, provided that, if no public treatment facility within the territorial limits of the law enforcement officer's jurisdiction was available to receive such person, "the law enforcement officer may detain such person in . . . other suitable place" In construing the phrase "other suitable place," we relied upon K.S.A. 1977 Supp. 65-4031, the statute governing the issuance of ex parte protective orders in detention cases. It stated, "no person shall be detained in protective custody in a nonmedical facility used for the detention of persons charged with or convicted of a crime *unless other facilities are not available*."¹⁶ Both K.S.A. 1977 Supp. 65-4027 and 65-4031 were repealed in 1998.¹⁷

¹¹ K.S.A. 59-2958(c).

¹² K.S.A. 59-2953(b).

¹³ K.S.A. 59-2960(a)(5).

¹⁴ K.S.A. 59-2961(a).

¹⁵ *Minutes*, Senate Committee on Judiciary, January 25, 1996.

¹⁶ Emphasis added.

¹⁷ L. 1998, Ch. 134, § 52.

As noted above, two provisions in the Act, K.S.A. 59-2953(b) and 59-2958, expressly prohibit the detention of a person "in a non-medical facility used for the detention of persons charged with or convicted of a crime," and this prohibition does not include the phrase "unless other facilities are not available." Arguably, the difference in language between these two statutes and K.S.A. 1977 Supp. 65-4031 indicates the legislature intended an absolute prohibition against detaining a proposed patient at the jail if no treatment facility was available; thus, calling into question the applicability of Attorney General Opinion 78-70. Because an officer's patrol vehicle is also used to transport arrestees and inmates who are under detention, it could also fall within the prohibition of K.S.A. 59-2953(b) and 59-2958.

Reading the above provisions of the Act *in pari material* and considering the legislative history of the Act, we conclude that the legislative intent of K.S.A. 59-2946(n) and K.S.A. 59-2953(a) is that the physician or psychologist performing the mental health evaluation determines the location to conduct that evaluation based upon the welfare of the detained person, but such location does not include a jail or an officer's patrol vehicle.

In a discussion with our office, you also asked what to do in a situation where a law enforcement officer takes a person into custody for committing a crime but shortly thereafter believes the person may suffer from "mental health issues." We assume that the officer's belief about the arrestee's mental health occurs prior to booking the arrestee into jail for the commission of the crime, that no complaint has been filed against the arrestee for that crime, and that the person is not free to leave. Whether a person has a "mental health issue" is not the criteria. K.S.A. 59-2953(a) requires the officer to have "a reasonable belief formed upon investigation" that the "*person's mental illness is likely to cause harm to self or others if allowed to remain at liberty.*"¹⁸ The term "likely to cause harm to self or others" is defined in K.S.A. 59-2946(f). Without meeting the requisite conditions of harm to self and others *and* allowed to remain at liberty, K.S.A. 59-2953(a) is not applicable.

Sincerely,

Derek Schmidt
Kansas Attorney General

Janet L. Arndt
Assistant Attorney General

DS:AA:JLA:sb

¹⁸ Emphasis added.