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ATTORNEY GENERAL OPINION NO. 83-186

Alan L. Hurlburt
Department of Social and
Rehabilitation Services
Smith-Wilson Building
2700 West Sixth Street
Topeka, Kansas 66606

Re: Infants -- Code for Care of Children; Definition
of Sexual Abuse and Exploitation in Code; Con-
formity with Federal Regulations

Synopsis: For purposes of civil proceedings under the Code
for Care of Children, the legislature defined
types of behavior which would constitute sexual
abuse by reference to sex offenses in the criminal
code, however, it did not thereby intend to adopt
a criminal definition of sexual abuse. Thus,
while certain acts described as sex offenses in
the criminal statutes may not be punishable crimes
if committed with a child age 16 years or older;
those same acts may constitute abuse of that child
under the definition of that term in the Code for
Care of Children. Cited herein: K.S.A. 21-3501,
21-3503, 21-3504 as amended by L. 1983, ch. 109;
21-3509, 21-3510, 21-3511, 21-3516, K.S.A. 1982
Supp. 38-1502 as amended by L. 1983, ch. 140, 42
U.S.C. §§5102, 5104, 45 C.F.R. §1340.2, 1340.14,
48 Fed. Reg. 3698 (January 26, 1983).

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Dear Mr. Hurlburt:

As counsel for the State Department of Social and Rehabili-
tation Services Division of Youth Services you have requested
an Attorney General opinion on certain questions raised by
the definition of sexual abuse in the Kansas Code for the

Care of Children. Your specific question is whether "the Kansas Code for Care of Children definition of sexual abuse and exploitation conform[s] with the federal definition of the same?"

You advise that the federal government provides funds, in the form of discretionary grants to Kansas and other states, for the purpose of assisting, improving, and expanding state run child abuse and neglect programs. The federal child abuse and neglect prevention program, as administered by the U.S. Department of Health and Human Services, requires state compliance with certain rules and regulations before the state program is eligible for federal assistance. At issue here is the requirement that the Kansas statutes define sexual abuse and exploitation in accordance with the federal definitions of the same. See 45 C.F.R. §1340.14(b). The federal regulations define "sexual abuse" to include

"[r]ape, incest and sexual molestation as those acts are defined by state law, by a person responsible for the child's welfare."
45 C.F.R. §1340.2(d)(1).

Sexual exploitation is defined by the federal regulations as follows:

"'Sexual exploitation' includes allowing, permitting, or encouraging a child to engage in prostitution, as defined by state law, by a person responsible for the child's welfare and allowing, permitting, encouraging or engaging in the obscene or pornographic photographing, filming, or depicting of a child as those acts are defined by state law, by a person responsible for the child's welfare."
45 C.F.R. §1340.2(d)(2).

It is not necessary that state definitions be identical to the federal definitions as long as they are the same in substance. In 48 Fed.Reg. 3698 (January 26, 1983) it is reported:

"A state is not required to have the words 'sexual abuse' and 'sexual exploitation' in its state statute as long as the state statute covers the conditions and situations described in the definition of these terms in these [federal] regulations."

You indicate that a question has arisen concerning whether the Kansas definitions of sexual abuse and, in particular, sexual exploitation, comply with these regulations. The

following circumstances give rise to this question. The Kansas Code for Care of Children, K.S.A. 1982 Supp. 38-1501 et seq., as amended by L. 1983, ch. 140, defines a "child in need of care" as a person less than 18 years of age who "has been physically, mentally or emotionally abused or neglected or sexually abused." (Emphasis added.) K.S.A. 1982 Supp. 38-1502(a)(3), as amended. That section further defines "sexual abuse" as "any act committed with a child which is described in article 35, chapter 21 of the Kansas Statutes Annotated and those acts described in K.S.A. 21-3602 or 21-3603, and amendments thereto." K.S.A. 21-3501 et seq., as amended by L. 1983, ch. 109, defines various sex offenses and includes the crime of sexual exploitation of a child. See K.S.A. 21-3516. K.S.A. 21-3602 and 21-3603, as amended by L. 1983, ch. 109, define the crimes of incest and aggravated incest.

The difficulty which prompted this opinion request arises from the fact that the Kansas Code for Care of Children defines sexual abuse by referencing acts described in the criminal code. The Code for Care of Children defines a child in need of care initially as a person under the age of 18 years. Article 35 of the criminal code, however, provides that certain described acts are crimes only when they involve children under age 16 years or less. See K.S.A. 21-3503, as amended, (indecent liberties with a child); 21-3504, as amended, (aggravated indecent liberties); 21-3509 (enticement of a child); 21-3510 (indecent solicitation); 21-3511 (aggravated indecent solicitation; child under age 12); 21-3516 (sexual exploitation of a child); and see L. 1983, ch. 109, §14 (aggravated sexual battery). You inform us that the federal regulations require that sexual abuse and exploitation be defined by state law to include all children under the age of 18 years. See 42 U.S.C. §§5102; 5104(3)(B). Thus you inquire whether the Kansas statutes are in conformity with the federal regulations discussed above.

As your research disclosed, there are strong arguments favoring both a positive and negative response to the question raised by these circumstances and your opinion request. It is our opinion, however, that the balance of these arguments favor the conclusion that the Kansas definitions of sexual abuse and exploitation comply with federal definitions of the same activity.

Initially, we note that proceedings under the Kansas Code for Care of Children are civil proceedings designed primarily for the protection of children and not for the punishment of adults who fail to properly care for the children for whom they are responsible. The latter function, at least in the case of certain forms of child abuse, including sexual

abuse, is performed by the criminal code. The legislature provided some guidance for construction of the Code for Care of Children in K.S.A. 1982 Supp. 38-1501 which states:

"K.S.A. 1982 Supp. 38-1501 through 38-1593 shall be known as and may be cited as the Kansas code for care of children and shall be liberally construed, to the end that each child within its provisions shall receive the care, custody, guidance, control and discipline, preferably in the child's own home, as will best serve the child's welfare and the best interests of the state. All proceedings, orders, judgments and decrees shall be deemed to have been taken and done in the exercise of the parental power of the state. Proceedings pursuant to this code shall be civil in nature." (Emphasis added.)

The clearly stated purpose of the legislation is the protection of children who are in need of care as defined by the statute. Under the terms of this act, that child is a person under the age of 18 years of age who has been subjected to various forms of neglect or abuse, including sexual abuse. See K.S.A. 1982 Supp. 38-1502(a)(3), as amended. To specifically define sexual abuse the Code for Care of Children makes reference to acts described in the criminal statutes which, when committed with a child, as child is defined in the Code for Care of Children, constitute sexual abuse. Such acts may, in turn, lead to a determination that a person under the age of 18 years is a "child in need of care."

Obviously, the use of the word "described" in K.S.A. 38-1502(c) as amended, is subject to two legitimate interpretations. On one hand, it can be argued that the word is intended in a narrow sense to refer generally to the behaviors described and not to the specific elements of each crime. Thus, the legislature intended to refer to and describe certain behavior which constitutes sexual abuse. The Code for Care of Children is designed to invoke the parens patriae power of the state to protect children (under 18 years of age) therefore, it is not relevant to its purposes to require that behavior which, before it may be defined as child abuse, also satisfy the elements of a crime as defined in K.S.A. 21-3501 et seq.

On the other hand, it can be maintained that by referring to the criminal statutes the legislature intended to fully incorporate into the definition of sexual abuse the definitions and elements of the crimes described in chapter 21, article 35, including the age limitation of 16 years where applicable.

It is our opinion that the first interpretation is more consistent with the language, policy and purposes of the Kansas Code for Care of Children. It is a well established rule that when a statute is susceptible of more than one legitimate construction, the intent of the legislature, if ascertainable, must control. Baker v. R.D. Anderson Constr. Co., 7 Kan.App.2d 568, 571 (1982). To determine legislative intent it is proper to look to the purpose to be accomplished by the statute, the necessity and the effect of the statute under the various possible constructions. State ex rel. Stephan v. Lane, 228 Kan. 379, 390 (1981). Perhaps the most important test for the proper interpretation of any statutory provision is whether the proposed interpretation will fulfill the purposes and goals of the statute.

The Code for Care of Children is designed for the protection of all children under the age of 18 years and, for its purposes, does not distinguish among those children based upon their age. We find no authority for reading such a distinction into the code based upon the fact that certain crimes are defined elsewhere in terms of such a distinction. Thus it is our opinion that when the legislature, sought to specify types of behavior which would constitute sexual abuse by referring to sex offenses in the criminal code, it did not intend to adopt a criminal definition and criminal tests to define sexual abuse. While certain acts, when committed with a 17 year old child, may not constitute a crime punishable under the criminal code, such acts may still be defined as sexual abuse of a child under the Code for Care of Children. It is our opinion that this interpretation is most consistent with the legislative purpose and proper rules of statutory interpretation. As the Kansas Supreme Court said when discussing the duty of the courts in these situations:

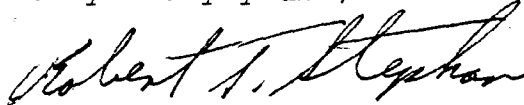
"It is the duty of the court to interpret a statute designed to ameliorate social conditions and promote the general welfare of the people of the state in such a way that it may be upheld and not nullified, if it be possible to do so, and in such a way that the intention of the legislature may be carried out to the fullest extent." Young v. Regents of State University, 87 Kan. 239, Syl. ¶2 (1912).

Therefore, it is our opinion that, for purposes of civil proceedings under the Code for Care of Children, the legislature defined types of behavior which would constitute sexual abuse by reference to sex offenses in the criminal code, however, it did not thereby intend to adopt a criminal definition of sexual abuse. Thus, while certain acts described as sex


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offenses in the criminal statutes may not be punishable crimes if committed with a child age 16 years or older; those same acts may constitute abuse of that child under the definition of that term in the Code for Care of Children.

Very truly yours,



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RTS:BJS:MFC:hle