

SESSION OF 2020

SUPPLEMENTAL NOTE ON SENATE BILL NO. 333

As Amended by Senate Committee on Judiciary

Brief*

SB 333 would create and amend law relating to a defendant's competency or incompetency to stand trial, as follows.

Amendments to Law

In statutes governing competency proceedings and commitment of incompetent defendants, the bill would amend the definitions section to state, as used in this article, "likely to cause harm to self or others" and "mentally ill person" mean the same as in the definitions section of the Care and Treatment Act for Mentally Ill Persons (Care and Treatment Act).

The bill would amend law governing competency proceedings to provide that the court shall proceed in accordance with a new procedure created by the bill if a defendant is found incompetent to stand trial, and the court finds by clear and convincing evidence that the defendant is not likely to attain competency to stand trial within six months and is a mentally ill person solely because of alcohol or chemical substance abuse, antisocial personality disorder, intellectual disability, traumatic or acquired brain injury, organic personality syndrome, or an organic disorder (applicable conditions).

The bill would amend law governing commitment of an incompetent defendant to state the new procedure created by

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

the bill shall apply when a substantial probability of obtaining competency to stand trial does not exist for a committed defendant, if the defendant is a mentally ill person solely because of the applicable conditions. Similarly, if a committed defendant who was found to have a substantial probability of attaining competency to stand trial has not attained such competency within six months from the date of original commitment, and the defendant is a mentally ill person solely because of the applicable conditions, then the new procedure created by the bill would apply. This would replace a provision bringing defendants of certain high-level felonies and other specified crimes, for whom commitment proceedings have commenced, within the definitions of “mentally ill person” and “likely to cause harm to self or others” for purposes of the Care and Treatment Act.

The bill would amend the definition in the Care and Treatment Act of “mentally ill person subject to involuntary commitment for care and treatment” to add an exclusion for a mentally ill person whose diagnosis is solely traumatic or acquired brain injury and reword a similar exclusion from “organic mental disorder” to “organic disorder.”

The bill would make technical amendments to ensure consistency in statutory organization, references, and phrasing.

New Procedure

Review of Charges; Commitment for Evaluation; Hearing; Placement

The new procedure created by the bill would require the court proceeding under it to review the nature of the charges against the defendant and to dismiss the criminal proceedings without prejudice if the defendant is charged with a misdemeanor offense or nonperson felony offense, with the county or district attorney required to provide victim notification.

If the defendant is charged with a person felony, the court would be required to commit the defendant to the custody of the Secretary for Aging and Disability Services (Secretary). Within 90 days of such commitment, the Secretary would be required to send the court a written evaluation report containing an opinion regarding

- Whether the defendant is likely to cause harm to self or others; and
- Recommendations of a placement, program, or community service plan involving the least restrictive setting appropriate to meet the needs of the defendant and consistent with public safety.

Upon receiving the report, the court would be required to set a hearing to be held within 30 days. If the court finds by clear and convincing evidence that the defendant is likely to cause harm to self or others, the court would be required to order the least restrictive placement or conditions possible as necessary to protect the public, which could include placing the defendant on conditional release, as specified elsewhere in the bill, or committing the defendant to the state security hospital or another appropriate secure facility for treatment and safekeeping. If the court does not find that the defendant is likely to cause harm to self or others, it would be required to dismiss the criminal proceeding without prejudice and discharge the defendant, with the county or district attorney providing victim notification regarding the outcome of the hearing.

Change in Placement; Required Report; Hearing

The bill would provide, whenever it appears to the Secretary or the Secretary's designee that a defendant placed under the above procedure is not likely to cause harm to self or others in a less restrictive environment, the Secretary or Secretary's designee could request the district court to order placement in a less secure setting or discharge the defendant. If it appears to the Secretary or Secretary's

designee that a more restrictive setting is necessary, the Secretary or Secretary's designee could request the district court order placement in a more secure setting.

Before a change in placement, conditional release, or discharge of the defendant, the Secretary or Secretary's designee would be required to submit a report to the court that includes a description of the defendant's current course of treatment, a current assessment of the defendant's mental status or condition, recommendations for future treatment (if any), and recommendations regarding the requested change in placement, conditional release, or discharge. Upon receiving such report, the district court would be required to order that a hearing be held on the proposed change and to provide notice of the hearing to the facility where the defendant is placed, to the district or county attorney, and to the defendant or defendant's attorney. The county or district attorney would be required to provide victim notification regarding the hearing. The court could order the defendant to undergo an evaluation by a person designated by the court, and the bill would require copies of the report of such evaluation be provided to the district or county attorney and to the defendant or the defendant's attorney at least seven days prior to the hearing.

At the hearing, the court would be required to receive all relevant evidence, including the written findings and recommendations of the Secretary or Secretary's designee, and to determine whether the defendant's placement shall be changed, the defendant shall be conditionally released, or the defendant shall be discharged. The defendant would have the right to present evidence and to cross-examine any witnesses called by the district or county attorney. The bill would require the county or district attorney to notify any victims of the outcome of the hearing.

Conditional Release

If the court orders conditional release, it could order the defendant be placed in an appropriate facility or community services program. A defendant on conditional release would be supervised by an individual appointed by the court who monitors the defendant's compliance with conditions imposed on the defendant's release, if any, and reports to the court as the court directs. The bill would specify the individual appointed by the court would not be a court services officer. The court could set conditions of release to ensure the defendant's well-being and the public's safety.

To ensure the safety and welfare of a defendant who is to be conditionally released and of citizens of the state, the court could allow the defendant to remain in custody at a facility under the supervision of the Secretary for up to 45 days to allow the Secretary or Secretary's designee to prepare recommendations for a suitable reentry program and the county or district attorney to provide victim notification. The bill would include requirements for the design of the reentry program, as well as supportive provisions such program could include.

At any time during conditional release, the defendant's attorney or the county or district attorney could file a motion for modification of conditions of release, and the court would be required to hold an evidentiary hearing on the motion within 14 days, with notice of the hearing given to the defendant's attorney and the county or district attorney. The bill would direct, if the court finds from the evidence presented at the hearing that the conditional provisions of release should be modified or vacated, the court to so order. The bill also would provide, if the court is informed that the defendant is not satisfactorily complying with the provision of conditional release, the court, after a properly noticed hearing, could make orders for additional conditions of release or order the defendant be placed in a more restrictive setting.

Duration of Placement; Review Hearings

The bill would limit placement under the new procedure to 24 months, unless the court determines the defendant remains likely to cause harm to self or others. The court would be required to conduct a review hearing at least annually, or more frequently if appropriate. This requirement would be satisfied by a hearing held under the above provisions of the bill. The court could order the defendant to undergo an evaluation by a person designated by the court, and the bill would require copies of the report of such evaluation be provided to the district or county attorney and to the defendant or the defendant's attorney at least seven days prior to the hearing. If the court determines the defendant remains likely to cause harm to self or others, the court would be required to determine whether the defendant's current placement and conditions remain the least restrictive necessary to protect the public. The court could order such changes in placement and conditions as are in the defendant's best interests and consistent with public safety.

If, at any time, the court finds the defendant is no longer a mentally ill person or is no longer likely to cause harm to self or others, the court would be required to dismiss the criminal case without prejudice, unless the court determines the defendant has obtained competency. Before dismissal, the court could order the defendant to undergo an evaluation to determine whether the defendant has attained competency. The bill would require the county or district attorney to provide victim notification.

Tolling of Statute of Limitations

The bill would move a tolling provision for the statute of limitations on the charged crime from a section governing procedure when a defendant is not civilly committed or is to be discharged to a new standalone section.

Background

The bill was introduced by the Senate Committee on Judiciary at the request of the Kansas Judicial Council.

In the Senate Committee hearing, representatives of the Kansas Judicial Council and InterHab testified in support of the bill, stating the bill reflected recommendations of a Judicial Council advisory committee that studied the issue of statutes governing competency to stand trial as they relate to defendants who are developmentally disabled, have a traumatic brain injury, or are otherwise deemed incompetent to stand trial and not likely to become competent, but who are not “mentally ill persons subject to involuntary commitment for care and treatment” under the Care and Treatment Act. The Judicial Council representative stated the bill provides a new procedural scheme for handling competency proceedings for such defendants. A representative of the Disability Rights Center of Kansas provided written-only testimony supporting the bill. A representative of the Judicial Branch testified as a neutral conferee, with a proposed amendment. Representatives of the Kansas County and District Attorneys Association and the Kansas Association of Criminal Defense Lawyers submitted written-only neutral testimony with proposed amendments. No opponent testimony was provided.

The Senate Committee adopted the amendment requested by the Judicial Branch, replacing language stating a defendant on conditional release shall be supervised by the district court probation and parole services with language stating such defendant would be supervised by an individual appointed by the court and would not be a court services officer.

Fiscal effect. According to the fiscal note prepared by the Division of the Budget on the bill as introduced, the Office of Judicial Administration (OJA) estimates enactment of the bill could require additional work time and training for court services officers, but a fiscal effect cannot be estimated until

the Judicial Branch has had an opportunity to operate under the bill's provisions.

The Kansas Department for Aging and Disability Services (KDADS) indicates enactment of the bill would create long-term expenditures for in-patient or out-patient services for forensic evaluations, in-patient restoration service costs, out-patient structured facility and staffing costs, and building a robust network of community services and supports. However, KDADS is unable to estimate a long-term fiscal effect.

KDADS also estimates additional expenditures between \$20,000 and \$30,000 from the State General Fund (SGF) in FY 2021 to secure technical assistance services from the federal Substance Abuse and Mental Health Services Administration GAINS Center to develop an implementation plan and provide solutions using a strategic planning tool.

The Kansas Department of Corrections (KDOC) states, if KDOC is required provide parole services subject to the bill's provisions, this additional work for KDOC would result in additional expenditures. The agency is unable to estimate a fiscal effect because it does not know how many individuals would be subject to provisions of the bill. Based on FY 2019 actuals, the current cost to supervise a person on parole is \$4.92 per day, per offender.

The Kansas Association of Counties states the cost of holding individuals who are not competent to stand trial could increase liability and risk for counties, if the bill is enacted.

Any fiscal effect associated with enactment of the bill is not reflected in *The FY 2021 Governor's Budget Report*.

Fiscal effect of the amended bill. Following Senate Committee action on the bill, the Senate Committee received the following additional information regarding the possible fiscal effect of the bill with the amendment adopted by the Senate Committee.

OJA indicates enactment of the bill, as amended, would not have a significant fiscal effect on the Judicial Branch. However, until the courts have had an opportunity to operate under the bill's provisions, an accurate estimate of the fiscal effect cannot be given.

Based upon more information obtained, KDADS added the following estimated costs to its initial estimate (included in the fiscal note on the bill as introduced). The additional estimate assumes KDADS does not operate facilities that would require initial startup and ongoing operating costs, but contracts with existing facilities. Assuming coverage of an estimated 35 individuals at a daily rate of \$766, the first year of coverage would require approximately \$10 million from the SGF. Assuming an additional 35 individuals would be covered in the second year and a maximum of 105 individuals in the third year and beyond, annual expenditures would be approximately \$20 million in the second year and \$30 million in the third year, all from SGF.

Additionally, the amendment adopted by the Senate Committee would require KDADS to employ four conditional release supervisors at an additional annual cost of \$400,000.

KDOC indicates the amended bill would trigger additional costs, as indicated in the fiscal note on the bill as introduced, if community corrections and parole are not excluded from supervision assignment.

The Kansas Association of Counties indicates the amended bill would not necessarily lower costs, but likely shift them. Holding individuals in detention or releasing them for monitoring could increase expenses for counties, particularly if the monitoring is outsourced. It is difficult to estimate the cost due to different monitoring requirements.