

**To: Judicial Council**  
**From: Tawnya Johnson, Staff Attorney**  
**Date: December 6, 2013**  
**Re: Juvenile Offender / Child in Need of Care Advisory Committee Report**

**Legislative Proposal**

The JO/CINC Advisory Committee completed work on drafting proposed amendments to the juvenile offender code which created an alternative adjudication procedure for the budding offender who can be rehabilitated. The Committee also addressed a technical conflict between K.S.A. 38-2268 and K.S.A. 38-2272. The Committee recommends that the Judicial Council introduce the attached legislation in the 2014 session.

## **Juvenile Offender Child in Need of Care Advisory Committee 2014 Legislative Proposal**

### **38-2346a Adjudication for Low Risk Offenders**

(a) *Findings and Purpose.* The following findings and declaration of purpose apply to this section.

(1) The Legislature finds that personal and familial circumstances may contribute to the commission of offenses by juveniles who represent a minimal threat to public safety and that in such cases it would further the interests of society and the juvenile to take an approach to adjudication that combines less formal procedures, appropriate disciplinary sanctions for misconduct, and the provision of necessary services.

(2) It is the purpose of this section to provide prosecutors with an alternative means of adjudication for low risk juvenile offenders who present a minimal threat to public safety and both the juvenile and society would benefit from such an approach.

(b) *Designation.* A county or district attorney with jurisdiction over the offense or offenses who believes that proceedings under this section are appropriate may, in his or her discretion, designate an alleged juvenile offense for adjudication under this section if it would be a misdemeanor if committed by an adult and is not subject to the placement matrix as contained in K.S.A. 38-2369 to 38-2371, and amendments thereto.

(1) The county or district attorney shall make such designation in the original complaint or by written notice filed with the court and served on the juvenile, the juvenile's counsel, and the juvenile's parent(s) or other custodian(s) within 14 days of the filing of the complaint.

(2) The filing of a written application for diversion under K.S.A. 38-2346 and amendments thereto shall toll the running of the 14 day period and shall resume upon the issuance of a written denial of diversion.

(c) In any adjudication under this section, the provisions of the revised Kansas juvenile justice code shall apply except as provided in this subsection.

(1) If during the proceedings the court determines that there is probable cause to believe that the juvenile is a child in need of care as defined by K.S.A. 38-2202, and amendments thereto, the court shall refer the matter to the county or district attorney, who shall file a petition as provided in K.S.A. 38-2234, and amendments thereto, and or refer the family to the Kansas Department for Children and Families for services.

(A) If the court presiding over the proceeding under this section finds, in accordance with K.S.A. 38-2334 and 38-2335, and amendments thereto, that the juvenile should be removed from the home, the court may place the juvenile in the temporary custody of some suitable person willing to accept temporary custody or the secretary.

(B) If the Child in Need of Care case is presided over by a different judge, the county or district attorney shall notify the court presiding over the proceedings under this section of pertinent orders entered in the child in need of care case.

(2) Notwithstanding any other provision of law, no juvenile may be committed to a juvenile correctional facility pursuant to K.S.A 38-2361(a)(12) for an offense adjudicated under this section or for the violation of a term or condition of the disposition for such an offense.

(3) Notwithstanding any other provision of law, no adjudication under this section or violation of the terms and conditions of the disposition, including a placement failure, may be used against the juvenile in a proceeding on a subsequent offense committed as a juvenile or as an adult. For purposes of this section, use against the juvenile includes, but is not limited to establishing an element of a subsequent offense; raising the severity level of a subsequent offense; or enhancing the sentence for a subsequent offense.

(4) Upon completion of the case and the termination of the court's jurisdiction, the record of the adjudication under this section shall be automatically expunged, and the provisions of K.S.A 38-2309, K.S.A 38-2310, K.S.A 38-2312, and amendments thereto, shall not apply.

(5) Notwithstanding any other provision of law, a juvenile may not be required to register as an offender under the Kansas Offender Registration Act, K.S.A. 22-4906, and amendments thereto, as a result of adjudication under this section.

(6) K.S.A 38-2347, and amendments thereto shall not apply to proceedings under this section.

(7) K.S.A. 38-2304(g)(1) shall not be applicable to proceedings under this section.

(8) The trial of offenses under this section shall be to the court and the right to a trial by jury under K.S.A. 38-2357, and amendments thereto, shall not apply.

(d) At any time prior to the beginning of a hearing at which the court may enter an order adjudicating the child as a juvenile offender, the county or district attorney may withdraw the designation for proceedings under this section by providing notice to the court, the juvenile, the juvenile's attorney and guardian ad litem, if any, and the juvenile's parents or guardians. Upon withdrawal of the designation, this section shall no longer apply and the case shall proceed and the court shall grant a continuance upon request.

(e) An adjudication under this section is an appealable order pursuant to K.S.A. 38-2380(b), and amendments thereto.

## Comments for 38-2346a. Adjudication for Low Risk Offenders

As described in subsection (a)'s findings and declaration of purpose, the proposed section is intended to provide an alternative approach to the adjudication of some offenses based on the view that both the juvenile and society benefits from an alternative approach. As spelled out more fully in subsection (c), the key features of this approach are a less formal set of procedures, correcting behavior through appropriate consequences, and the provision of necessary family services. The Committee believes that such an approach is desirable when personal and family issues are a significant contributing factor to the commission of relatively minor offenses by juveniles who are low risk, in the sense that they present a minimal threat to the public. In such cases, an alternative approach is more likely to produce a positive outcome for the juvenile, the juvenile's family, and society.

The Committee believes the decision to designate an offense or offenses for adjudication under this section is a matter of prosecutorial discretion and that prosecutors would be in the best position to make this judgment. Subsection (b) therefore makes the designation of an offense for adjudication under this section a matter of prosecutorial discretion and there is no provision for judicial review and no basis for a juvenile to claim a right of designation. Likewise, subsection (d) allows the prosecutor to withdraw the designation at any time prior to the beginning of a hearing at which the juvenile may be adjudicated as a juvenile offender.

The Committee considered other alternatives, including having the court decide or treating the designation as a matter of waiver (like a plea bargain or a diversion, but without an admission of guilt). The Committee also discussed whether and to what extent prosecutorial discretion should be limited by judicial review or by allowing the juvenile to request and/or object to designation for adjudication under this subsection. Ultimately, however, the Committee concluded that the designation of the case for adjudication under this section is no different from many other decisions subject to unreviewable prosecutorial discretion. In addition, the Committee believes that prosecutors are in the best position to make this decision because they are most familiar with the facts of the case and the circumstances of the juvenile.

Subsection (c) is the key provision that defines how Adjudication for Low Risk Offenders differs from ordinary adjudications under the code. These differences fall into three general categories.

First, paragraph (c)(1) strengthens the linkage between the Juvenile Justice Code and the Child in Need of Care Code in cases involving juveniles whose offenses are connected with parental issues. It is adapted from K.S.A. 23-3207(c), which permits the court to mandate the filing of a CINC petition in domestic custody cases. It also gives the county or district attorney the option of referring the family to the Kansas Department for Children and Families for services.

Second, paragraphs (c)(2), (c)(3), (c)(4), (c)(5), (c)(6), and (c)(7) specify that adjudications under this section cannot have certain consequences for the juvenile: commitment to a correctional facility ((c)(2)), use of the adjudication in subsequent prosecutions ((c)(3)); inclusion of the offense in a juvenile's criminal record ((c)(4)); registration as a sex offender

((c)(5)), and prosecution as an adult or pursuant to extended juvenile jurisdiction provisions ((c)(6), and limitations on continued out of home placement (c)(7)). The Committee considered further restrictions, such as additional limitations on the retention of fingerprints and photographs or enhanced confidentiality provisions, but decided that such limitations were not necessary.

The exclusion of these consequences promotes the rehabilitative focus of adjudication under this section by removing consequences that are “penal” in character. Sanctions such as placement in a correctional facility, inclusion of the offense on a criminal registry, and registration in the Kansas Offender Registry are penal in character and are not in keeping with a rehabilitative approach. The Committee believes that rehabilitation necessary entails the recognition that actions have consequences and that appropriate sanctions are necessary even for offenders targeted for adjudication under this section, but that those sanctions should be different in kind from the more serious sanctions for criminal behavior.

In addition, if these consequences are “off the table,” then the rationale of *In re L.M.*, 286 Kan. 460, 186 P.3d 164 (2008), does not apply and the constitutional right of a jury trial should not attach. For this result to be achieved, it is critical that the consequences listed above cannot ever result from an adjudication under this section. For example, a judge cannot have the discretion to order confinement in a correctional facility based on a violation of the terms and conditions of placement. Likewise, a failed placement that results from an adjudication under this section could not be considered in a subsequent adjudication when determining whether a juvenile offender is a matrix-eligible chronic misdemeanor. *See* K.S.A. 38-2369(a)(3)(C).

Accordingly, the third difference between this alternative means of adjudication and other adjudications under the code, as specified in paragraph (c)(8), is that the right to a jury trial does not apply. While the right to a jury trial is an essential constitutional safeguard for offenses that may result in a loss of liberty or a permanent criminal record, it produces a level of adversarial formality that is inappropriate for adjudication of low risk offenders. An important side benefit of this approach is that it will save the state the added costs of jury trials in some cases.

### **K.S.A. 38-2268 Voluntary relinquishment; voluntary permanent custodianship; consent to adoption**

(c) *Permanent custody.* (1) A parent may consent to appointment of ~~the secretary or~~ an individual as permanent custodian and if the ~~secretary or~~ individual accepts the consent, the ~~secretary or~~ individual shall stand *in loco parentis* to the child and shall have and possess over the child all the rights of a legal guardian. ~~When the consent is to the secretary, the secretary shall have the right to place the child in the permanent custody of an individual who is appointed permanent custodian.~~

#### Comments for K.S.A. 38-2268

The Committee believes that the references to secretary should be stricken because the references conflict with K.S.A. 38-2272(b). K.S.A. 38-2272(b) states that “upon the appointment of a permanent custodian, the secretary’s custody of the child shall cease.”