

KANSAS TRIAL LAWYERS ASSOCIATION



To: Representative Erin Davis, Chairperson
Members of the House Children and Seniors Committee

From: Margaret Farley

Date: March 20, 2018

RE: HB 2704: Requiring written informed consent before administering an antipsychotic medication to an adult care home resident (SUPPORT)

Thank you for the opportunity to testify today. My name is Margaret Farley and I am a long-time member of KTLA, a past president and past legislative chair. KTLA is very much in favor of HB 2704 because this law will save the lives of many adult care home residents. It will also keep many others from suffering the unending nightmare of being ‘doped up’ for no real or good reason at the end of their lives. If residents and their families know of the serious hazards of anti-psychotics in this population, few will choose to use them.

Like several other KTLA members, I represent people around the state who have been injured or killed by nursing facility or assisted living care. We deal with the sad aftermath of injuries or deaths due to nursing home negligence. Residents and families come to us with their stories of suffering and disability and loss and we help them seek fair compensation for their losses. We want adult care homes to become safer places for residents. We do not doubt that everyone in this room shares that goal.

HB 2704 offers one clear step toward creating safer nursing homes, in the light of well-known and widely publicized facts, from the 2006 FDA black box warning to the Human Rights Watch report to the CMS state rankings on the use of anti-psychotics in Kansas. Chemical restraints have been outlawed in Medicare and Medicaid nursing facilities since 1987 by the Nursing Home Reform Law. Nursing homes and doctors haven’t done what it takes to halt this elder drug abuse epidemic in 30 years or even the last 11 years. Hasn’t the long-term care community had enough time to work together, to plan for change, to implement change, to coordinate efforts? Isn’t it time for “time’s up”? We need a change now, before more older people get hurt.

We know that the opioid crisis is a crisis of over-medication: drugs too freely distributed, unwisely prescribed, their effects and on-going use not monitored. Haven’t we created a similar

epidemic with anti-psychotics in nursing homes? How long do we wait for the industry and treating doctors to self-regulate. Consider the following Newsweek article, <http://www.newsweek.com/va-opioid-crisis-killing-us-veterans-682402>, which explores the way in which anti-psychotics are being used to treat veterans with PTSD, and literally killing them with over-sedation and other effects.

HB 2704 may even “provide cover” for doctors who are having issues with families and/or nursing staff wanting the drugs—the families will have to sign off on the decision. It will serve as a great educational tool. And it is a document that can easily be included with uniform transfer forms between hospitals and nursing homes, and can become part of the EMR.

Written informed consent is a bedrock legal concept which applies to surgeries and medical treatments. Medication is a medical treatment. One of the most basic concepts in the law is battery, a civil tort. The civil offense of battery occurs when a person intentionally touches another person in a harmful or offensive manner without their permission. The concept applies in the health care arena also. This is the reason that health care providers get signed informed consent prior to surgery. The medical standard of care is to obtain informed consent with any treatment or medication prescribed for a patient. The actual practice may be different.

The only way to definitively prove that informed consent has been given is to put it in writing.

The patterned instructions of Kansas are standard jury instructions commonly known as PIKs. They state the law so the jury can apply the law to the facts of the case. The PIK for informed consent by a health care provider, 123.14, states as follows:

A _____ has a duty to make a reasonable disclosure to the patient of the nature and probable consequences of the suggested or recommended treatment including the dangers within (*his*) (*her*) knowledge which are possible in the treatment proposed. This disclosure is required so the patient can make an intelligent informed consent to the proposed treatment. The duty of the _____ to disclose is limited to those disclosures which a _____ would reasonably make under the same or similar circumstances. If a complete disclosure of all facts, diagnoses and possible consequences would endanger the recovery of the patient because of an existing physical or mental condition, the _____ may withhold such information. (The blanks offer the opportunity to substitute various types of health care providers.) The duty of fully informed consent applies no matter where the resident is or where the patient is.

KTLA urges you to pass HB 2704 favorably out of committee in order to begin to decrease the well-documented harm done by these powerful and dangerous drugs to adult care home residents in violation of their basic civil rights.

Respectfully submitted,
Margaret Farley