



January 22, 2020

Chairwoman Concannon and Members of the House Children and Seniors Committee,

My name is Mitzi McFatrach and I am here to today to testify in support of HB 2229 which would address a serious inequity for older and vulnerable adults in Kansas Adult Care Facilities.

Background: A bill to allow electronic monitoring in adult care homes was introduced in 2016 as SB 456 by the Senate Ways and Means Committee. Jane Carney, Wichita citizen, raised to Sen. Susan Wagle the need for legislation which would address the right for an older adult or family/legal representative to electronically record in the resident's private area in an adult care facility. Mrs. Carney's spouse Frank, a co-founder of Pizza Hut has Alzheimer's disease. The Carney's had used electronic monitoring in their private residence to allow Mr. Carney maximum independence and assure that his spouse was aware if he exited their home or needed other assistance when she was not in the same room with him. By the terms of the adult care facility's admission contract, the Carney's were denied the right to continue video monitoring in Mr. Carney's private room/area. Mrs. Carney had asked to video in her husband's private room to be aware of his needs or any changes in his health condition and status.

The 2016 bill was not passed, but a similar bill and subsequent amendments, HB 2232 was passed in 2018. The House Children and Seniors Committee heard and passed the bill with amendments. It was enrolled with an effective date of July 1, 2018. KDADS Secretary was to provide regulations by January 1, 2019. Regulations have not yet been issued.

Extensive testimony was given on this bill by provider associations and by families and advocates for consumers. The 2018 Kansas Long Term Care Ombudsman testimony contains a good representation of many older adult resident concerns.

http://www.kslegislature.org/li_2018/b2017_18/committees/ctte_h_children_and_seniors_1/documents/testimony/20170214_11.pdf

Lisa Van Dusen, private citizen brought to the Committee hearing compelling video footage of the abuse of her mother by an aide in a Wichita area adult care facility as part of her testimony. Mrs. Van Dusen is willing to share that video if the Committee wishes to view it.

Purpose of Legislation: Assure the right of each resident to electronically record in the resident's private area of the Kansas Adult Care facility where he/she resides.

- This is a right that each citizen has in her/his private residence outside of an adult care facility.

- There was no prior law that prevented a resident from having this right in an adult care facility.
- Many facilities restricted this right for individuals through the terms of admission contracts.
- This right to electronically record provides an older adult resident and/or their legal representative the ability to monitor, assure, and protect the well-being of a resident within her/his private area of an adult care facility.
- Electronic monitoring provides an avenue to document abuse, neglect, or exploitation of a vulnerable adult in Kansas Adult Care Facilities, as well as to address fall risk or other risks to a vulnerable adult resident.

Legal status prior to passage in 2018 HB 2232:

- Individuals electronically record in her/his home (e.g. baby monitors and/or security cameras used to monitor persons with dementia).
- Kansas law did not explicitly allow or prohibit electronic monitoring in adult care facilities, however many facilities prohibited electronic monitoring through provisions in the admissions contract.

The Law passed in 2018:

- Guarantees an individual right/all individuals rights to electronically record in her/his private area of KS adult care home/facility
- Prohibits person from obstructing or tampering with the electronic recording device and provides for penalties should obstruction occur (e.g. nurse, nurse aide or other staff, family member, or another person who might obstruct in order to prevent detection of abuse)
- Requires posting of notice by the facility that electronic recording may be occurring in resident rooms
- Requires posting at all resident rooms, not only the rooms where recording is in progress (prevents easy targeting of elders who do not have electronic recording in their room)

Older Adult, Family/Legal Representative, and Advocates Concerns with the Law:

Provision we are requesting the Committee to Strike from the Law

(m) No court or state agency shall admit into evidence or consider during any proceeding any tape or recording created using an electronic monitoring device in a resident's room in an adult care home, whether authorized under this section or not, or take or authorize any action based on such tape or recording, unless:

(1) The tape or recording shows the time and date when the events shown on the tape or recording occurred, if the tape or recording is a video tape or recording; and

(2) the contents of the tape or recording have not been edited or artificially enhanced.

- The provision above in the 2018 law created a higher Kansas Rules of Evidence statutory requirement in order to use in any judicial proceeding an electronic recording made of/in a resident's room in an adult care facility.
- The requirement in this statute exceeds the current Kansas Rules of Evidence requirement for an electronic recording which is made in another public or private settings, including recordings of residents made in the public areas of an adult care facility.

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- The higher Rules of Evidence requirement applicable to resident recordings in her/his private room exceeds the existing Rules of Evidence for electronic recording(s) made in other settings and which may be used in a criminal, civil, and/or administrative proceeding(s).
- The Rules of Evidence requirement is increased by this statute's provision which requires that an electronic recording may not be used as evidence in any proceeding (civil, criminal or administrative) if the recording does not have *a*) a date and time stamp on it and *b*) if there is any editing or enhancing of the recording (intentional or accidental). Should either of these requirements not be met by a recording, then, the electronic recording cannot be used as evidence in any judicial proceeding- criminal, civil or administrative. In other words not used to prosecute a criminal abuse, not used to secure civil damages for injury or death, and not be used to verify mistreatment of a resident under state and federal law and regulation governing the practices of adult care facilities, Medicare/Medicaid fraud or other similar deficient practices of a facility.
- The higher Rule of Evidence requirement adds undue and unnecessary burden to the frail older adult or their legal representative.
- According to the Kansas Rules of Evidence it is the duty of legal counsel and the court to determine the veracity and admissibility of an electronic recording as evidence in any civil, criminal, and administrative proceeding, *excepting since 2018 any electronic recording made in the private area of a resident's room in an adult care facility*. There is abundant case law to guide courts and counsel in ascertaining the veracity and admissibility of evidence.
- The higher Rule of Evidence requirement dramatically reduces the protection of a recording made in a resident's private area of an adult care facility or out right fails to protect an older and vulnerable adult who experiences abuse, neglect and/or exploitation in the resident's private area of an adult care facility. Under this statutory provision an electronic recording may not be used in judicial proceedings, even if an edit or enhancement is the result of an accident due to lack of familiarity with the technology used to make the recording or the result of the abuser/person committing harm to cover their misdeed.
- Although older residents pay room and board to live in an adult care facility just as he/she would in an apartment, the individual does not have the same rights as the individual would have to electronically record in a residence outside of an adult care facility. The federal government Centers for Medicare & Medicaid Services/CMS guidelines references nursing facilities as the resident's home. Facilities often refer to their facility and the private or semi-private living area as the resident's home. Yet this Kansas law does not afford an individual the same protection from an electronic recording when the recording is made in the person's private living area of a Kansas adult care facility, rather than in her/his home or apartment outside of a licensed adult care facility.

We are asking the Committee to correct this serious inequity for vulnerable adults by striking the portion of statute specific to (m) (1) (2) on the prohibition for use as evidence in any judicial proceeding which does not meet these conditions.