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January 21, 2016

ATTORNEY GENERAL OPINION NO. 2016- 1

Tim Keck, Interim Secretary
Kansas Department for Aging and Disability Services
New England Building
503 South Kansas Avenue
Topeka, KS 66603-3404

Re: Criminal Procedure—Offender Registration—Registration of Offender; Duties of Sheriff

Criminal Procedure—Offender Registration—Duties of Offender Required to Register

Synopsis: The Kansas Offender Registration Act requires the registering law enforcement agency to register and verify registration of civilly committed sexually violent predators receiving care and treatment and residing at a special hospital located in the county. Cited herein: K.S.A. 2015 Supp. 22-4901; 22-4902; 22-4905; 59-29a02; 59-29a07; and K.S.A. 65-425.

* * *

Dear Mr. Secretary:

As Secretary for the Kansas Department for Aging and Disability Services (KDADS), your predecessor, Kari M. Bruffett, asked our opinion on the following question:

Does the Kansas Offender Registration Act, K.S.A. 22-4901 *et seq.*, require the Pawnee County Sheriff to register civilly committed sexually violent predators

receiving treatment at a facility located on the grounds of Larned State Hospital in Pawnee County?

To respond to the KDADS request, we must opine on the three parts implicit in the question. The first part is whether a sexually violent predator (SVP) receiving care and treatment and residing at Larned State Hospital (LSH) must register under the Kansas Offender Registration Act (the Act or KORA).¹ Next, we determine whether the SVP's commitment/residency in a special hospital,² such as Larned State Hospital,³ affects the requirement to register under the Act. Finally, we must opine on what are the registering law enforcement agency's duties under the Act.

Your question requires us to interpret several provisions of the Act. The most fundamental rule of statutory construction is that the intent of the Legislature governs if that intent can be ascertained.⁴ A court would first attempt to ascertain legislative intent through the statutory language enacted, giving common words their ordinary meanings.⁵ Only if the statute's language or text is unclear or ambiguous would a court resort to employing the "canons of construction, legislative history, or other background considerations to divine the legislature's intent and construe the statute accordingly."⁶ We analyze your question in the same manner.

Because we believe the statutes in question are plain and unambiguous, we look no further than the language of the Act to resolve your question.⁷ We now turn to the three parts implicit in your question.

¹K.S.A. 2015 Supp. 22-4901 *et seq.*

²"'Hospital' means 'general hospital,' 'critical access hospital,' or 'special hospital.'" K.S.A. 65-425(j). "'Special hospital' means an establishment with an organized medical staff of physicians; with permanent facilities that include inpatient beds; and with medical services, including physician services, and continuous registered professional nursing services for not less than 24 hours of every day, to provide diagnosis and treatment for patients who have specified medical conditions." K.S.A. 65-425(b). See *also* K.S.A. 2015 Supp. 22-4902(p).

³ KDADS presented us information that Larned State Hospital is licensed by the Kansas Department of Health and Environment as a special hospital as defined in K.S.A. 65-425(b).

⁴ *Nationwide Mutual Ins. Co. v. Briggs*, 298 Kan. 873, 875 (2014).

⁵ *Cady v. Schroll*, 298 Kan. 731, 738 (2014).

⁶ *Cady*, 298 Kan. at 739; see *also State v. Simmons*, 50 Kan.App.2d 448, 453 (2014) (applying this method of statutory interpretation specifically to the Act).

⁷ Throughout the Act, the Legislature has included language making clear the preference for registration of offenders. For example, K.S.A. 2015 Supp. 22-4905(b) specifies "[n]othing contained in this subsection shall be construed to alleviate any offender from meeting the requirements prescribed in the Kansas offender registration act." K.S.A. 2015 Supp. 22-4908 provides "[n]o person required to register as an offender pursuant to the Kansas offender registration act shall be granted an order relieving the offender of further registration under this act." Thus, while we think the statute's terms are plain and unambiguous, even if ambiguity were present we think the intent of the Legislature would require interpreting terms in the manner that prefers registration.

Duty of Sexually Violent Predators to Register

As a general rule, the Act requires that, unless otherwise provided, any “offender,” as defined by the Act,⁸ who is statutorily required to register, shall “register *in person* with the registering law enforcement agency⁹ within three business days of coming into any county or location of jurisdiction in which the offender resides¹⁰ or intends to reside, maintains employment or intends to maintain employment, or attends school or intends to attend school.”¹¹

An offender statutorily required to register is defined in the Act and includes “any person who, on or after July 1, 2001, is found to be a sexually violent predator pursuant to K.S.A. 59-29a01 *et seq.*, and amendments thereto.”¹² Thus, although the SVP program is civil in nature, an SVP is an “offender” required to register under the Act,¹³ and the SVPs who reside at LSH are covered by the general rule requiring them to register in the county where the offender resides. Because the Pawnee County sheriff is the registering law enforcement agency in Pawnee County, as defined by the Act, the general provisions of the Act require the SVPs who reside at LSH to register in person with the Pawnee County sheriff in the manner prescribed by law. A failure by an offender to satisfy this duty may constitute a violation of the Act and may subject the offender to criminal liability in one or more counties.¹⁴

We therefore must turn to the second part implicit in your question, which is whether any of the Act’s special provisions qualifying that general duty to register are applicable to SVPs at LSH.

Exceptions to an Offender’s Duty to Register

As part of the Act, the Legislature has enacted specific provisions governing registration of offenders in specified circumstances. In this section, we review whether any of those special statutory provisions apply to SVPs residing at LSH and, if so, how they may affect those offenders’ duty to register.

⁸ K.S.A. 2015 Supp. 22-4902(a).

⁹ “‘Registering law enforcement agency’ means the sheriff’s office or tribal police department responsible for registering an offender.” K.S.A. 2015 Supp. 22-4902(n).

¹⁰ “‘Reside’ means to stay, sleep or maintain with regularity or temporarily one’s person and property in a particular place other than a location where the offender is incarcerated. It shall be presumed that an offender resides at any and all locations where the offender stays, sleeps or maintains the offender’s person for three or more consecutive days or parts of days, or for ten or more nonconsecutive days in a period of 30 consecutive days.” K.S.A. 2015 Supp. 22-4902(j).

¹¹ K.S.A. 2015 Supp. 22-4905(a) (emphasis added).

¹² K.S.A. 2015 Supp. 22-4902(d).

¹³ K.S.A. 2015 Supp. 22-4905.

¹⁴ K.S.A. 2015 Supp. 22-4903.

The Legislature has enacted specific provisions governing the registration of offenders in a correctional facility.¹⁵ These specific provisions provide that an offender in a correctional facility, like offenders generally, must register within three business days of initially being taken into the correctional facility's custody.¹⁶ However, the Act further recognizes the specific circumstances of the offender during the period of incarceration in a correctional facility by providing that the staff of the correctional facility, rather than the local law enforcement agency, may conduct the registration of those offenders within three business days of the offender's initial custody at the correctional facility¹⁷ and by further providing that such offender's registration need not be periodically updated while he or she remains in custody.¹⁸ However, LSH is not a "correctional facility" within the meaning of the Act.¹⁹ Thus, the Act's "correctional facility" exception to the general duty to register does not apply to the registration of the SVPs residing at LSH.

The Legislature also has enacted specific provisions governing the registration of offenders who reside in a treatment facility.²⁰ These specific provisions create a mechanism for offenders in a treatment facility to become registered within three business days of such offender arriving at the facility for inpatient treatment.²¹ The statutory procedure for registering offenders in a treatment facility differs from the procedure for registering offenders in a correctional facility; while the correctional facility staff may fulfill the registration of inmates in a correctional facility, the staff of a treatment facility are given no such authority and instead are required to inform the registering law enforcement agency of the offender's arrival at and departure from the treatment facility.²² While LSH may qualify as a "treatment facility" as that term is used in other statutes, LSH does not fit the definition of "treatment facility" in the Act. The Act specifically provides that the definition of treatment facility "does not include a hospital, as defined in K.S.A. 65-425, and amendments thereto."²³ LSH is registered with the Kansas Department of Health and Environment as a "special hospital" within the meaning of K.S.A. 2015 Supp. 65-425(b);²⁴ therefore, it is not a "treatment facility" as used in the Act.

¹⁵ K.S.A. 2015 Supp. 22-4904(b) and 22-4905(d).

¹⁶ K.S.A. 2015 Supp. 22-4904(b)(1) and 22-4905(d).

¹⁷ K.S.A. 2015 Supp. 22-4904(b) and 22-4905(d).

¹⁸ K.S.A. 2015 Supp. 22-4905(d).

¹⁹ "Correctional facility" means any public or private correctional facility, juvenile detention facility, prison or jail. K.S.A. 2015 22-4902(q). SVPs are civilly committed to KDADS custody "until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large. Such control, care and treatment shall be provided at a facility operated by KDADS." K.S.A. 59-29a07(a). LSH is a facility operated by KDADS and not the Kansas Department of Corrections.

²⁰ K.S.A. 2015 Supp. 22-4904(c) and 22-4905(i).

²¹ K.S.A. 2015 Supp. 22-4904(c)(1).

²² K.S.A. 2015 Supp. 22-4904(c)(1) and (2). Thus, nothing in the Act relieves a registering law enforcement agency of any duty to register offenders residing at a treatment facility within such agency's jurisdiction.

²³ K.S.A. 2015 Supp. 22-4902(p)

²⁴ KDADS has presented to the Attorney General's Office a certificate showing that LSH has been designated by the Kansas Department of Health and Environment as a "special hospital" within the meaning of K.S.A. 65-

Thus, the Act's "treatment facility" exception to the general duty to register does not apply to the registration of SVPs residing at LSH.

We reviewed the entire Act and found no other provisions that might plausibly be interpreted as creating an exception to the general duty of an SVP residing at LSH to register while in Pawnee County.²⁵ The fact the Legislature enacted special provisions to accomplish the registration of offenders in a correctional facility or a treatment facility, but made no such special provisions applicable to SVPs residing at LSH, tends to confirm the conclusion that the plain language of the Act imposes the same duty to register on SVPs at LSH as it imposes on offenders otherwise residing in Pawnee County. It is notable that even the specific provisions applicable to correctional facilities and treatment facilities do not create an *exemption* from registration; rather, offenders in those facilities are required to register, but different procedures for accomplishing their registrations have been provided by the Legislature. It would strain credulity to conclude that the Legislature intended SVPs at LSH to be the *only* offenders exempt from a duty to register under the Act and then expressed that intent not through any express statutory provision but through the statute's *silence* on the matter.²⁶ Therefore, we conclude that no exception to the general rule is applicable to SVPs residing at LSH, and such persons thus have the same duty as all offenders – specifically, to register with the registering law enforcement agency as required by K.S.A. 2015 Supp. 22-4905.

425 and thus is not a "treatment facility" within the meaning of K.S.A. 22-4902(p). A more commonsense interpretation that "Larned (State Hospital) is a treatment facility" was reached by the Court of Appeals, but that opinion was interpreting a different statute that has a different definition of "treatment facility" and therefore does not alter the conclusion here. See *Merryfield v. Kansas Soc. & Rehab. Servs.*, 253 P.3d 386 (Table), 2011 WL 2555662 at *4 (Kan. Ct. App. 2011) (unpublished).

²⁵ We are aware of the Pawnee County attorney's assertion that Larned State Hospital is "exempted" from the general registration duties imposed by K.S.A. 2015 Supp. 22-4904 "because the facility was accredited as a 'specialty hospital' [sic] rather than categorized as a 'treatment facility.'" John Settle letter to Athena Andaya, September 8, 2015. We agree that LSH is registered with KDHE as a "special hospital" and, therefore, is not a "treatment facility" within the meaning of the Act. However, that does not mean LSH is "exempted" from the requirements of K.S.A. 2015 Supp. 22-4904; to the contrary, it means that the Act's special provisions governing registration of offenders in a "treatment facility" are inapplicable to LSH and, therefore, the general duties imposed by K.S.A. 2015 Supp. 22-4904 and 22-4905 apply. We do acknowledge that K.S.A. 2015 Supp. 22-4905(a) provides that offenders "who cannot physically register in person with the registering law enforcement agency" because of "hospitalization" may be "subject to verification requirements other than in-person registration." This provision appears to provide a certain amount of flexibility in *how* registration of hospitalized offenders may be accomplished by the registering law enforcement agency, but it does not alter the existence of a *duty* to register.

²⁶ See *State v. Jolly*, 301 Kan. 313, 321 (2015) ("When a statute is plain and unambiguous, an appellate court does not speculate as to the legislative intent behind it and will not read into the statute something not readily found in it. Where there is no ambiguity, the court need not resort to statutory construction."); see also *State v. Fredrick*, 292 Kan. 169, 174-75 (2011) ("This court has repeatedly said that our role is to determine the legislature's intent through the statutory language employed and that we only resort to other canons of construction if the language is unclear. We do not speculate as to the legislative intent behind a plain and unambiguous statute simply to allow us to use that speculative intent to justify reading something into a statute that is not readily found in it.") (internal citations omitted).

Duty of the Pawnee County Sheriff

We have concluded that the Act generally imposes a duty on SVPs residing at LSH to register while in Pawnee County and that no exception to that general rule relieves such SVPs of that duty. We now turn our attention to your specific question about what duties the Act imposes on the Sheriff of Pawnee County regarding the registration of those offenders residing at LSH who are required to register while in Pawnee County.

In general, the county sheriff is the “registering law enforcement agency” within the meaning of the Act upon whom certain duties are imposed.²⁷ The Act imposes on the sheriff various duties that, taken together, accomplish the registration of offenders who are under a duty to register in the sheriff’s county.²⁸ We are mindful of the Pawnee County attorney’s assessment that the sheriff’s responsibilities under the Act arise only after a “released” offender “reports” to the sheriff.²⁹ We have reviewed the entire Act and can find no basis within it for the assertion that it applies only to “released” offenders; to the contrary, in other circumstances in which an offender has not been “released,” such as when he or she is in custody in a correctional facility, the Act nonetheless applies as discussed above. Thus, we think the assertion that the Act applies only to “released” offenders has no basis in the Act.

Regarding the county attorney’s other assertion, that any duties of the sheriff arise only when the offender “reports” to the sheriff, we note that this conclusion has a basis in the text of the statute: the Act provides that the sheriff shall “upon the reporting of any offender” undertake certain tasks.³⁰ On the other hand, as discussed above, the Act imposes a duty to register SVPs residing at LSH in Pawnee County, and courts generally presume the Legislature did not impose a duty that is impossible to perform.³¹ In any event, we need not address that circumstance here; we will assume, *for purposes of this section*, that the question upon which we were asked to opine presupposes that an SVP at LSH who is required to register while residing in Pawnee County has “reported” to the Pawnee County sheriff. We will limit our opinion to that circumstance.

Once an offender “reports” to the sheriff, the duties of the sheriff are set forth in K.S.A. 2015 Supp. 22-4904(d). The language of that section is mandatory; it provides the sheriff “shall” perform certain duties. When an offender required to register reports or presents himself or

²⁷ K.S.A. 2015 Supp. 22-4902(n).

²⁸ K.S.A. 2015 Supp. 22-4904(d).

²⁹ John Settle letter to Athena Andaya dated September 8, 2015.

³⁰ K.S.A. 2015 Supp. 22-4904(d).

³¹ See generally, *State v. McElroy*, 281 Kan. 256, 263 (2006) (citing *State v. Van Hoet*, 277 Kan. 815, 826 (2004) (“When the legislature revises an existing law, it is presumed that the legislature intended to change the law from how it existed prior to the amendment, and *it is presumed that the legislature does not intend to enact useless or meaningless legislation.*”) (emphasis added)).

herself for registration on the offender registry, the Act plainly requires the registering law enforcement agency to execute the list of mandatory statutory duties.³² In this case, when an SVP residing at LSH in Pawnee County reports to the sheriff of Pawnee County, the sheriff is required to register the SVP in person upon the initial registration. As noted above, the Act does provide some flexibility for the sheriff to determine how subsequent verification of registration status of hospitalized offenders is to be accomplished, but that provision of law does not relieve the sheriff of the duty of receiving and processing registrations.

Conclusion

As written, the Kansas Offender Registration Act is clear. All covered offenders, which include SVPs, have a duty to register upon taking up residence in a county. There are no statutory provisions relieving SVPs residing at LSH from that general duty. None of the statutory provisions establishing special processes by which that duty to register may be met applies to SVPs residing at LSH. To the contrary, the Legislature has expressly excluded hospitals, including LSH, from the special registration processes that apply to treatment facility residents. Thus, those SVPs residing at LSH have a duty to register in Pawnee County. As the registering law enforcement agency, the Pawnee County sheriff has a duty to receive and process those registrations, at least when an SVP “reports” to the sheriff.

We note and are sympathetic to the Pawnee County attorney’s assertion that during the two decades SVPs have been residents at LSH, it has not been the practice for SVPs residing at LSH to register with the Pawnee County sheriff.³³ But that practice would not bind a court interpreting the plain and unambiguous terms of the statute.³⁴ We also recognize that Pawnee County has special circumstances because of the presence of the SVP program at LSH and the unique concentration of SVPs who reside there. It seems reasonable that the Legislature would make special provision to govern the registration of SVPs at LSH, but the Legislature has not done so.

As the Act currently is written, the Legislature has made provision only for the special circumstances of offenders in correctional facilities and in treatment facilities but not in LSH. The special provisions regarding correctional facilities have shifted the burden for receiving and processing the initial registrations of offenders in those facilities from the county sheriff to employees at those facilities, and the special provisions regarding treatment facilities place

³² K.S.A. 2015 Supp. 22-4904(d).

³³ John Settle letter to Athena Andaya, September 8, 2015.

³⁴ See, e.g., *State v. McElroy*, 281 Kan. 256, 265 (2006)(statutory interpretation “raises issues of law subject to de novo review on appeal.”)

upon the staff of such facilities the burden to notify the sheriff of the presence of offenders in the facility, but in no case has the Legislature wholly relieved offenders of the duty to register. In sharp contrast, the Legislature has not enacted *any* special provision governing the registration of SVPs who reside at LSH,³⁵ and unless it does so, the general duties imposed by the Act are binding on the SVPs residing at LSH and on the Pawnee County sheriff.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Athena E. Andaya

Athena E. Andaya
Deputy Attorney General

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³⁵ We are aware that KDADS recently has moved some number of offenders into transitional release, a later stage of treatment that also is located on the grounds at LSH. Just as the Act does not distinguish the duty to register offenders residing within a facility from that of offenders residing outside a facility, it also does not distinguish the duties of offenders in earlier stages of treatment from those in later stages, including transitional release. As the Act is written, it imposes the duty to register on all offenders, including all in the SVP program regardless of the stage of their treatment. It is our understanding that this conclusion is consistent with the practice in Labette County and Miami County, which also have some number of later-stage SVPs residing in their communities while receiving treatment, and the sheriffs in those counties register those SVPs during their treatment. We recognize that a logical distinction could be made between registering SVPs in transitional release, who may have physical access to the community, and SVPs in earlier stages of treatment who likely do not. Such a distinction might be consistent with the recognized purpose of the Kansas offender registration act, which is “to protect public safety and, more specifically, to protect the public from sex offenders as a class of criminals who are likely to reoffend.” *State v. Wilkinson*, 269 Kan. 603, 609 (2000). But the Legislature has not made such a distinction, and the courts may not “judicially create [an] amendment to [the Act] that the legislature did not make itself, based upon ... belief that such an amended provision would fit the overall legislative purpose of the [Act].” *Fredrick*, 292 Kan. at 174.