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**TESTIMONY**  
**House Bill 2232: Electronic Monitoring in Adult Care Homes**

**By Barbara Hickert**  
**Kansas State Long-Term Care Ombudsman**  
**February 14, 2017**

**Chairman Alford and Members of the Health and Children & Seniors Committee:**

Thank you for allowing me to provide this testimony on House Bill 2232. I am Barbara Hickert, the Kansas State Long-Term Care Ombudsman. We are a state agency which advocates for the rights of individuals residing in adult care homes throughout Kansas. This includes nursing facilities, as well as long-term care units of hospitals, assisted living facilities, home plus facilities, residential health care facilities, boarding care facilities, and adult day care centers.

Every year our network of regional ombudsman and certified ombudsman volunteers investigate and resolve complaints made by or on behalf of residents with the goal of enhancing their quality of life and quality of care. Our experience tells us that electronic monitoring is often a last-ditch step by relatives who suspect abuse or serious neglect but feel that their concerns are not being acted upon. Families are witnessing injury and neglect of their loved one and feel the only way to know that their loved one is being cared for appropriately is to place an electronic monitoring device in their loved ones' room.

We believe that residents have the right to install cameras in what is their home, whether that is an apartment in an assisted living facility or a room in a nursing home; and in the case of residents residing in a shared room, with permission from the other resident or their representative.

The reason we are providing neutral testimony, rather than standing in support, is that we believe this bill could go further to protect residents' rights. Our concerns center on consent and privacy. These concerns including:

- 1) Who may consent on behalf of the resident for Electronic Monitoring
- 2) Ensuring that every resident that chooses, even those with some cognitive decline, is allowed to participate in the decisions regarding Electronic Monitoring
- 3) That the restrictions placed on the Electronic Monitoring in section (m) (6) (A)-(E) are respected.

In order to incorporate these protections into HB2232, we are respectfully proposing seven amendments to the bill. The amendments for the committee's consideration are attached to this

testimony. The remainder of our testimony will detail the suggested changes and the reasoning behind them.

### **Amendment #1**

*If the resident has not affirmatively objected to the authorized electronic monitoring and the resident's physician determines that the resident lacks the ability to understand and appreciate the nature and consequences of electronic monitoring, the resident's representative may consent on behalf of the resident, in order of priority:*

- (1) the court-appointed guardian of a resident.*
- (2) a health care agent named under the Kansas Power of Attorney Act;*
- (3) the resident's spouse;*
- (4) the resident's parent;*
- (5) the resident's adult child who has the written consent of the other adult children of the resident to act as the sole decision-maker regarding authorized electronic monitoring; or*
- (6) the resident's adult brother or sister who has written consent of the other adult siblings of the resident to act as the sole decision-maker regarding authorized electronic monitoring.*

Limiting the persons who may provide consent for electronic monitoring on behalf of a resident to the legal representative is too restrictive. It gives no avenue to allow a concerned family member, where there is no legal representative, to provide electronic monitoring when the resident is not able to consent. This amendment lists the resident representatives who may consent in order of priority. If a resident has no legal representative, and consent is being given by either an adult child or the resident adult sibling, we believe written consent of all other adult children or adult siblings should be required.

This amendment would also clarify that consent by other parties only applies, if the resident lacks the ability to understand the nature and consequences of electronic monitoring

### **Amendment #2**

*(c) Prior to another person, consenting on behalf of a resident the resident must be asked by that person, in the presence of a facility employee, if he or she wants authorized electronic monitoring to be conducted. The person must explain to the resident:*

- (1) the type of electronic monitoring device to be used;*
- (2) restrictions that may be placed on the electronic monitoring device's use, including those listed (m) (6) (A)-(6);*
- (3) with whom the recording may be shared; and*
- (4) the resident's ability to decline all recording.*

*For the purposes of this subsection, a resident affirmatively objects when he or she orally, visually, or through the use of auxiliary aids or services declines authorized electronic monitoring. The resident's response must be documented on the notification and consent form.*

If a person other than the resident is consenting to the electronic monitoring, this would require that the person consenting meet with the resident with a facility staff member present to help ensure that resident is able to participate in the decision to the fullest extent possible and without undue influence.

### **Amendment #3**

*(d) A copy of the completed form shall be provided to the resident and his or her roommate(s) if applicable, and a copy shall be sent to the Office of the Kansas Long-Term Care Ombudsman.*

Requiring a copy of the consent form to be sent our agency would allow us follow up with each resident to ensure that their rights regarding electronic monitoring are being followed, It would also allow representatives of our office to be aware of the placement of all electronic monitoring equipment in order to ensure privacy in our communications with the resident(s) as required by federal and state law.

### **Amendment #4**

*(f) If the roommate(s) has/have not affirmatively objected to the authorized electronic monitoring and the roommates' physician determines that the roommate(s) lacks the ability to understand and appreciate the nature and consequences of electronic monitoring, the resident's representative may consent on behalf of the resident, in order of priority:*

- (1) the court-appointed guardian of a resident.*
- (2) a health care agent named under the Kansas Power of Attorney Act;*
- (3) the resident's spouse;*
- (4) the resident's parent;*
- (5) the resident's adult child who has the written consent of the other adult children of the resident to act as the sole decision-maker regarding electronic monitoring; or*
- (6) the resident's adult brother or sister who has written consent of the other adult siblings of the resident to act as the sole decision-maker regarding electronic monitoring.*

This amendment lists the resident representatives, in order of priority, who may consent on behalf of the roommate(s) in a shared room using the same language in amendment #1.

### **Amendment #5**

*Prior to another person, consenting on behalf of a roommate, the roommate must be asked by that person, in the presence of a facility employee, if he or she wants electronic monitoring to be conducted. The person must explain to the roommate:*

- (1) the type of electronic monitoring device to be used;*
- (2) the standard conditions that may be placed on the electronic monitoring device's use, including those listed under (m)(6)(A)-(E);*
- (3) with whom the recording may be shared; and*
- (4) the roommate's ability to decline all recording.*

*For the purposes of this subsection, a resident affirmatively objects when he or she orally, visually, or through the use of auxiliary aids or services declines electronic monitoring. The resident's response must be documented on the notification and consent form.*

This is similar to amendment #2. If a person other than the roommate is consenting to the electronic monitoring, this would require that the person consenting meet with the roommate with a facility staff member present to help ensure that roommate is able to participate in the decision to the fullest extent possible and without undue influence

**Amendment #6**

*(e) Any resident previously conducting authorized electronic monitoring must obtain consent from any new roommate before the resident may resume authorized electronic monitoring. If a new roommate does not consent to electronic monitoring and the resident conducting the authorized electronic monitoring does not remove or disable the electronic monitoring device, the facility may turn off the device.*

Amendments #6 allows the facility to turn off the electronic monitoring device in the event a new roommate moved into the room who does not consent to electronic monitoring and the resident or resident representative do not remove or disable the monitoring equipment themselves.

**Amendment #7**

*(i) Consent may be withdrawn by the resident or roommate at any time, and the withdrawal of consent shall be documented in the resident's clinical record. If a roommate withdraws consent and the resident conducting the electronic monitoring does not remove or disable the electronic monitoring device, the facility may turn off the electronic monitoring device.*

Amendment #7 is similar to #6 in that it allows the facility staff to turn off the monitoring equipment in the event that the resident or the roommate withdrawn their consent and the resident or resident representative does not remove or disable the monitoring equipment themselves.

While HB2232 does a good job of establishing requirements for electronic monitoring in adult care homes, our office hopes that the committee will see our proposed amendments as a way to strength and protect the rights of residents regarding the use of electronic monitoring.

I thank the committee for your time and am happy to answer any questions.

## HOUSE BILL No. 2232

By Committee on Children and Seniors

1-31

AN ACT concerning adult care homes; relating to electronic monitoring.

*Be it enacted by the Legislature of the State of Kansas:*

Section 1. (a) As used in this section:

(1) "Adult care home" means the same as defined in K.S.A. 39-923, and amendments thereto;

(2) "authorized electronic monitoring" means the placement of one or more electronic monitoring devices in the room of an adult care home resident and making recordings with such devices after notifying the adult care home of the resident's intent to conduct electronic monitoring; and

(3) "electronic monitoring device" means a surveillance instrument used to broadcast or record activity or sound occurring in a room, including a video surveillance camera or an audio device designed to acquire communications or other sounds occurring in the room, but not to intercept wire or electronic communications.

(b) A resident shall be permitted to conduct authorized electronic monitoring in the resident's room subject to the requirements of this act. If the resident has not affirmatively objected to the authorized electronic monitoring and the resident's physician determines that the resident lacks the ability to understand and appreciate the nature and consequences of electronic monitoring, the resident's representative may consent on behalf of the resident, in order of priority:

- (1) the court-appointed guardian of a resident.
- (2) a health care agent named under the Kansas Power of Attorney Act;
- (3) the resident's spouse;
- (4) the resident's parent;
- (5) the resident's adult child who has the written consent of the other adult children of the resident to act as the sole decision maker regarding authorized electronic monitoring; or
- (6) the resident's adult brother or sister who has the written consent of the other adult siblings of the resident to act as the sole decision maker regarding authorized electronic monitoring.

(c) Prior to another person, consenting on behalf of a resident the resident must be asked by that person, in the presence of a facility employee, if he or she wants authorized electronic monitoring to be conducted. The person must explain to the resident:

- (1) the type of electronic monitoring device to be used;
- (2) the standard conditions that may be placed on the electronic monitoring device's use, including those listed under (h) (6);
- (3) with whom the recording may be shared; and
- (4) the resident's ability to decline all recording.

For the purposes of this subsection, a resident affirmatively objects when he or she orally, visually, or through the use of auxiliary aids or services declines authorized electronic monitoring. The resident's response must be documented on the notification and consent form.

(d) An adult care home shall not discharge or refuse to admit a resident or person or otherwise retaliate against a resident or person based on conducting or consenting to authorized electronic monitoring.

(e) A resident, or such resident's representative as listed in (b) (1)-(d), who wishes to conduct authorized electronic monitoring shall notify the adult care home on a form prescribed by the secretary for aging and disability

services. The facility shall provide a completed to the resident and his or her roommate(s) if applicable, and a copy shall be sent to the Office of the Kansas Long-Term Care Ombudsman. Such form shall be maintained in such person's resident file at the adult care home and shall require the resident, or person consenting to the electronic monitoring on behalf of the resident, to:

- (1) Release the adult care home from any civil liability for a violation of the resident's privacy rights in connection with the use of the electronic monitoring device;
- (2) if the electronic monitoring device is a video surveillance camera, choose whether the camera will always be unobstructed or will be obstructed in specified circumstances to protect the dignity of the resident; and
- (3) if the resident resides in a multi-resident room, obtain the consent of other residents in the room on a form prescribed for this purpose by the secretary.

(f) If the roommate(s) has/have not affirmatively objected to the authorized electronic monitoring and the roommates' physician determines that the roommate(s) lacks the ability to understand and appreciate the nature and consequences of electronic monitoring, the resident's representative may consent on behalf of the resident, in order of priority:

- (1) the court-appointed guardian of a resident.
  - (2) a health care agent named under the Kansas Power of Attorney Act;
  - (3) the resident's spouse;
  - (4) the resident's parent;
  - (5) the resident's adult child who has the written consent of the other adult children of the resident to act as the sole decision maker regarding authorized electronic monitoring; or
  - (6) the resident's adult brother or sister who has the written consent of the other adult siblings of the resident to act as the sole decision maker regarding authorized electronic monitoring.
- (g) Prior to another person, consenting on behalf of a roommate, the roommate must be asked by that person, in the presence of a facility employee, if he or she wants authorized electronic monitoring to be conducted. The person must explain to the roommate:
- (1) the type of electronic monitoring device to be used;
  - (2) the standard conditions that may be placed on the electronic monitoring device's use, including those listed under (h) (6);
  - (3) with whom the recording may be shared; and
  - (4) the roommate's ability to decline all recording.

For the purposes of this subsection, a resident affirmatively objects when he or she orally, visually, or through the use of auxiliary aids or services declines electronic monitoring. The resident's response must be documented on the notification and consent form.

(h) Any resident previously conducting authorized electronic monitoring must obtain consent from any new roommate before the resident may resume authorized electronic monitoring. If a new roommate does not consent to monitoring and the resident conducting the electronic monitoring does not remove or disable the electronic monitoring device, the facility may turn off the device.

(i) Consent may be withdrawn by the resident or roommate at any time, and the withdrawal of consent shall be documented in the resident's clinical record. If a roommate withdraws consent and the resident conducting the electronic monitoring does not remove or disable the electronic monitoring device, the facility may turn off the electronic monitoring device.

- (j) An adult care home shall make reasonable physical accommodations for authorized electronic monitoring, including:
- (1) Providing a reasonably secure place to mount the electronic monitoring device;
  - (2) providing access to power sources for the electronic monitoring device;
  - (3) making reasonable accommodations and exhausting all reasonable options if a resident in a multi-resident room wishes to conduct electronic monitoring pursuant to this section and the resident or residents with whom the resident shares the room do not consent to the monitoring, including offering to move the resident who wishes to conduct electronic monitoring to another shared room that is available or becomes available; and
  - (4) making reasonable accommodations and exhausting all reasonable options if a resident wishes to conduct electronic monitoring and another resident begins residing in the multi-resident room who does not consent to the monitoring before moving the resident wishing to conduct electronic monitoring.
- (k) A resident, or the person consenting on behalf of the resident, shall pay all costs associated with installing and maintaining an electronic monitoring device requested under this section.
- (l) Each adult care home shall post a conspicuous notice at the entrance to the adult care home stating that the rooms of some residents may be monitored electronically by or on behalf of the room's resident or residents.
- (m) On or before a person's admission to an adult care home, such person shall complete and sign a form prescribed by the secretary for aging and disability services. Such form shall be maintained in such person's resident file at the adult care home and shall state the following:
- (1) That a person who places an electronic monitoring device in a resident's room or discloses a recording made by such device may be civilly liable for any unlawful violation of the privacy rights of another person;
  - (2) that a resident, or such resident's representative as listed in (b) (1)-(d), is entitled to conduct authorized electronic monitoring under this section;
  - (3) the basic procedures required to request authorized electronic monitoring;
  - (4) who may request authorized electronic monitoring;
  - (5) who may consent to authorized electronic monitoring; and
  - (6) restrictions that a resident may elect to place on electronic monitoring conducted in the resident's room, including, but not limited to:
    - (A) Prohibiting video recording;
    - (B) prohibiting audio recording;
    - (C) turning off the device or blocking the visual recording component of the device during an exam or procedure administered by a healthcare professional;
    - (D) turning off the device or blocking the visual recording component of the device while the resident is dressing or bathing; or
    - (E) turning off the device or blocking the visual recording component of the device during a resident's visit with a spiritual adviser, ombudsman, attorney, financial planner, intimate partner or other visitor; and
  - (7) any other information related to authorized electronic monitoring that the secretary deems necessary or appropriate to include on such form.
- (n) Any electronic monitoring device installed or operated pursuant to this section shall comply with the requirements of the national fire protection association 101 life safety code, or other standards determined

by the secretary for aging and disability as having substantially equivalent requirements.

(o) (1) A person is prohibited from knowingly hindering, obstructing, tampering with or destroying, without the consent of the resident or individual who authorized electronic monitoring, an electronic monitoring device installed in a resident's room in accordance with this section.

(2) A person is prohibited from knowingly hindering, obstructing, tampering with or destroying, without the consent of the resident or individual who authorized electronic monitoring, a video or audio recording obtained in accordance with this section.

(3) (A) Any person who violates this subsection shall be guilty of a class B nonperson misdemeanor.

(B) Any person who violates this subsection with the intent to commit or conceal the commission of a misdemeanor offense shall be guilty of a class A nonperson misdemeanor.

(C) Any person who violates this subsection with the intent to commit or conceal the commission of a felony offense shall be guilty of a severity level 4, nonperson felony.

(p) The secretary for aging and disability services shall adopt rules and regulations as may be necessary to administer the provisions of this section.

Sec. 2. This act shall take effect and be in force from and after its publication in the statute book.