

1 **SENATE FLOOR VERSION**

2 April 11, 2011

3 As Amended

4 ENGROSSED HOUSE

5 BILL NO. 1319

6 By: Wright, Farley, Reynolds  
7 and Ritze of the House

8 and

9 Sykes and Brecheen of the  
10 Senate

11 [ driving under the influence - enacting the Mark  
12 McGee Act of 2011 - child endangerment - modifying  
13 penalties - noncodification - effective date ]

14 BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

15 SECTION 1. NEW LAW A new section of law not to be  
16 codified in the Oklahoma Statutes reads as follows:

17 This act shall be known and may be cited as the "Mark McGee Act  
18 of 2011".

19 SECTION 2. AMENDATORY 21 O.S. 2001, Section 852.1, as  
20 last amended by Section 122, Chapter 234, O.S.L. 2009 (21 O.S. Supp.  
21 2010, Section 852.1), is amended to read as follows:

22 Section 852.1 A. A person who is the parent, guardian, or  
23 person having custody or control over a child as defined in Section  
24 1-1-105 of Title 10A of the Oklahoma Statutes, commits child  
endangerment when the person:

1. Knowingly permits physical or sexual abuse of a child;

1           2. Knowingly permits a child to be present at a location where  
2 a controlled dangerous substance is being manufactured or attempted  
3 to be manufactured as defined in Section 2-101 of Title 63 of the  
4 Oklahoma Statutes;

5           3. Knowingly permits a child to be present in a vehicle when  
6 the person knows or should have known that the operator of the  
7 vehicle is impaired by or is under the influence of alcohol or  
8 another intoxicating substance; or

9           4. Is the driver, operator, or person in physical control of a  
10 vehicle in violation of Section 11-902 of Title 47 of the Oklahoma  
11 Statutes while transporting or having in the vehicle such child or  
12 children.

13           However, it is an affirmative defense to this paragraph if the  
14 person had a reasonable apprehension that any action to stop the  
15 physical or sexual abuse or deny permission for the child to be in  
16 the vehicle with an intoxicated person would result in substantial  
17 bodily harm to the person or the child.

18           Nothing in this subsection shall prohibit the prosecution of a  
19 person pursuant to the provisions of Section 11-902 or 11-904 of  
20 Title 47 of the Oklahoma Statutes.

21           B. The provisions of this section shall not apply to any  
22 parent, guardian or other person having custody or control of a  
23 child for the sole reason that the parent, guardian or other person  
24 in good faith selects and depends upon spiritual means or prayer for

1 the treatment or cure of disease or remedial care for such child.  
2 This subsection shall in no way limit or modify the protections  
3 afforded said child in Section 852 of this title or Section 1-4-904  
4 of Title 10A of the Oklahoma Statutes.

5 C. Any person convicted of violating any provision of this  
6 section shall be guilty of a felony punishable by imprisonment in  
7 the custody of the Department of Corrections for a term of not more  
8 than four (4) years, or by a fine not exceeding Five Thousand  
9 Dollars (\$5,000.00), or by both such fine and imprisonment.

10 SECTION 3. AMENDATORY 47 O.S. 2001, Section 11-902, as  
11 last amended by Section 3, Chapter 310, O.S.L. 2009 (47 O.S. Supp.  
12 2010, Section 11-902), is amended to read as follows:

13 Section 11-902. A. It is unlawful and punishable as provided  
14 in this section for any person to drive, operate, or be in actual  
15 physical control of a motor vehicle within this state, whether upon  
16 public roads, highways, streets, turnpikes, other public places or  
17 upon any private road, street, alley or lane which provides access  
18 to one or more single or multi-family dwellings, who:

19 1. Has a blood or breath alcohol concentration, as defined in  
20 Section 756 of this title, of eight-hundredths (0.08) or more at the  
21 time of a test of such person's blood or breath administered within  
22 two (2) hours after the arrest of such person;

23 2. Is under the influence of alcohol;

24

1 3. Is under the influence of any intoxicating substance other  
2 than alcohol which may render such person incapable of safely  
3 driving or operating a motor vehicle; or

4 4. Is under the combined influence of alcohol and any other  
5 intoxicating substance which may render such person incapable of  
6 safely driving or operating a motor vehicle.

7 B. The fact that any person charged with a violation of this  
8 section is or has been lawfully entitled to use alcohol or a  
9 controlled dangerous substance or any other intoxicating substance  
10 shall not constitute a defense against any charge of violating this  
11 section.

12 C. 1. Any person who is convicted of a violation of the  
13 provisions of this section shall be ~~deemed~~ guilty of a misdemeanor  
14 for the first offense and shall participate in an assessment and  
15 evaluation ~~by an assessment agency or assessment personnel certified~~  
16 ~~by the Department of Mental Health and Substance Abuse Services~~  
17 ~~pursuant to Section 3-460 of Title 43A of the Oklahoma Statutes~~  
18 pursuant to subsection G of this section and shall follow all  
19 recommendations made in the assessment and evaluation ~~and~~. Such  
20 person shall be punished by imprisonment in jail for not less than  
21 ten (10) days nor more than one (1) year. ~~Any person convicted of a~~  
22 ~~violation for a first offense shall~~ and be fined not more than One  
23 Thousand Dollars (\$1,000.00).  
24

1           2. Any person who, within ten (10) years ~~after a previous~~  
2 ~~conviction~~ of the date following the completion of the execution of  
3 any sentence or deferred judgment for a violation of this section or  
4 a violation pursuant to the provisions of any law of this state or  
5 another state prohibiting the ~~offense~~ offenses provided in  
6 subsection A of this section, ~~is convicted of~~ Section 11-904 of this  
7 title or paragraph 4 of subsection A of Section 852.1 of Title 21 of  
8 the Oklahoma Statutes, commits a second offense pursuant to the  
9 provisions of this section or has a prior conviction in a municipal  
10 criminal court of record for the violation of a municipal ordinance  
11 prohibiting the offense provided for in subsection A of this section  
12 and within ten (10) years of ~~such municipal conviction is convicted~~  
13 the date following the completion of the execution of such sentence  
14 or deferred judgment commits a second offense pursuant to the  
15 ~~provision~~ provisions of this section shall be ~~deemed~~ guilty of a  
16 felony and shall participate in an assessment and evaluation ~~by an~~  
17 ~~assessment agency or assessment personnel certified by the~~  
18 ~~Department of Mental Health and Substance Abuse Services pursuant to~~  
19 ~~Section 3-460 of Title 43A of the Oklahoma Statutes~~ pursuant to  
20 subsection G of this section and shall be sentenced to:

- 21           a. follow all recommendations made in the assessment and  
22                       evaluation for treatment at the defendant's expense,  
23                       or

24

- 1           b. placement in the custody of the Department of  
2           Corrections for not less than one (1) year and not to  
3           exceed five (5) years and a fine of not more than Two  
4           Thousand Five Hundred Dollars (\$2,500.00), or  
5           c. treatment, imprisonment and a fine within the  
6           limitations prescribed in subparagraphs a and b of  
7           this paragraph.

8           However, if the treatment in ~~subparagraph a~~ subsection G of this  
9 ~~paragraph~~ section does not include residential or inpatient  
10 treatment for a period of not less than five (5) days, the person  
11 shall serve a term of imprisonment of at least five (5) days.

12           3. Any person who is convicted of a second felony offense  
13 pursuant to the provisions of this section or a violation pursuant  
14 to the provisions of any law of this state or another state  
15 prohibiting the offenses provided for in subsection A of this  
16 section, Section 11-904 of this title or paragraph 4 of subsection A  
17 of Section 852.1 of Title 21 of the Oklahoma Statutes shall  
18 participate in an assessment and evaluation ~~by an assessment agency~~  
19 ~~or assessment personnel certified by the Department of Mental Health~~  
20 ~~and Substance Abuse Services pursuant to Section 3-460 of Title 43A~~  
21 ~~of the Oklahoma Statutes~~ pursuant to subsection G of this section  
22 and shall be sentenced to:

- 23           a. follow all recommendations made in the assessment and  
24           evaluation for treatment at the defendant's expense,

1 two hundred forty (240) hours of community service and  
2 use of an ignition interlock device, or

3 b. placement in the custody of the Department of  
4 Corrections for not less than one (1) year and not to  
5 exceed ten (10) years and a fine of not more than Five  
6 Thousand Dollars (\$5,000.00), or

7 c. treatment, imprisonment and a fine within the  
8 limitations prescribed in subparagraphs a and b of  
9 this paragraph.

10 However, if the treatment in ~~subparagraph a~~ subsection G of this  
11 ~~paragraph section~~ does not include residential or inpatient  
12 treatment for a period of not less than ten (10) days, the person  
13 shall serve a term of imprisonment of at least ten (10) days.

14 4. Any person who is convicted of a third or subsequent felony  
15 offense pursuant to the provisions of this section or a violation  
16 pursuant to the provisions of any law of this state or another state  
17 prohibiting the offenses provided for in subsection A of this  
18 section, Section 11-904 of this title or paragraph 4 of subsection A  
19 of Section 852.1 of Title 21 of the Oklahoma Statutes shall  
20 participate in an assessment and evaluation ~~by an assessment agency~~  
21 ~~or assessment personnel certified by the Department of Mental Health~~  
22 ~~and Substance Abuse Services pursuant to Section 3-460 of Title 43A~~  
23 ~~of the Oklahoma Statutes~~ pursuant to subsection G of this section  
24 and shall be sentenced to:

- 1 a. follow all recommendations made in the assessment and  
2 evaluation for treatment at the defendant's expense,  
3 followed by not less than one (1) year of supervision  
4 and periodic testing at the defendant's expense, four  
5 hundred eighty (480) hours of community service, and  
6 use of an ignition interlock device for a minimum of  
7 thirty (30) days, or  
8 b. placement in the custody of the Department of  
9 Corrections for not less than one (1) year and not to  
10 exceed twenty (20) years and a fine of not more than  
11 Five Thousand Dollars (\$5,000.00), or  
12 c. treatment, imprisonment and a fine within the  
13 limitations prescribed in subparagraphs a and b of  
14 this paragraph.

15 However, if the person does not undergo residential or inpatient  
16 treatment pursuant to ~~subparagraph a~~ subsection G of this ~~paragraph~~  
17 section the person shall serve a term of imprisonment of at least  
18 ten (10) days.

19 5. Any person who, ~~within ten (10) years~~ after a previous  
20 conviction of a violation of murder in the second degree or  
21 manslaughter in the first degree in which the death was caused as a  
22 result of driving under the influence of alcohol or other  
23 intoxicating substance, **is convicted of** a violation of this section  
24 shall be ~~deemed~~ guilty of a felony and shall be punished by

1 imprisonment in the custody of the Department of Corrections for not  
2 less than five (5) years and not to exceed twenty (20) years, and a  
3 fine of not more than Ten Thousand Dollars (\$10,000.00).

4 6. Provided, however, a conviction from another state shall not  
5 be used to enhance punishment pursuant to the provisions of this  
6 subsection if that conviction is based on a blood or breath alcohol  
7 concentration of less than eight-hundredths (0.08).

8 7. In any case in which a defendant is charged with a second or  
9 subsequent driving under the influence of alcohol or other  
10 intoxicating substance offense within any municipality with a  
11 municipal court other than a court of record, the charge shall be  
12 presented to the county's district attorney and filed with the  
13 district court of the county within which the municipality is  
14 located.

15 D. Any person who is convicted of a violation of driving under  
16 the influence with a blood or breath alcohol concentration of  
17 fifteen-hundredths (0.15) or more pursuant to this section shall be  
18 deemed guilty of aggravated driving under the influence. A person  
19 convicted of aggravated driving under the influence shall  
20 participate in an assessment and evaluation ~~by an assessment agency~~  
21 ~~or assessment personnel certified by the Department of Mental Health~~  
22 ~~and Substance Abuse Services pursuant to Section 3-460 of Title 43A~~  
23 ~~of the Oklahoma Statutes~~ pursuant to subsection G of this section  
24 and shall comply with all recommendations for treatment. Such

1 person shall be sentenced to not less than one (1) year of  
2 supervision and periodic testing at the defendant's expense, ~~four~~  
3 ~~hundred eighty (480) hours of community service,~~ and an ignition  
4 interlock device for a minimum of ~~thirty (30)~~ ninety (90) days.  
5 Nothing in this subsection shall preclude the defendant from being  
6 charged or punished as provided in paragraph 1, 2, 3, 4 or 5 of  
7 subsection C of this section. Any person who is convicted pursuant  
8 to the provisions of this subsection shall be guilty of a  
9 misdemeanor for a first offense and shall be punished as provided in  
10 paragraph 1 of subsection C of this section. Any person who, within  
11 ten (10) years of the completion of the execution of any sentence or  
12 deferred judgment, commits a second violation of this subsection  
13 shall be guilty of a felony and shall be punished as provided in  
14 paragraph 2 of subsection C of this section. Any person who commits  
15 a second felony offense pursuant to this subsection shall, upon  
16 conviction, be guilty of a felony and shall be punished as provided  
17 in paragraph 3 of subsection C of this section. Any person who is  
18 convicted of a third or subsequent felony offense pursuant to the  
19 provisions of this subsection shall be guilty of a felony and shall  
20 be punished as provided in paragraph 4 of subsection C of this  
21 section.

22 E. When a person is sentenced to imprisonment in the custody of  
23 the Department of Corrections, the person shall be processed through  
24 the Lexington Assessment and Reception Center or at a place

1 determined by the Director of the Department of Corrections. The  
2 Department of Corrections shall classify and assign the person to  
3 one or more of the following:

4 1. The Department of Mental Health and Substance Abuse Services  
5 pursuant to paragraph 1 of subsection A of Section 612 of Title 57  
6 of the Oklahoma Statutes; or

7 2. A correctional facility operated by the Department of  
8 Corrections with assignment to substance abuse treatment.

9 F. The Department of Public Safety is hereby authorized to  
10 reinstate any suspended or revoked driving privilege when the person  
11 meets the statutory requirements which affect the existing driving  
12 privilege.

13 G. Any person who is found guilty of a violation of the  
14 provisions of this section shall be ordered to participate in, ~~prior~~  
15 ~~to sentencing,~~ an alcohol and drug substance abuse evaluation and  
16 assessment program offered by a certified assessment agency or  
17 certified assessor for the purpose of evaluating and assessing the  
18 receptivity to treatment and prognosis of the person and shall, at  
19 the expense of the defendant, follow all recommendations made in the  
20 assessment and evaluation for treatment. The court shall order the  
21 person to reimburse the agency or assessor for the evaluation and  
22 assessment. The fee for an evaluation and assessment shall be the  
23 amount provided in subsection C of Section 3-460 of Title 43A of the  
24 Oklahoma Statutes. The evaluation and assessment shall be conducted

1 at a certified assessment agency, the office of a certified assessor  
2 or at another location as ordered by the court. The agency or  
3 assessor shall, within seventy-two (72) hours from the time the  
4 person is evaluated and assessed, submit a written report to the  
5 court for the purpose of assisting the court in its ~~final~~ sentencing  
6 determination. The court shall, as a condition of any sentence  
7 imposed, including deferred and suspended sentences, require the  
8 person to participate in and successfully complete all  
9 recommendations from the evaluation, such as an alcohol and  
10 substance abuse treatment program pursuant to Section 3-452 of Title  
11 43A of the Oklahoma Statutes. If such report indicates that the  
12 evaluation and assessment shows that the defendant would benefit  
13 from a ten-hour or twenty-four-hour alcohol and drug substance abuse  
14 course or a treatment program or both, the court shall, as a  
15 condition of any sentence imposed, including deferred and suspended  
16 sentences, require the person to follow all recommendations  
17 identified by the evaluation and assessment and ordered by the  
18 court. No person, agency or facility operating an evaluation and  
19 assessment program certified by the Department of Mental Health and  
20 Substance Abuse Services shall solicit or refer any person evaluated  
21 and assessed pursuant to this section for any treatment program or  
22 substance abuse service in which such person, agency or facility has  
23 a vested interest; however, this provision shall not be construed to  
24 prohibit the court from ordering participation in or any person from

1 voluntarily utilizing a treatment program or substance abuse service  
2 offered by such person, agency or facility. If a person is  
3 sentenced to imprisonment in the custody of the Department of  
4 Corrections and the court has received a written evaluation report  
5 pursuant to the provisions of this subsection, the report shall be  
6 furnished to the Department of Corrections with the judgment and  
7 sentence. Any evaluation and assessment report submitted to the  
8 court pursuant to the provisions of this subsection shall be handled  
9 in a manner which will keep such report confidential from the  
10 general public's review. Nothing contained in this subsection shall  
11 be construed to prohibit the court from ordering judgment and  
12 sentence in the event the defendant fails or refuses to comply with  
13 an order of the court to obtain the evaluation and assessment  
14 required by this subsection. If the defendant fails or refuses to  
15 comply with an order of the court to obtain the evaluation and  
16 assessment, the Department of Public Safety shall not reinstate  
17 driving privileges until the defendant has complied in full with  
18 such order. Nothing contained in this subsection shall be construed  
19 to prohibit the court from ordering judgment and sentence and any  
20 other sanction authorized by law for failure or refusal to comply  
21 with an order of the court.

22 H. Any person who is found guilty of a violation of the  
23 provisions of this section may be required by the court to attend a  
24 victims impact panel program, if such a program is offered in the

1 county where the judgment is rendered, and to pay a fee, not less  
2 than Fifteen Dollars (\$15.00) nor more than Twenty-five Dollars  
3 (\$25.00) as set by the governing authority of the program and  
4 approved by the court, to the program to offset the cost of  
5 participation by the defendant, if in the opinion of the court the  
6 defendant has the ability to pay such fee.

7 I. Any person who is found guilty of a felony violation of the  
8 provisions of this section ~~may~~ shall be required to submit to  
9 electronic monitoring as authorized and defined by Section 991a of  
10 Title 22 of the Oklahoma Statutes.

11 J. ~~Any person who, within ten (10) years after a previous~~  
12 ~~conviction of a violation of this section or a violation pursuant to~~  
13 ~~the provisions of law of another state prohibiting the offense~~  
14 ~~provided in subsection A of this section or a violation of a~~  
15 ~~municipal ordinance prohibiting the offense provided in subsection A~~  
16 ~~of this section, pleads guilty or nolo contendere or is convicted of~~  
17 ~~a violation of this section shall not be required to undergo the~~  
18 ~~alcohol and drug substance evaluation program required by subsection~~  
19 ~~C of this section. The court shall, as a condition of any sentence~~  
20 ~~imposed, including deferred and suspended sentences, require the~~  
21 ~~person to participate in and successfully complete all~~  
22 ~~recommendations from the evaluation, such as an alcohol and drug~~  
23 ~~substance abuse treatment program pursuant to Section 3-452 of Title~~  
24 ~~43A of the Oklahoma Statutes.~~

1       ~~K.~~ Any person who is found guilty of a violation of the  
2 provisions of this section who has been sentenced by the court to  
3 perform any type of community service shall not be permitted to pay  
4 a fine in lieu of performing the community service.

5       ~~L.~~ K. When a person is found guilty of a violation of the  
6 provisions of this section, the court shall order, in addition to  
7 any other penalty, the defendant to pay a one-hundred-dollar  
8 assessment to be deposited in the Drug Abuse Education and Treatment  
9 Revolving Fund created in Section 2-503.2 of Title 63 of the  
10 Oklahoma Statutes, upon collection.

11       ~~M.~~ L. 1. When a person is eighteen (18) years of age or older,  
12 and is the driver, operator, or person in physical control of a  
13 vehicle, and is convicted of violating any provision of this section  
14 while transporting or having in the motor vehicle any child less  
15 than eighteen (18) years of age, the fine shall be enhanced to  
16 double the amount of the fine imposed for the underlying driving  
17 under the influence (DUI) violation which shall be in addition to  
18 any other penalties allowed by this section.

19       2. Nothing in this subsection shall prohibit the prosecution of  
20 a person pursuant to Section 852.1 of Title 21 of the Oklahoma  
21 Statutes who is in violation of any provision of this section or  
22 Section 11-904 of this title.

23       M. Any plea of guilty, nolo contendere or finding of guilt for  
24 a violation of this section or a violation pursuant to the

1 provisions of any law of this state or another state prohibiting the  
2 offenses provided for in subsection A of this section, Section 11-  
3 904 of this title, or paragraph 4 of subsection A of Section 852.1  
4 of Title 21 of the Oklahoma Statutes, shall constitute a conviction  
5 of the offense for the purpose of this section for a period of ten  
6 (10) years following the completion of any court-imposed  
7 probationary term.

8 N. If qualified by knowledge, skill, experience, training or  
9 education, a witness shall be allowed to testify in the form of an  
10 opinion or otherwise solely on the issue of impairment, but not on  
11 the issue of specific alcohol concentration level, relating to the  
12 following:

13 1. The results of any standardized field sobriety test  
14 including, but not limited to, the horizontal gaze nystagmus (HGN)  
15 test administered by a person who has completed training in  
16 standardized field sobriety testing; or

17 2. Whether a person was under the influence of one or more  
18 impairing substances and the category of such impairing substance or  
19 substances. A witness who has received training and holds a current  
20 certification as a drug recognition expert shall be qualified to  
21 give the testimony in any case in which such testimony may be  
22 relevant.

23 SECTION 4. This act shall become effective November 1, 2011.

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1 COMMITTEE REPORT BY: COMMITTEE ON APPROPRIATIONS, dated 4-6-11 - DO  
2 PASS, As Amended and Coauthored.

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