Approved 3-3-87
Date

MINUTES OF THE SENATE COMMITTEE ON PUBLIC HEALTH AND WELFARE.

The meeting was called to order by SENATOR ROY M. EHRLICH at
Chairperson

10:00 a.m./~~p.m.~~ on February 23, 1987 in room 526-S of the Capitol.

All members were present except:

Committee staff present:
Emalene Correll, Legislative Research
Bill Wolff, Legislative Research
Norman Furse, Revisor of Statutes Office
Clarene Wilms, Committee Secretary

Conferees appearing before the committee:

Marilyn Bradt, Kansans for Improvement of Nursing Homes
Pat Donahue, Coordinator of Senior Citizens law projects, Kansas Legal Services, Inc.

Others attending: see attached list

The committee was made aware of two bills that were in need of introduction. Norman Furse told the committee that the first bill addressed the expiration, July 1, 1987, of the health planning development act and is needed to delete terminology referring to this act in other sections of the statutes.

Senator Bond moved that the committee introduce this bill. Senator Hayden seconded the motion and the motion carried.

The committee was also advised that a bill resulting from the subcommittee on SB-33, SB-34 and SB-35 was requested.

Senator Hayden moved that the committee introduce this bill. Senator Bond seconded the motion and the motion carried.

Marilyn Bradt testified and presented written testimony in support of SB-264. Ms. Bradt stated that her organization supported the concepts listed in her testimony. (attachment 1)

Pat Donahue testified and presented written testimony at the request of the committee chairman. Mr. Donahue's testimony covered various legal aspects of this bill and stated the views of HCFA, SRS, the possible fiscal impact of SB-264 and also listed costs which would be avoided under the present medicaid elgibility rules. (attachment 2)

The meeting adjourned at 10:40 a.m.

The next meeting is scheduled for February 24, 1987, at 10:00 a.m. in room 526-S.

SENATE
PUBLIC HEALTH AND WELFARE COMMITTEE
DATE 2-23-87

(PLEASE PRINT) NAME AND ADDRESS	ORGANIZATION
John O. Miller, Topeka, Ks.	AARP
Katie Pyle	Silver-haired Leg.
Marilyn Bradt	KINH
Mark Intermill	KCOA
Barbara Helton	SEK-AAA
Ruthella McBride	SEK-AAA
Donn Priest	SRS
Carolyn Baxter	ADRDA
Wanda Blaser	ADRDA, Topeka
Robert P. Guthrie	ADRDA Topeka
Lyndon Drew, Topeka	KDOA
Brenda Stapp, Topeka	KDOA
Gary Robbins	KOA
KATH R LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Marcella Bruery Topeka	ADRDA
John W Bruery	"
Pat Donahue (PAT DONAHUE)	KANSAS LEGAL SERVICES, INC.

KINH Kansans for Improvement of Nursing Homes, Inc.

913 Tennessee, suite 2 Lawrence, Kansas 66044 (913) 842 3088

TESTIMONY PRESENTED TO
THE SENATE PUBLIC HEALTH AND WELFARE COMMITTEE
CONCERNING SB 264
DIVISION OF ASSETS

February 19, 1987

Mr. Chairman and Members of the Committee:

Kansans for Improvement of Nursing Homes believes there is broad agreement among Kansans that it is neither humane nor, in the long run, to the state's advantage to impoverish the spouse of a person needing extensive care, either in the home or in a nursing home setting, in order to pay for that care.

The Alzheimer's Task Force, reporting their findings and recommendations to the 1986 Legislature, opened the discussion with a recommendation that a division of assets law be enacted. This past summer the 5052 Committee, established by legislative resolution to develop and recommend a comprehensive long term care plan for the state, has recommended that Kansas "Reduce the possibility that private pay nursing home clients spending jointly held resources to pay for nursing home care will leave a healthy spouse without resources to remain independent." And, to that end, the committee recommended that the state enact a division of assets law.

These two bodies, the Alzheimer's Task Force and the 5052 Committee, represent a wide range of Kansans -- consumers, providers and academicians. To their findings KINH would add the agreement of its nearly 900 members, many of whom have had close contact with the kinds of problems addressed. The question in their minds is not so much whether Kansas should adopt a division of assets policy as it is how the state can achieve those goals in the most equitable manner, what it will cost, and how we shall pay for it.

The bill before this committee is the result of extensive deliberation by the Special Committee on Judiciary. It provides a significant step toward an equitable process. Specifically, we support the following concepts:

1. Use of home care services as well as nursing home care to trigger division of assets provisions. KINH believes that there is widespread agreement that it is desirable to maintain disabled persons in their own homes as long as possible and that it is in the state's best interest to assist in doing so.
2. Protection of $25,000 in resources as well as $8,600 protected income.

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attachment 1

3. Recovery by the state of state expenditures to whatever extent possible from the estate of the recipient's spouse.

4. Notice of the specific provisions of the law to be furnished to the medicaid applicant and spouse.

Even in a time of extrordinary fiscal restraint in Kansas, KINH believes this legislation merits your full support. We urge you to report SB 264 favorably.

Kansans for Improvement of Nursing Homes
Marilyn Bradt
Legislative Coordinator

TESTIMONY OF PATRICK H. DONAHUE
ON SB 264
DIVISION OF ASSETS
FEBRUARY 23, 1987

I am appearing here today at the request of this committee. My name is Pat Donahue. I am the Kansas Legal Services, Inc. coordinator of senior citizen law projects. We operate 11 senior citizen law projects across the state under contract with Kansas' 11 area agencies on aging. In 1986 we provided legal assistance to 4,462 seniors. I have personally worked with a number of families with the problems we are discussing here and I have given seminars for the Kansas Bar Association's lawyers across Kansas on Medicaid. This summer I was asked by the Interim Committee to participate in the hearings on the division of assets proposal.

It is my view that there is a hole in the safety net for married couples of moderate means when one spouse needs long-term custodial care. There is now no way to get help until both become poor. The well-to-do are in a position to (establish) eligibility for medicaid through prior estate plans which use intervivos medicaid qualifying trusts to shelter assets from Medicaid spenddown and later pour these as assets forward through the will to the recipient's heirs. The medicaid qualifying trust is permitted under federal medicaid law. The poor are automatically qualified for medicaid. The couples in the low and middle income bracket fall through the net.

In time, insurance may help solve the problem but there is no such insurance now. Developing long-term care insurance will take time. The recent national proposals for add-on Part B medicare health insurance for catastrophic illness do not address the problem of long-term, custodial care.

I want to address the very insightful thought provoking question raised by Senator Hayden concerning whether Kansas (a separate property state) in adopting a division of resources law would be on the same footing with Washington (a community property state) if HCFA subsequently challenges the Kansas law. I reviewed the HCFA administrator's decision in In re Washington State Plan Amendment, Docket No. 84-6, January 31, 1986. In that case HCFA held that:

> "the community property laws of Washington cannot be imposed upon the application of 42 CFR 435.723. From this account the application of that State law is inconsistent with and irrelevant to the objectives of the regulation in its statutory setting. The objectives are to reach income that is determined to be available and not to ascribe ownership. Ascribing ownership to defeat determination of availability is not responsive to the program's objectives. Thus, the

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> Administrator holds that in this particular matter, the statute and regulations contemplate their own different inherent notion of atribution of income and do not rely on a property law of any State. There is no conflict with State law because the regulations are concerned with availability and not mere ownership. The concepts are not coextensive. Nursing Home Residents Advisory Council v. Kelly, 470 F. Supp. 747 (D. MN 1979). However, they do not conflict.

The HCFA view is that medicaid eligibility terms on "availability" of resources not the "ownership" of resources. Thus, at least as far as HCFA is concerned, it is immaterial whether Kansas is a separate property state. If it should happen that the courts subsequently decide the HCFA is wrong and that "ownership" determines "availability" then Kansas would be in a better position to defend a division of income statute than a community property state. This is so because under community property law, all marital income is presumed to be community income. Washington tried to divide this community property and designate it separate property while it ostensibly remained a community property state. In Kansas there would be no such inconsistency.

The question of income availability must be addressed if the proposed law is to pass master with HCFA. The federal availability regulation 42 CFR §435.723 says that considering mutual income to be available to the sick spouse stops one month after the sick spouse becomes institutionalized. From that point on, only the income available to sick spouse is asked to determine medicaid eligibility.

Because HCFA sees the issue is availability not ownership, SB 264 addresses the income available to the sick spouse. The amount of available income is reduced by requiring the sick spouse to pay some minimum support to the well spouse from the separate income of the sick spouse. Kansas law says that the duty of support between marriage partners is reciprocal. Lindbloom v. Lindbloom, 177 Kan 286(1955). Moreover, KSA 21-3605(f) makes nonsupport of a spouse a crime. Therefore, a support requirement would be consistent with existing law.

Presently, SRS by state regulation, permits the sick spouse to transfer income to the well spouse until the well spouse's income is lifted to a $341/month support level. KPAM Sect. 3443(7) Rev. No. 9. It seems reasonable for the state to declare, as a divorce court would, that the well spouse is entitled to a maintenance income above $341/month. The federal regulations at 42 CFR §435.725(c) permit transfer from the sick spouse "an additoinal amount for the maintenance needs of the (well) spouse". The interim committee, with input from SRS, selected the $717/ month figure which now carries over into SB 264.

I believe it would be wise to make it clear in the proposed legislation: (1) that maintaining support for the well spouse up to a level of $717/month is a marital obligation of the sick spouse and (2) that this obligation vests the well spouse with an ownership property interest in the nature of a judgment lien in the separe income of the sick spouse. In this way the income going to support the well spouse is unavailable to the sick spouse.

Fiscal Impact

I have reviewed the SRS calculations of fiscal impact. The fiscal note developed by SRS would add $2.2M to the 235.2M combined federal state Kansas medicaid budget - an increase of less than 1%. My view is that Kansas should try to verify that the SRS projections against the known cost experience of states with division of resources rules and with other states using more liberal eligibility guidelines. Such states would include those that have adopted division of resources rules: California, Minnesota, Colorado, Illinois, Indiana, New York, Maryland and New Mexico. The SRS methodology for projecting fiscal impact of income division can be criticized on the following grounds:

(1) The assumption that 14% of all nursing home residents have spouses at home should be reduced since some of these have spouse who are themselves nursing home residents. This adjustment would lower the fiscal impact.

(2) The assumed number of nursing home residents who will have income sufficiently large to transfer part of it to the well spouse it not offset by a similar assumption that there will be a similar percentage of well spouses who will have income large enough to prohibit the transfer. This adjustment would lower the fiscal impact.

Avoided Cost

While reviewing the fiscal impact of the proposal, some attention should be given to cost avoidance and social cost. Under the present medicaid eligibility rules, well spouses of medicaid recipients who have incomes less than $6,652 (125% of poverty) will qualify for:

- Food stamps
- Energy assistance
- Weatherization
- Commodity programs
- Hill-Burton Act medical assistance
- HCBS
- Medically needy medicaid

In this situation, they will fall short of self-sufficiency, be perpetually at risk, and act as a brake on community economic growth.

State Protective Measures

The California division of resources law contains provisions which direct the state welfare department to:

(1) Assume that the new law is not in conflict with federal law until a final determination is made by the Secretary of HHS.

(2) Take all "available and necessary" steps to obtain a final determination revising an initial HCFA determination of conflict.

(3) To "immediately" request that the Attorney General seek judicial review of any adverse final HHS decision and to immediately notify the appropriate fiscal bodies of the legislature.

I think it would be prudent to include such provisions in SB 264.

This concludes my testimony.