Approved January 26, 1988
Date

MINUTES OF THE HOUSE COMMITTEE ON JUDICIARY.

The meeting was called to order by Representative Robert S. Wunsch at
Chairperson

3:30 ~~xx~~a.m./p.m. on January 20, 1988 in room 313-S of the Capitol.

All members were present except:
Representatives Crowell, O'Neal and Sebelius, who were excused.

Committee staff present:
Jerry Donaldson, Legislative Research Department
Jill Wolters, Revisor of Statutes Office
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee:
Attorney General Robert T. Stephan
Ron Smith, Kansas Bar Association
Jerry Slaughter, Kansas Medical Society
Winston Barton, Secretary of Social and Rehabilitation Services
Esther Wolf, Secretary of Aging
Pat Donahue, Kansas Legal Services, Inc.
Irving Peterson, Riley County Silver Haired Legislature, Manhattan
John Yager, A.A.R.P., Clearview City

The Chairman announced the Commitee would hear bill requests.

Attorney General Robert T. Stephan presented a list of bill requests for the Committee to consider for introduction. These proposals were the result of a study by the Attorney General's Drug Task Force, (see Attachment I).

Representative Whiteman moved and Representative Peterson seconded to introduce the bills requested by the Attorney General as Committee bills. The motion passed.

Ron Smith requested the Committee introduce a bill amending the uniform commercial code, and a bill concerning garnishments, (see Attachment II).

A motion was made by Representative Buehler to introduce the bills requested by the Kansas Bar Association as Committee bills. The motion was seconded by Representative Fuller. The motion passed.

Jerry Slaughter requested the Committee introduce four bills concerning the collateral source rule, (see Attachment III); non-economic damages, (see Attachment IV); periodic payment of damages, (see Attachment V); and punitive damages, (see Attachment VI).

Representative Snowbarger moved to introduce the four bills requested by the Kansas Medical Society, as Committee bills. Representative Douville seconded and the motion passed.

Hearing on S.B. 264-Authorizing the division of assets between spouses in determining eligibility for medical assistance.

Secretary Winston Barton provided the Committee with a summary of S.B. 264 and a comparison of Kansas proposals and federal proposals on division of assets/income legislation, (see Attachment VII). He was supportive of S.B. 264 and said S.R.S. would be willing to assist the

Committee with this legislation. He said S.R.S. would have some technical amendments.

Secretary Barton stated if lines 206 through 210 were deleted, the federal match would be withheld and the fiscal note would double for the state.

Secretary Esther Wolf testified the Department on Aging requests that S.B. 264 be passed.

A Summary of Silver Haired Legislature Resolution No. 403, encouraging the enactment of S.B. 264, was distributed to the Committee, (see Attachment VIII). Also distributed was a copy of a memorandum dated March 30, 1987, from the Legislative Research Department explaining the division of resources and income according to S.B. 264, (see Attachment IX), and a copy of a proposed amendment submitted last year which would strike lines 206 through 210 and lines 285 through 289 and insert a New Sec. 4, (see Attachment X).

Pat Donahue, in his testimony, advised the Committee on the present federal "division of assets" initiatives; explained the U.S. 9th Circuit Court of Appeal's decisions upholding the rights of medicaid states to permit spouses to divide income; and reviewed the issues which remained unresolved at the end of the last session, (see Attachment XI). He also distributed an article he wrote, Medicaid and Long-Term Institutional Care for the Victims of Catastrophic Disabling Illness, dated September-October 1987, from the Kansas Bar Association Journal, (see Attachment XII).

Irving Peterson expressed his concern that S.B. 264 be passed.

The Chairman submitted a petition from Kenneth Thompson and 80 members of the Bonner Springs Senior Citizens Club requesting passage of S.B. 264, (see Attachment XIII).

John Yager stated if the division of assets bill is not passed both spouses will have to be institutionalized at state expense.

A revised fiscal note dated January 20, 1988 was distributed in the amount of $1,394,478, of which $627,515 would be state funds, (see Attachment XIV).

The Committee meeting adjourned at 4:40 p.m.

The next meeting will be on Thursday, January 21, 1988, at 3:30 p.m. in room 313-S.

GUEST REGISTER

DATE January 20, 1988

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Robert Schulenberg	Lawrence Council on Aging	1115 Tenn Lawrence
Walter Bryant	" " " "	2905 Alabama
Reba Bryant	" " " "	" "
Cecil Herschell	" " " "	100 Cs Kansas #36 Lawrence
B.C. Herschell	" " " "	" " "
Lois Johnson	ADRDA Colby Ks	McDonald, Ks
Robert C. Guthrie	ADRDA Topeka Chapt.	Topeka Kansas
Marvel Chambers	ADRDA - So. Central Kansas Chapter	Wichita KS
Addie B. Frazier	ADRDA So Central Kansas Chapter	" "
Robert E. Fiester	ADRDA So Central Kansas Chapter	Wichita KS
Harold C. Pitts	KCOA	Topeka, KS
Irving E. Peterson	SHL Riley Co	Manhattan KS
Esther Peterson	" "	" "
Ron Smith	Cedar Wood Living Center	205 N Michigan Lawrence KS
Carol J Smith	Kansas Department of Aging. ADRDA Douglas County Council on Aging KINH	1311 West 22nd Street Lawrence, KS 66046
Ruth E Trowbridge	Council on Aging, Lawrence, Ks	310 Minnesota
Leola Kaun	C.O.A	1101 Vermont #102
Merle Jackson	Council on Aging Lawrence KS	447 Ohio Street
W. H. Cramer	AARP Chapter 1696	Douglas Ct
Lawraine McNally	Council on Aging Lawrence Ks	
Jan Worley	Ks Reno Co Coalition on Aging	Hutchinson
Opal Barton	AARP	Clearview City Ks
John Yager	AARP	Clearview City KS
Edith Schumacher	AARP	Clearview City Ks
Vi Yager	AARP	Clearview City Ks

GUEST REGISTER

DATE 1/20

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Jim McBride	Observer	Topeka
Anita Stufflebean	United Way	BOX 4188 Topeka, KS-04
Michael Woolf		Topeka
Ric Silber		DOB
Susan Kluss	Budget Division	Topeka
Marguerite Goldsmith	GOR Dir	Topeka
MIKE HASSUR	OBSERVER	"
Bonnie Wilson		Topeka
Mike German	KS Railroad Association	Topeka
Kevin D. McFarland	KS Homes For the Aging	Topeka
Mark Intermill	Kansas Coalition on Aging	Topeka
Barbara Hinkle	SHL Food Co.	Spearville
Dave Gerst	SWKAAA	Dodge City
Pat Heap	SWKAAA	" "
JACK GUMB	SRS	TOPEKA
John Schmidt	SRS	Topeka
Virgil Hilderbrand	SHL	Topeka
MONDA M SPOOL	NC-EH AREA AGENCY ON AGING	MANHATTAN
Oscar Ledezma	(Citizens Veneguela)	Kingman
Barbara Wunsch		Kingman
Lynda L Dunn	KDOA	Topeka
Esther V Wolf	KDOA	Topeka
J. G. De La Torre	Office of the Governor	Topeka
KEITH L LANDIS	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS	"

GUEST REGISTER

DATE 1/20

HOUSE JUDICIARY

NAME	ORGANIZATION	ADDRESS
Tom Bell	Ks. Hosp. Assn.	Topeka
Ralph E. Schul	Ks Silver Hair Legis	Greenola, Ks
Mary Lou. Schul	SCKAAA-PSA#10 Board	Elk. Co.

MEMORANDUM

TO: Kansas House Judiciary Committee
FROM: Robert T. Stephan, Attorney General
SUBJECT: Legislative Proposals from the Attorney General's Drug Task Force
DATE: January 20, 1988

Criminal Justice/Law Enforcement

1) Amend K.S.A. 1987 Supp. 65-4127b to increase the penalty for manufacturing controlled substances to a C felony. Under current law the penalty for manufacture is only an A misdemeanor. The task force believes the penalty should be as great for manufacture as for possession.

2) Amend K.S.A. 65-4127a and K.S.A. 1987 Supp. 65-4127b to increase the penalty for distributing substances from a D felony to a B felony in those instances in which the distribution is to a child under the age of 18 years.

3) Amend K.S.A. 1987 Supp. 21-3610a which relate to furnishing cereal malt beverage to a minor or intoxicants to a minor to enhance a second conviction to an A misdemeanor. Under current law the penalty is and remains a B misdemeanor regardless of the number of convictions.

4) Amend K.S.A. 1987 Supp. 41-727 which relates to purchase or consumption of liquor by minors to make the crime a class C misdemeanor upon first conviction and a class B misdemeanor upon a second or subsequent conviction. Currently it is an unclassified misdemeanor punishable by a fine of not less than $100 nor more than $250 and up to 40 hours public service for persons over the age of 18 but less than 21 years of age.

5) Create a new alternative for the courts to utilize in dealing with alcohol and drug abusers. This would allow the judge to send a defendant to a drug or alcohol rehabilitation treatment program in a secure facility prior to sentencing. The procedure would further require all defendants to have an alcohol and drug presentence evaluation prior to disposition of the case.

6) A new state crime patterned after the federal crime of arranging drug sales or purchases over the telephone should be established as a class D felony.

Attachment I

Intervention/Treatment

1) Pass a legislative resolution requiring that all inmates in the custody of the Secretary of Corrections be screened for alcohol and drug abuse problems by a qualified evaluator and be provided appropriate treatment for identified problems prior to release. Although the parole board has basically been requiring inmates who become parole eligible to complete a drug treatment program if necessary, there is no requirement otherwise that this be done.

2) Require all juvenile offenders who have been adjudicated for a felony type offense to be assessed by certified alcohol drug safety action project and referred for treatment or education programs if appropriate. Such assessment should be discretionary in cases in which the juvenile offender is adjudicated for a misdemeanor type offense or the juvenile is placed on diversion.

60-717. Order of garnishment. (a) *Form.* (1) An order of garnishment issued independently of an attachment, either prior to judgment or as an aid for the enforcement of a judgment, for the purpose of attaching any property, funds, credits or indebtedness belonging to or owing the defendant, other than earnings, is declared to be sufficient if substantially in the following form:

"In the District Court of _____ County, Kansas, A. B., Plaintiff, vs. C. D., Defendant, and E. F., Garnishee. The State of Kansas to the Garnishee: You are hereby ordered as a garnishee to file with the clerk of the above named court, within 10 days after service of this order upon you, your answer under oath stating whether you are at the time of the service of this order upon you, and also whether at any time thereafter but before you sign your answer, indebted to the defendant, or have in your possession or control any property belonging to the defendant, excluding earnings (compensation for personal services, whether denominated as wages, salary, commission, bonus or otherwise) due and owing the defendant and stating the amount of any such indebtedness and description of any such property. For the purpose of this order, if you are, at the time this order is served upon you, an executor or administrator of an estate containing property or funds to which defendant is or may become entitled as a legatee or distributee of the estate upon its distribution, you are deemed to be indebted to the defendant to the extent of such property or funds. You are further ordered to withhold the payment of any such indebtedness, or the delivery away from yourself of any such property, until the further order of the court. Your answer on the form served herewith shall constitute substantial compliance with this order.

"Failure to file your answer may entitle the plaintiff to judgment against you for the full amount of the claim and costs.

"Witness my hand and seal of the court at _____ in this county, this _____ day of _____, 19__, _____, Clerk of the court, _____ County."

(2) An order of garnishment, issued independently of an attachment as an aid for the enforcement of a judgment and for the purpose of attaching earnings of the defendant, is declared to be sufficient if substantially in the following form:

"In the District Court of _____ County, Kansas, A. B., Plaintiff, vs. C. D., Defendant, and E. F., Garnishee. The State of Kansas to the Garnishee: You are hereby ordered as a garnishee to file with the clerk of the above named court, within ~~30~~ days after service of this order upon you, your answer under oath stating whether you are indebted to the defendant by reason of earnings (compensation for personal services, whether denominated as wages, salary, commission, bonus or otherwise) due and owing the defendant and stating the amount of any such indebtedness. Computation of the amount of your indebtedness shall be made as prescribed by the answer form served herewith and shall be based upon defendant's earnings for ~~the entire normal~~ pay period ~~in which~~ this order is served upon you. You are further ordered to withhold the payment of that portion of defendant's earnings required to be withheld pursuant to the directions accompanying the answer form until the further order of the court. Your answer on the form shall constitute substantial compliance with this order.

"Failure to file your answer may entitle the plaintiff to judgment against you for the full amount of the claim and costs.

"Witness my hand and seal of the court at _____ in this county, this _____ day of _____, 19__, _____, Clerk of the court, _____ County."

... You are hereby ordered as a garnishee to file with the clerk of the above named court, within ~~30~~ 40 days after service of this order upon you, your answer ...

... defendant's earnings for ~~the entire normal~~ any pay period ending ~~in which~~ during the thirty (30) day period beginning the day this order is served upon you. You are further ordered to withhold from each payment for earnings due the defendant for the pay periods ending during such thirty (30) day period the payment of that portion of defendant's earnings required to be withheld pursuant to the directions accompanying the answer form until the further order of the court.

Attachment II

If such order of garnishment is issued at the written direction of the party entitled to enforce the judgment, pursuant to K.S.A. 60-716 to enforce (1) an order of any court for the support of any person, (2) an order of any court of bankruptcy under chapter XIII of the federal bankruptcy act or (3) a debt due for any state or federal tax, the clerk of the district court shall cause such purpose to be clearly stated on the order of garnishment and the accompanying garnishee's answer form immediately below the caption. If the garnishment is to enforce a court order for the support of any person, the garnishment shall not exceed 50% of an individual's disposable earnings unless the person seeking the garnishment specifies to the garnishee a greater percent to be withheld, as authorized by subsection (g) of K.S.A. 60-2310 and amendments thereto.

(b) *Service and return.* The order of garnishment shall be served on the garnishee, together with two copies of the form for the garnishee's answer prescribed in K.S.A. 60-718 and amendments thereto and returned by the officer making service in the same manner as an order of attachment. If the order is served prior to a judgment on the plaintiff's claim, the order shall also be served on the defendant, if the defendant can be found, but failure to serve the defendant shall not relieve the garnishee from liability under the order.

(c) *Effect.* An order of garnishment issued to attach any property, funds, credits or other indebtedness belonging to or owing the defendant, other than earnings, shall attach (1) all such property of the defendant which is in the possession or under the control of the garnishee, and all such credits and indebtedness due from the garnishee to the defendant at the time of service of the order and (2) all such property coming into the possession or control of the garnishee and belonging to the defendant, and all such credits and indebtedness becoming due to the defendant between the time of the serving of the order of garnishment and the time of the signing of the answer of the garnishee, but if the garnishee is an executor or administrator of an estate and the defendant is or may become a legatee or distributee thereof, the order of garnishment shall attach and create a first and prior lien upon any property or funds of such estate to which the defendant is entitled upon distribution of the estate and the garnishee shall be prohibited from paying to the defendant any of such property or funds until so ordered by the court from which the order of garnishment was issued.

An order of garnishment issued for the purpose of attaching earnings of the defendant shall have the effect of attaching the nonexempt portion of the defendant's earnings for the ~~entire normal pay~~ period in which the order is served. Nonexempt earnings are earnings which are not exempt from wage garnishment pursuant to K.S.A. 60-2310 and amendments thereto, and computation thereof for a normal pay period shall be made in accordance with the directions accompanying the garnishee's answer form served with the order of garnishment.

History: L. 1963, ch. 303, 60-717; L. 1969, ch. 284, § 1; L. 1970, ch. 238, § 7; L. 1972, ch. 222, § 2; L. 1978, ch. 227, § 2; L. 1982, ch. 247, § 1; L. 1983, ch. 198, § 1; July 1.

entire

strike "entire normal pay"

thirty (30) day

(4)

60-718. Answer of ga ..hee; reply; judgment; limitation when garnishee is public officer. (a) Within 10 days after service upon a garnishee of an order of garnishment issued to attach any property, funds, credits or indebtedness belonging to or owing the defendant, other than earnings, the garnishee shall file a verified answer thereto with the clerk of the court, stating the facts with respect to the demands of the order. The answer of the garnishee shall be sufficient if substantially in the following form, but the garnishee's answer shall contain not less than that prescribed in the form:

ANSWER OF GARNISHEE

State of Kansas
County of _____

_____ being first duly sworn, say that on the _____ day of _____, 19___, I was served with an order of garnishment in the above entitled action, that I have not delivered to the defendant _____, any money, personal property, goods, chattels, stocks, rights, credits nor evidence of indebtedness belonging to the defendant, other than earnings, since receiving the order of garnishment, and that the following is a true and correct statement:

(1) (Money or indebtedness due) I hold money or am indebted to the defendant, other than for earnings due and owing defendant, as of the date of this answer, in the following manner and amounts: _____.

(2) (Personal property in possession) I have possession of personal property, goods, chattels, stocks, rights, credits, or effects of the defendant, as of the date of this answer, described and having an estimated value as follows: _____.

(3) (To be answered by garnishee who is an executor or administrator of an estate) I am an _____ of the estate of _____
(executor or administrator)
containing funds or property to which defendant is or may become entitled as a _____,
(legatee or distributee)
and I understand that the order of garnishment shall attach and create a first and prior lien on all such property or funds to which defendant becomes entitled upon distribution of the estate and that I am prohibited from delivering to defendant any such property or funds until further order of the court from which the order of garnishment was issued. The approximate date for distributing the assets of the estate is _____, 19___.

I will hold the above described moneys or other items in my possession, until the further order of the court.

_____
(Signature), Garnishee

Subscribed and sworn to before me this _____ day of _____, 19___.

INSTRUCTIONS TO GARNISHEE

This form is provided for your convenience in furnishing the answer required of you in the order of garnishment. If you do not choose to use this form, your answer, under oath, shall not contain less than that prescribed herein. Your answer must be filed with the clerk of the above-named court within the time prescribed in the order of garnishment.

(b) Within ~~30~~ 40 days after service upon a garnishee of an order of garnishment issued for the purpose of attaching any earnings due and owing the defendant, the garnishee shall file an answer thereto with the clerk of

the court, stating the facts w respect to the demands of the order. If the defendant is not employed by the garnishee or has terminated employment with the garnishee, the answer is not required to be verified. Otherwise, the answer shall be verified. The answer of the garnishee is declared to be sufficient if substantially in the following form, but the garnishee's answer shall contain not less than that prescribed in the form:

ANSWER OF GARNISHEE

The defendant _____
Terminated employment on _____ (date) ☐ (check one)
Was never employed. ☐

_____
(Signature), Garnishee

If one of the above applies, you are not required to complete the remainder of this form and it is not required to be verified. You must return the form within the time prescribed in the order of garnishment.

If neither of the above applies, you must complete the remainder of this form and have it verified.

State of Kansas
County of _____

_____, being first duly sworn, say that on the _____ day of _____, 19___, I was served with an order of garnishment in the above entitled action, that since being served with said order I have delivered to the defendant _____, only that portion of the defendant's earnings authorized to be delivered to the defendant pursuant to the instructions accompanying this form and that the statements in my answer are true and correct.

INSTRUCTIONS TO GARNISHEE

The order of garnishment served upon you has the effect of attaching that portion of the defendant's earnings (defined as compensation for personal services, whether denominated as wages, salary, commission, bonus or otherwise) which is not exempt from wage garnishment. This form is provided for your convenience in furnishing the answer required of you in the order. It is designed so that you may prepare your answer in conjunction with the preparation of your payroll. Wait until the end of the normal pay period ~~in which this order has been served upon you~~ and apply the tests set forth in these instructions to the entire earnings of the defendant-employee during the pay period, completing your answer in accordance with these instructions. If you do not choose to use this form, your answer, under oath, shall not contain less than that prescribed herein. Your answer must be filed with the clerk of the above-named court within the time prescribed in the order of garnishment.

First, furnish the information required by paragraphs (a) through (f) of the form below. Read carefully the "Note to Garnishee" following paragraph (f). Then, if the total amount of the defendant-employee's disposable earnings are not exempt from wage garnishment, complete paragraphs (g) and (h) of the form by computing the amount of defendant-employee's disposable earnings which are to be paid over to the defendant-employee by using the following table:

I. If the defendant-employee's disposable earnings are less than
$100.50 for a Weekly pay period
$201.00 for a Bi-Weekly pay period
$217.75 for a Semi-Monthly pay period
$435.50 for a Monthly pay period
Pay the employee as if the employee's pay check were not garnished.

The order of garnishment served upon you has the effect of attaching all pay periods which end during the thirty (30) day period beginning on the day you are served with the order of garnishment for that portion of the defendant's earnings (defined as...

Wait until the end of the normal pay period or periods ~~in which this order has been served upon you~~ which end during the thirty (30) day period beginning on the day you are served with the order of garnishment and apply the tests set forth in these instructions to the entire earnings of the defendant-employee ending during the ~~pay~~ thirty (30) day period, completing your answer in accordance with these instructions.

II. If the defendant-employee's disposable earnings are
$100.50 to $134.00 for a Weekly pay period
pay the defendant-employee $100.50
$201.00 to $268.00 for a Bi-Weekly pay period
pay the defendant-employee $201.00
$217.75 to $290.33 for a Semi-Monthly pay period
pay the defendant-employee $217.75
$435.50 to $580.67 for a Monthly pay period
pay the defendant-employee $435.50
Any disposable earnings remaining after payment of the above amounts shall be retained until further order of the court.

III. If the defendant-employee's disposable earnings are more than
$134.00 for a Weekly pay period
pay the defendant-employee 75% of the defendant-employee's disposable earnings
$268.00 for a Bi-Weekly pay period
pay the defendant-employee 75% of the defendant-employee's disposable earnings
$290.33 for a Semi-Monthly pay period
pay the defendant-employee 75% of the defendant-employee's disposable earnings
$580.67 for a Monthly pay period
pay the defendant-employee 75% of the defendant-employee's disposable earnings
Any disposable earnings remaining after payment of the above amounts shall be retained until further order of the court.

IV. SUPPORT ORDERS. If the person seeking the garnishment for court ordered support desires to garnish more than 50% of disposable earnings, that person may request in writing to the clerk of the court to check one of the below applicable percentages:

55% Employee also supports a spouse or dependent child not covered by this support order and payments are 12 weeks overdue.

60% Employee does not support a spouse or dependent child and payments are not 12 weeks overdue.

65% Employee does not support a spouse or dependent child and payments are 12 weeks overdue.

STATEMENT OF GARNISHEE

(a) The normal pay period for defendant is weekly _____ every two weeks _____ semi-monthly _____ monthly _____ (designate one).

(b) This answer covers earnings for the ~~normal~~ pay period beginning on the _____ day of _____, 19___, and ending on the _____ day of _____, 19___, which ~~normal pay~~ period includes the day on which the order of garnishment was served upon me.

(c) Total gross earnings due for the normal pay period covered by (b) above are ..... $_____

(d) Average gross earnings for normal pay period as designated in (a) above ..... $_____

(e) Amounts required by law to be withheld for the ~~normal~~ pay period covered by (b) above are:

(1) Federal social security tax ... $_____
(2) Federal income tax ..... $_____
(3) State income tax ..... $_____
(4) Railroad retirement tax ..... $_____
Total ..... $_____
(Deduct only those items listed above)

(f) Disposable earnings for the ~~normal~~ pay period covered by (b) above are (subtract (e) from (c) above) ..... $_____

Note to Garnishee: If the order of garnishment states at the top of the order that it is issued to enforce (1) an order of any court of bankruptcy under chapter XIII of the federal bankruptcy act or (2) a debt due for any state or federal tax, you must retain in your possession until further order of the court all of the disposable earnings shown in (f) above. If the order of garnishment states at the top of the order that it is issued to enforce an order of any court for the support of any person, you must retain in your possession until further order of the court 50% of the disposable earnings shown in (f) above, or such greater percentage as may be indicated in paragraph IV above. If the order of garnishment is not issued for any of such purposes, compute the amount of earnings which may be paid to defendant pursuant to the instructions accompanying this form and furnish the information required by (g) and (h) below.

(b) This answer covers earnings for the ~~normal~~ pay period or periods beginning on the _____ day of _____, 19__, and ending on the _____ day of _____, 19__, which ~~normal pay~~ period includes the day on which the order of garnishment was served upon me.

(e) Amounts required by law to be withheld for the ~~normal~~ pay period or periods covered by (b) above are:

(f) Disposable earnings for the ~~normal~~ pay period or periods covered by (b) above are (subtract (e) from (c) above) .....$_____

(f) above for all pay periods ending during the thirty (30) day period covered by the order of garnishment.

50% of the disposable earnings for all pay periods ending during the thirty (30) day period covered by the order

(g) In accordance with the instructions accompanying this answer form, I have determined that the amount which may be p) defendant is ..... $_____

(h) After paying to defendant the amount stated in (g) above, I am holding the remainder of defendant's disposable earnings in the amount of ..... $_____

I will hold in my possession until further order of the court all of the moneys required herein to be withheld.

_____
(Signature), Garnishee

Subscribed and sworn to before me this _____ day of _____, 19____.

Answer of garnishee must be filed with the clerk of this court pursuant to Kansas law.

(c) The clerk shall cause a copy of the answer to be mailed promptly to the plaintiff and the defendant. Within 10 days after the filing of the answer the plaintiff or the defendant or both of them may reply thereto controverting any statement in the answer. If the garnishee fails to answer within the time and manner herein specified, the court may grant judgment against garnishee for the amount of the plaintiff's judgment or claim against the defendant, but if the claim of the plaintiff has not been reduced to judgment, the liability of the garnishee shall be limited to the judgment ultimately rendered against the defendant. Such judgments may be taken only upon written motion and notice given in accordance with K.S.A. 60-206 and amendments thereto. Notwithstanding the foregoing, if the garnishee is a public officer for the state or any instrumentality thereof and the indebtedness sought by plaintiff to be withheld from defendant is an indebtedness to defendant incurred by or on behalf of the state or any instrumentality thereof, judgment against the state or such instrumentality shall be limited to an amount for claim and costs not exceeding the total amount of the indebtedness of the state or instrumentality thereof to defendant. If the garnishee answers as required herein and no reply thereto is filed, the allegations of the answer are deemed to be confessed. If a reply is filed as herein provided, the court shall try the issues joined, the burden being upon the party filing the reply to disprove the sworn statements of the answer, except that the garnishee shall have the burden of proving offsets or indebtedness claimed to be due from the defendant to the garnishee, or liens asserted by the garnishee against property of the defendant.

History: L. 1963, ch. 303, 60-718; L. 1967, ch. 324, § 1; L. 1969, ch. 284, § 2; L. 1970, ch. 238, § 8; L. 1972, ch. 222, § 3; L. 1978, ch. 227, § 3; L. 1982, ch. 247, § 2; L. 1983, ch. 198, § 2; July 1.

60-2310. Wage garnishment; definitions; restrictions; sickness preventing work; assignment of account; exceptions; prohibition on courts. (a) *Definitions.* As used in this act and the acts of which this act is amendatory, unless the context otherwise requires, the following words and phrases shall have the meanings respectively ascribed to them:

(1) "Earnings" means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus or otherwise;

(2) "disposable earnings" means that part of the earnings of any individual remaining after the deduction from such earnings of any amounts required by law to be withheld;

(3) "wage garnishment" means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt; and

(4) "federal minimum hourly wage" means that wage prescribed by subsection (a)(1) of section 6 of the federal fair labor standards act of 1938, and any amendments thereto.

(b) *Restriction on wage garnishment.* Subject to the provisions of subsection (e), only the aggregate disposable earnings of an individual may be subjected to wage garnishment. The maximum part of such earnings of any wage earning individual which may be subjected to wage garnishment for any workweek or multiple thereof may not exceed either (1) twenty-five percent of the individual's aggregate disposable earnings for that workweek or multiple thereof, or (2) the amount by which the individual's aggregate disposable earnings for that workweek or multiple thereof exceed an amount equal to 30 times the federal minimum hourly wage, or equivalent multiple thereof for such longer period, whichever is less. No one creditor may issue more than one garnishment against the earnings of the same judgment debtor during any one ~~month~~ thirty (30) day period, but the court shall allow the creditor to file amendments or corrections of names or addresses of any party to the order of garnishment at any time. Nothing in this act shall be construed as charging the plaintiff in any garnishment action with the knowledge of the amount of any defendant's earnings prior to the commencement of such garnishment action. In answering such order the garnishee-employer shall withhold from all earnings of the judgment-debtor for pay periods ending during such thirty (30) day period an amount or amounts as are allowed and required by law.

(c) *Sickness preventing work.* If any debtor is prevented from working at the debtor's regular trade, profession or calling for any period greater than two weeks because of illness of the debtor or any member of the family of the debtor, and this fact is shown by the affidavit of the debtor, the provisions of this section shall not be invoked against any such debtor until after the expiration of two months after recovery from such illness.

(d) *Assignment of account.* If any person, firm or corporation sells or assigns an account to any person or collecting agency, that person, firm or corporation or their assignees shall not have or be entitled to the benefits of wage garnishment. The provision of this subsection shall not apply to assignments of support rights to the secretary of social and rehabilitation services pursuant to K.S.A. 39-709 and 39-756, and amendments thereto, or to support rights which have been assigned to any other state pursuant to title IV-D of the federal social security act (42 U.S.C. § 651,*et seq.*), or to the assignments of accounts receivable or taxes receivable to the director of accounts and reports made under K.S.A. 75-3728b and amendments thereto.

(e) *Exceptions to restrictions on wage garnishment.* The restrictions on the amount of disposable earnings subject to wage garnishment as provided in subsection (b) shall not apply in the following instances:

(1) Any order of any court for the support of any person, including any order for support in the form of alimony, but the foregoing shall be subject to the restriction provided for in subsection (g);

(2) any order of any court of bankruptcy under chapter XIII of the federal bankruptcy act; and

(3) any debt due for any state or federal tax.

(f) *Prohibition on courts.* No court of this state may make, execute or enforce any order or process in violation of this section.

(g) The maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment to enforce any order for the support of any person shall not exceed:

(1) If the individual is supporting a spouse or dependent child (other than a spouse or child with respect to whose support such order is used), 50% of the individual's disposable earnings for that week;

(2) if the individual is not supporting a spouse or dependent child described in clause (1), 60% of such individual's disposable earnings for that week; and

(3) with respect to the disposable earnings of any individual for any workweek, the 50% specified in clause (1) shall be 55% and the 60% specified in clause (2) shall be 65%, if such earnings are subject to garnishment to enforce a support order for a period which is prior to the twelve-week period which ends with the beginning of such workweek.

Sec. ___ K.S.A. 1986 Supp. 60-717, 60-718 and 60-2310 are hereby repealed.

Sec. ___ Effective January 1, 1989.

COLLATERAL SOURCE RULE

This act repeals K.S.A. 60-3403, the abolition of the collateral source rule in medical malpractice actions passed by the legislature in 1986. The Kansas Supreme Court held that law unconstitutional in Farley v. Engelken, 241 Kan. 663 (1987). Under this act, evidence of collateral source benefits will be admissible in all personal injury trials after July 1, 1988. If such evidence of collateral source benefits is presented, evidence of the cost of securing the benefit and amounts to be taken out of any award to pay back those benefits is also admissible. Upon receiving this evidence, the trier of fact must consider whether any award will duplicate the collateral source benefits, along with the cost of securing the benefit and amounts to be deducted from any award for liens or subrogation.

Attachment III

BILL NO. _____

AN ACT concerning civil procedure and evidence; repealing K.S.A. 60-3403.

Be it enacted by the Legislature of the State of Kansas.

Section 1. As used in this act:

(a) "Claimant" means any person seeking damages in an action for personal injury or death, and includes the heirs at law, executor or administrator of a decedent's estate.

(b) "Collateral source benefits" means any of the following benefits which were or are reasonably expected to be received by a claimant, or by someone for the benefit of a claimant, for expenses incurred or reasonably expected to be incurred as a result of the occurrence upon which the personal injury action is based: (i) Any benefits received as a result of any medical or other insurance coverage, or any benefit in the nature of insurance coverage, except life or disability insurance coverage; and (ii) any workers' compensation benefit, military service benefit plan, employment wage continuation plan, welfare benefit program or other publicly funded benefit plan or program provided by law.

(c) "Cost of the collateral source benefit" means the amount paid or to be paid in the future to secure a collateral source benefit by the claimant or by any one on behalf of the claimant.

Section 2. In any action for personal injury or death, evidence of collateral source benefits received, or evidence of collateral source benefits which are reasonably expected to be received in the future, shall be admissible.

Section 3. When evidence of collateral source benefits is admitted into evidence pursuant to section 2, evidence of the cost of the collateral source benefit and the extent to which the right to recovery is subject to a lien or subrogation shall be admissible.

Section 4. In determining damages in any action for personal injury or death, the trier of fact shall consider: (1) The extent to which damages awarded will duplicate collateral source benefits and (2) the cost of the collateral source benefit and any lien or subrogation right.

Section 5. The provisions of this act shall apply to any action pending or brought on or after July 1, 1988, regardless of when the cause of action accrued.

Section 6. K.S.A. 60-3403 is repealed.

Section 7. This law shall be in force and take effect after its publication in the statute books.

NON-ECONOMIC DAMAGES

This bill is designed to consolidate all of the present laws limiting non-economic damages into one law. The bill provides that the limitation on non-economic damages in medical malpractices cases (K.S.A. 60-3407) and the limitation on pain and suffering in personal injury actions apply only to causes of action accruing before the effective date of this act. This act then combines both statutes into one law that provides a limitation of $250,000 on non-economic losses in causes of action accruing after its effective date of July 1, 1988.

Attachment IV

1-4-88

BILL NO. _____

AN ACT concerning damages for noneconomic loss in damages in personal injury actions, amending K.S.A. 60-3407 and 1987 Kan. Sess. Laws Ch. 217, Section 1, and repealing the existing statutes.

Section 1. K.S.A. 60-3407 is hereby amended to read as follows:

60-3407. Limitations on compensatory damages.

(a) In any medical malpractice liability action:

(1) The total amount recoverable by each party from all defendants for all claims for noneconomic loss based on causes of action accruing before July 1, 1988, shall not exceed a sum total of $250,000; and

(2) subject to K.S.A. 1986 Supp. 60-3411, the total amount recoverable by each party from all defendants for all claims shall not exceed a sum total of $1,000,000.

(b) If a medical malpractice liability action is tried to a jury, the court shall not instruct the jury on the limitations imposed by this section or the ability of the claimant to obtain supplemental benefits under K.S.A. 1986 Supp. 60-341.

(c) In a medical malpractice liability action, subject to apportionment of fault pursuant to K.S.A. 60-258a and amendments thereto:

(1) If the verdict results in an award for noneconomic loss which exceeds $250,000, the court shall enter judgment for $250,000 for all the party's claims for noneconomic loss.

(2) If the verdict results in an award for current economic loss which exceeds the difference between $1,000,000 and the amount awarded by the court for damages for noneconomic loss, the court shall enter judgments for an amount equal to such difference for all the party's claims for current economic loss.

(3) If the sum of the amounts awarded by the court for noneconomic loss and for current economic loss is $1,000,000 or more, no judgment shall be entered for future economic loss. If the sum of such amounts is less than $1,000,000 and the verdict results in an award for future economic loss which exceeds the difference between $1,000,000 and the sum of such amounts, the court shall enter judgment for the cost of an annuity contract which, to the greatest extent possible, will provide for the payment of benefits over the period of time specified in the verdict in the amount awarded by the verdict for future economic loss, the cost of such annuity not to exceed the difference between $1,000,000 and the sum of the amounts awarded by the court for noneconomic loss and current economic loss.

(d) The limitations on the amount of damages recoverable for noneconomic loss under this section shall be adjusted annually on July 1 by rule of the supreme court in proportion to the net change in the United States city average consumer price index for all urban consumers during the preceding 12 months.

(e) The provisions of this section shall not be construed to repeal or modify the limitation provided by K.S.A. 60-1903 and amendments thereto in wrongful death actions.

Section 2. 1987 Kan. Sess. Laws Ch. 217, Section 1, is hereby amended to read as follows:

(a) As used in this section, "personal injury action" means any action for damages for personal injury or death, except for medical malpractice liability actions.

(b) In any personal injury action, the total amount recoverable by each party from all defendants for all claims for pain and suffering shall not exceed a sum total of $250,000.

(c) In every personal injury action, the verdict shall be itemized by the trier of fact to reflect the amount awarded for pain and suffering.

(d) If a personal injury action is tried to a jury, the court shall not instruct the jury on the limitations of this section. If the verdict results in an award for pain and suffering which exceeds the limit of this section, the court shall enter judgment for $250,000 for all the party's claims for pain and suffering. Such entry of judgment by the court shall occur after consideration of comparative negligence principles in K.S.A. 60-258a.

(e) The provisions of this section shall not be construed to repeal or modify the limitation provided by K.S.A. 60-1903 and amendments thereto in wrongful death actions.

(f) The provisions of this section shall apply only to personal injury actions which are based on causes of action accruing on or after July 1, 1987, and before July 1, 1988.

Section 3.

(a) As used in this section "personal injury action" means any action seeking damages for personal injury or death.

(b) In any personal injury action, the total amount recoverable by each party from all defendants for all claims for noneconomic loss shall not exceed a sum total of $250,000.

(c) In every personal injury action, the verdict shall be itemized by the trier of fact to reflect the amount awarded for noneconomic loss.

(d) If a personal injury action is tried to a jury, the court shall not instruct the jury on the limitations of this section. If the verdict results in an award for noneconomic loss which exceeds the limit of this section, the court shall enter judgment for $250,000 for all the party's claims for noneconomic loss. Such entry of judgment by the court shall occur after consideration of comparative negligence principles in K.S.A. 60-258a.

(e) The provisions of this section shall not be construed to repeal or modify the limitation provided by K.S.A. 60-1903 and amendments thereto in wrongful death actions.

(f) The provisions of this section shall apply only to personal injury actions which are based on causes of action accruing on or after July 1, 1988.

Section 4. K.S.A. 60-3407 and 1987 Kan. Sess. Laws Ch. 217, Section 1, are hereby repealed.

Section 5. This law shall be in force and take effect after its publication in the statute book.

PERIODIC PAYMENT OF DAMAGES

This act is designed to assure that damage payments in personal injury actions are made as the claimant needs them. In so doing, damage awards may be drafted with precision, and the problems associated with paying a large sum of money in the present to pay future expenses are alleviated.

Under this act, juries are required to itemize awards for past and future damages, for economic and non-economic losses, and to state the number of years over which future damages are to be paid. The jury does not reduce the future damages figure to present value. Damages incurred to the date of judgment, or past damages, are paid in a lump sum. Upon the request of any party, the court will require that future damages be paid periodically over the number of years set forth in the verdict.

An annuity is then purchased to pay for the judgment, subject to court approval. Execution on the judgment is stayed until the annuity is purchased and approved. In the event an annuity is not purchased the court may reduce the judgment to present value and require a lump sum payment.

The act also provides for the abatement of payments when the party receiving payments dies. In a wrongful death action, the deceased beneficiary's share is redistributed among the living beneficiaries. To protect payments from creditors, the annuity is exempt from levy, garnishment or attachment. The annuity payments are not taxable income to the beneficiary.

Since attorney fees are often paid from awards, the act sets forth options for the payment of such fees. The fee can be paid out of the lump sum award and periodic payments, or may be paid in lump sum in an amount not to exceed 1/3 of the cost of the annuity. The amount paid to purchase the annuity is then reduced accordingly.

To guarantee that payments will be secure, annuities purchased under this act are covered by to the Kansas Life and Health Insurance Guaranty Act.

Attachment V

January 6, 1988

BILL NO. _____

AN ACT concerning the periodic payment of damages in personal injury actions, enacting the Periodic Payment of Personal Injury Judgments Act, amending K.S.A. 40-3003, K.S.A. 60-262, K.S.A. 60-1903, K.S.A. 60-2103, and Kan. Sess. Laws Ch. 224, Section 1, and repealing K.S.A. 40-3003, K.S.A. 60-1903, K.S.A. 60-2103, K.S.A. 60-3408, K.S.A. 60-3409, and 1987 Kan. Sess. Laws Ch. 224, Section 1.

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

Section 1. (a) The purposes of this act are to: (1) Alleviate some of the practical problems incident to unpredictability of large future losses; (2) effectuate more precise awards of damages for actual losses; (3) pay damages as the trier of fact finds the losses will accrue; and (4) assure that payments of damages more nearly serve the purposes for which they are awarded.

(b) This Act shall be known as the Periodic Payment of Personal Injury Judgments Act.

Section 2. As used in this act:

(a) "Economic loss" means (1) reasonable expenses of necessary medical care and related benefits, (2) lost wages, time or income by reason of any disability, (3) aggravation of a preexisting ailment or condition because of the bodily injury, and (4) other harm for which money damages can be measured. In actions for wrongful death, the term means damages allowable pursuant to K.S.A. 1986 Supp. 60-1904 and amendments thereto.

(b) "Future damages" means damages arising from personal injury or death which the trier of fact finds will be incurred after the damages findings are made.

(c) "Medical care and related benefits" means reasonable expenses of necessary medical care, hospitalization and treatment.

(d) "Noneconomic loss" means pain and suffering, disability, disfigurement and any accompanying mental anguish. In actions for wrongful death, the term means damages allowable pursuant to K.S.A. 1986 Supp. 60-1904 and amendments thereto.

(e) "Past damages" means damages that have been incurred when the damages findings are made, including any punitive or exemplary damages allowed by law.

(f) "Personal injury action" means any action seeking damages for personal injury or death. Personal injury action includes medical malpractice liability actions.

Section 3. In any personal injury action past damages shall be paid in lump sum.

Section 4. At the request of any party to such action made prior to trial, the court shall include in the judgment a requirement that future damages be paid in periodic payments. In any trial in which a party has elected to proceed under this act, the finder of fact shall not reduce the damages awarded to present value. Judgment shall be entered for past damages and judgment shall be entered for future damages prorated over the number of years specified by the finder of fact.

Section 5. Upon the death of the party for whom the damages have been awarded in any personal injury action, that portion of the periodic payments awarded for medical care and related benefits and for noneconomic loss which are due in the future shall terminate and abate. However if a judgment in an action for wrongful death provides for periodic payments to be made to more than one individual the surviving beneficiaries shall succeed to the shares of the deceased beneficiaries in proportion to their shares in the judgment.

Section 6. As a condition of approving periodic payments of future damages under this act, the court shall require a party against whom damages have been assessed, or that party's representative, to purchase an annuity or annuities from a company satisfactory to the court to assure full payment of such damages and to make a qualified assignment as described in section 130 of the Internal Revenue Code of 1986. In the event such an assignment is not made or such an annuity or annuities is not purchased, the court shall reduce the damages to present value, after receiving evidence of the appropriate discount rate, and shall enter judgment for a lump sum. When an assignment is made and when an annuity or annuities is purchased as the method of making periodic payments, the judgment shall be deemed satisfied upon the payment of past damages, purchase of the annuity or annuities, the making of a qualified assignment and approval by the court.

Section 7. K.S.A. 60-2103 is hereby amended to read as follows:

dures. Garden City Educators' Ass'n v. Vance, 224 K. 732, 735, 585 P.2d 1057.

45. Cited in dissenting opinion; no final order entered by trial court. Brady v. Brady, 225 K. 485, 493, 592 P.2d 865.

46. Jurisdiction invoked hereunder from order initiated under 23-496; final decision. Brown v. Tubbs, 2 K.A.2d 522, 523, 582 P.2d 1165.

47. Appeal from directed verdict in medical malpractice action; reversed; exclusion of proffered testimony. Moore v. Francisco, 2 K.A.2d 526, 527, 583 P.2d 391.

48. Appellate jurisdiction matter of right in boundary line dispute when district court order involves title to real estate and has semblance of finality. State v. Williams, 3 K.A.2d 205, 206, 592 P.2d 129.

49. Interlocutory appeal hereunder; denial of motion to dismiss in wrongful death action reversed; widow of deceased has exclusive right to bring action. Johnson v. McArthur, 226 K. 128, 129, 596 P.2d 148.

50. Appeal from trial court's finding of occurrence of prohibited practices during negotiations dismissed; moot. NEA-Topeka, Inc. v. U.S.D. No. 501, 227 K. 529, 531, 608 P.2d 920.

51. Judgment under 60-254(b) may not later be reviewed as intermediate ruling on appeal of final judgment of entire case. Dennis v. Southeastern Kansas Gas Co., 227 K. 872, 876, 878, 610 P.2d 627.

52. Any act or ruling from beginning of proceedings reviewable hereunder upon final decision in any action. Kauk v. First Nat'l Bank of Hoxie, 5 K.A.2d 83, 89, 613 P.2d 670.

53. Creditor of insolvent corporation cannot maintain personal action on own behalf against directors or officers who breach duty by negligent mismanagement. Speer v. Dighton Grain, Inc., 229 K. 272, 277, 624 P.2d 952.

54. Debt collection agency is "supplier" within meaning of Consumer Protection Act. State, *ex rel.*, Miller v. Midwest Service Bureau of Topeka, Inc., 229 K. 322, 623 P.2d 1343.

55. In multiple party suit where final judgment against one of parties is entered, appeal from such judgment may be taken as matter of right. Patterson v. Missouri Valley Steel, Inc., 229 K. 481, 483, 484, 625 P.2d 483.

56. Service upon resident agent of dissolved corporation during three year wind-up period constitutes valid service on corporation. Vogel v. Missouri Valley Steel, Inc., 229 K. 492, 493, 625 P.2d 1123.

57. Board of county commissioners is a proper party to an appeal by city from its order denying land annexation by city. Board of Johnson County Commissioners v. City of Lenexa, 230 K. 632, 634, 640 P.2d 1212 (1982).

58. Order disqualifying out-of-state attorney is final decision from which an appeal may be perfected hereunder. Skahan v. Powell, 8 K.A.2d 204, 205, 206, 208, 653 P.2d 1192 (1982).

59. Action brought under Federal Employer's Liability Act; right of contribution against third-party tortfeasor allowed by 60-258a. Gaulden v. Burlington Northern, Inc., 232 K. 205, 210, 654 P.2d 383 (1982).

60-2103. Appellate procedure. (a) *When and how taken.* When an appeal is permitted by law from a district court to an appellate court, the time within which an appeal may be taken shall be thirty (30 from the entry of the judgment, as pro by K.S.A. 60-258, except that upon a ing of excusable neglect based on a of a party to learn of the entry of jud the district court in any action may e the time for appeal not exceeding thir days from the expiration of the origina herein prescribed. The running of the for appeal is terminated by a timely m made pursuant to any of the rules h after enumerated, and the full time f peal fixed in this subsection commen run and is to be computed from the en any of the following orders made u timely motion under such rules: Grant denying a motion for judgment unde section (b) of K.S.A. 60-250; or grant denying a motion under subsection K.S.A. 60-252 to amend or make addi findings of fact, whether or not an alte of the judgment would be required motion is granted; or granting or den motion under K.S.A. 60-259 to al amend the judgment; or denying a m for new trial under K.S.A. 60-259.

A party may appeal from a judgme filing with the clerk of the district c notice of appeal. Failure of the appell take any of the further steps to secu review of the judgment appealed fron not affect the validity of the appeal, ground only for such remedies as are fied in this chapter, or when no rem specified, for such action as the app court having jurisdiction over the a deems appropriate, which may includ missal of the appeal. If the record on a has not been filed with the appellate the parties, with the approval of the d court, may dismiss the appeal by stipu filed in the district court, or that cour dismiss the appeal upon motion and by the appellant.

(b) *Notice of appeal.* The notice peal shall specify the parties taking t peal; shall designate the judgment o thereof appealed from, and shall nam appellate court to which the appeal is The appealing party shall cause not the appeal to be served upon all othe ties to the judgment as provided in 60-205, but his or her failure so to do not affect the validity of the appeal.

(c) *Security for costs.* Security fo costs on appeal shall be given in such

and manner as shall be prescribed by a general rule of the supreme court unless the appellate court shall make a different order applicable to a particular case.

(d) *Supersedeas bond.* Whenever an appellant entitled thereto desires a stay on appeal, he or she may present to the district court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed, or if the judgment is affirmed, and to satisfy in full such modification of the judgment such costs, interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed after notice and hearing at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. When an order is made discharging, vacating, or modifying a provisional remedy, or modifying or dissolving an injunction, a party aggrieved thereby shall be entitled, upon application to the judge, to have the operation of such order suspended for a period of not to exceed ten (10) days on condition that, within said period of ten (10) days such party shall file a notice of appeal and obtain the approval of such supersedeas bond as is required under this section.

(e) *Failure to file or insufficiency of bond.* If a supersedeas bond is not filed within the time specified, or if the bond filed is found insufficient, and if the action is not yet docketed with the appellate court, a bond may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file a bond may be made only in the appellate court.

(f) *Judgment against surety.* By entering into a supersedeas bond given pursuant to subsections (c) and (d) of this section, the surety submits himself or herself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his or her agent upon whom any papers affecting his or her liability on the bond may be served. His or her liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the judge prescribes may be served on the clerk of the court who shall forthwith mail copies to the surety if his or her address is known.

(g) *Docketing record on appeal.* The record on appeal shall be filed and docketed with the appellate court at such time as the supreme court may prescribe by rule.

(h) *Cross-appeal.* When notice of appeal has been served in a case and the appellee desires to have a review of rulings and decisions of which he or she complains, the appellee shall within twenty (20) days after the notice of appeal has been served upon him or her and filed with the clerk of the trial court, give notice of his or her cross-appeal.

(i) *Intermediate rulings.* When an appeal or cross-appeal has been timely perfected the fact that some ruling of which the appealing or cross-appealing party complains was made more than thirty (30) days before filing of the notice of appeal shall not prevent a review of the ruling.

History: L. 1963, ch. 303, 60-2103; L. 1975, ch. 178, § 29; Jan. 10, 1977.

Source or prior law:

(a). G.S. 1868, ch. 80, §§ 544, 545; L. 1909, ch. 182, §§ 569, 572; L. 1913, ch. 241, § 1; R.S. 1923, 60-3306, 60-3309; L. 1937, ch. 268, § 2.

(b). G.S. 1868, ch. 80, §§ 544, 545; L. 1909, ch. 182, § 569; R.S. 1923, 60-3306.

(d). L. 1865, ch. 53, § 2; G.S. 1868, ch. 80, §§ 551 to 553, 555, 558; L. 1909, ch. 182, §§ 586 to 590; R.S. 1923, 60-3322 to 60-3326; L. 1933, ch. 217, § 1.

(g). L. 1901, ch. 278, § 3; L. 1909, ch. 182, §§ 574, 576; R.S. 1923, 60-3311, 60-3312; L. 1937, ch. 268, § 3.

(h). L. 1909, ch. 182, § 578; R.S. 1923, 60-3314; L. 1937, ch. 268, § 4.

(i). L. 1937, ch. 268, § 5; L. 1951, ch. 350, § 1.

Cross References to Related Sections:

Appeals from limited actions, see 61-2101 et seq.

Waiver of right to appeal in divorce actions, see 60-1610.

If the Periodic Payment of Personal Injury Judgment Act applies to the judgment, the amount of the bond shall be fixed at such sum as will cover the whole amount of past damages, the amount the District Court finds to reasonably represent the cost of an annuity which would be sufficient to satisfy the portion of the judgment for future damages, interest and the costs on appeal, unless the Court, after notice and hearing and for good cause shown, fixes a different amount or orders security other than the bond.

Section 8. If a party for whom damages have been awarded and his attorney have agreed that attorney's fees be paid from the award pursuant to a contingency fee arrangement, the portion of the fee attributable to past damages shall be paid in lump sum and the portion of the fee attributable to future damages shall be paid periodically. The foregoing notwithstanding, the claimant and his attorney may elect to apply a portion, not to exceed one-third (1/3), of the total cost of the annuity or annuities specified in Section 6 in satisfaction of the claimant's attorney's fees. The balance of such cost shall be utilized to purchase the annuity or annuities, which shall be deemed to fully satisfy the requirements of Section 6 even though it provides a level of payments below that found by the trier of fact for future damages.

Section 9. If an annuity is purchased pursuant to this Act by the party against whom damages have been assessed or by the party's insurer, neither the claimant nor the claimant's attorney shall own, receive by assignment or otherwise have any interest in the ownership or purchase of the annuity and periodic payments made through such annuity shall not be accelerated, deferred, increased or decreased by the claimant or the claimant's attorney. If the party against whom damages have been assessed or that party's insurer assigns the obligation to pay, the assignee shall not provide to the claimant or to his attorney rights against the assignee which are greater than those of a general creditor and the assignee's obligation shall be no greater than the obligation of the assignor.

Section 10. Benefits under an annuity contract awarded pursuant to this act shall not be assignable or subject to levy, execution, attachment, garnishment or any other remedy or procedure for the recovery or collection of a debt until payment is accrued, and this exemption cannot be waived.

Section 11. K.S.A. 60-262 is hereby amended to read as follows:

26. Applied: action for fraud and breach of oral contract; statute of limitations; evidence. Wolf v. Brungardt, 215 K. 272, 285, 524 P.2d 726.

27. Applied: admission of certain exhibits in specialty newspaper in prosecution for perjury; not reversible error. State v. Craig, 215 K. 381, 384, 524 P.2d 679.

28. Aggravated robbery conviction; error to admit evidence of prior conviction to impair credibility. State v. Harris, 215 K. 649, 652, 527 P.2d 949.

29. Applied: exclusion of evidence of communications relevant to issue in debt harassment case not harmless. Dawson v. Associates Financial Services Co., 215 K. 814, 823, 824, 529 P.2d 104.

30. Error by trial court in admission of prior convictions harmless error: conviction affirmed. State v. Watkins, 219 K. 81, 94, 547 P.2d 810.

31. Erroneous admission of blood test results obtained without consent prejudicial: conviction under 8-530 reversed. State v. Gordon, 219 K. 643, 652, 653, 549 P.2d 886.

32. Erroneous admission of prior convictions constituted prejudice: not harmless error. State v. Donnelson, 219 K. 772, 775, 549 P.2d 964.

33. Applied: conviction of welfare fraud affirmed. State v. Ambler, 220 K. 560, 564, 552 P.2d 896.

34. Applied; admission of prior conviction of rape did not amount to a denial of substantial justice; harmless error. State v. Yates, 220 K. 635, 637, 556 P.2d 176.

35. Evidence of probation officer's card of defendant did not affect constitutional rights; harmless error. State v. Wilson & Wentworth, 221 K. 359, 364, 559 P.2d 374.

36. Admission of deposition; no harmless error. Stremel v. Sterling, 1 K.A.2d 310, 312, 564 P.2d 559.

37. Testimony cumulative; admission of evidence not error. State v. Mantz, 222 K. 453, 460, 565 P.2d 612.

38. Harmless error rule applied; trial to court not jury. State v. Dodson, 222 K. 519, 524, 565 P.2d 291.

39. Admission of evidence of other crimes to show plan did not constitute reversible error. State v. Gourley, 224 K. 167, 171, 578 P.2d 713.

40. Letter mistakenly included in trial exhibits delivered to jury held harmless error; judgment affirmed. State v. McClain, 224 K. 464, 580 P.2d 1334.

41. Applied; admission of evidence of prior conviction on issue of identity not prejudicial although not admissible to show plan. State v. McBarron, 224 K. 710, 713, 585 P.2d 1041.

42. Admission of photographs of victim held harmless error. State v. Dargatz, 228 K. 322, 329, 614 P.2d 430.

43. Under 60-225, substitution for deceased litigant whose appeal is pending must be made within reasonable time or appeal will be dismissed. Long v. Riggs, 5 K.A.2d 416, 417, 617 P.2d 1270.

44. Final sentence in instruction erroneous but error held harmless when instruction entirely viewed. English Village Properties, Inc. v. Boettcher & Lieurance Constr. Co., 7 K.A.2d 307, 314, 640 P.2d 1280 (1982).

45. Failure of judge to find controlling facts in action tried without a jury held not prejudicial to defendant. Panhandle Agri-Service, Inc. v. Becker, 231 K. 291, 296, 644 P.2d 413 (1982).

60-262. Stay of proceedings to enforce judgment. (a) *Automatic stay; exceptions — injunctions and receiverships.* Except as stated herein, no execution shall issue upon a judgment nor shall proceedings be taken for its enforcement until the expiration of ten (10) days after its entry. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action, shall not be stayed during the period after its entry and until an appeal is taken or during the pendency of an appeal. The provisions of subsection (c) of this section govern the suspending, modifying, restoring, or granting of an injunction during the pendency of an appeal.

(b) *Stay on motion for new trial or for judgment.* In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to K.S.A. 60-259, or of a motion for relief from a judgment or order made pursuant to K.S.A. 60-260, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to K.S.A. 60-250, or of a motion for amendment to the findings or for additional findings made pursuant to K.S.A. 60-252(b).

(c) *Injunction pending appeal.* When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the judge in said judge's discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

(d) *Stay upon appeal.* When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subsection (a) of this section. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

(e) *Stay in favor of the state or agency thereof.* When an appeal is taken by the state or an officer or agency thereof or by direction of any department of the state and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.

(f) *Power of appellate court not limited.* The provisions in this section do not limit any power of the appellate court or of a

, such time as may be required to comply with the Periodic Payment of Personal Injury Judgments Act.

Section 12. K.S.A. 40-3003 is hereby amended to read as follows: K.S.A. 40-3003. (a) This act shall provide coverage, for the policies and contracts specified in subsection (b), for:

(1) Persons who, regardless of where they reside, except for nonresident certificate holders under group policies or contracts, are the beneficiaries, assignees or payees of the persons covered under paragraph (2); and

(2) persons who are owners of or certificate holders under such policies or contracts, and who: (A) Are residents; (B) are not residents, but only with respect to an annuity contract awarded pursuant to K.S.A. 1986 Supp. 60-3407 or 60-3409 or the Kansas Periodic Payment of Personal Injury Judgments Act or an annuity contract for future economic loss procured pursuant to a settlement agreement in a medical malpractice liability action, as defined by K.S.A. 1985 Supp. 60-3401 or the Kansas Periodic Payment of Personal Injury Judgments Act and amendments thereto; or

(C) are not residents, but only under all of the following conditions:

(i) The insurers which issued such policies or contracts are domiciled in this state;

(ii) such insurers never had a license or certificate of authority in the states in which such persons reside;

(iii) such states have associations similar to the association created by this act; and

(iv) such persons are not eligible for coverage by such associations.

(b) This act shall provide coverage to the persons specified in subsection (a) for direct, nongroup life, health, annuity and supplemental policies or contracts, and for certificates under direct group policies and contracts issued by member insurers, except as limited by this act.

Section 13. 1987 Kan. Sess. Laws Ch. 224 Section 1 is hereby amended to read as follows: (a) In any action for damages for personal injury, the verdict shall be itemized by the trier of fact to reflect the amounts, if any, awarded for:

(1) Noneconomic injuries and losses, as follows:
(A) Pain and suffering,
(B) disability,
(C) disfigurement,
and any accompanying mental anguish;

(2) reasonable expenses of ~~necessary medical care, hospitalization and treatment received~~, medical care and related benefits; and

(3) economic injuries and losses other than those itemized under subsection (a)(2).

(b) Where applicable, the amounts required to be itemized pursuant to subsection (a) shall be further itemized by the trier of fact to reflect those amounts awarded for injuries and losses sustained to date and those awarded for injuries and losses reasonably expected to be sustained in the future.

(c) The trier of fact shall state the anticipated period of time in years over which payment of damages is necessary.

(d) In any action for damages for personal injury, the trial court shall instruct the jury only on those items of damage upon which there is some evidence to base an award.

Section 14. K.S.A. 60-1903 and amendments thereto is hereby amended to read as follows: 60-1903. (a) In any wrongful death action, the court or jury may award such damages as are found to be fair and just under all the facts and circumstances, but the damages, other than pecuniary loss sustained by an heir at law, cannot exceed in the aggregate the sum of $100,000 and costs.

(b) If a wrongful death action is to a jury, the court shall not instruct the jury on the monetary limitation imposed by subsection (a) upon recovery of damages for nonpecuniary loss. If the jury verdict results in an award of damages for nonpecuniary loss which, after deduction of any amounts pursuant to K.S.A. 60-258a and amendments thereto, exceeds the limitation of subsection (a), the court shall enter judgment for damages of $100,000 for nonpecuniary loss.

(c) In any wrongful death action, the verdict shall be itemized by the trier of fact to reflect the amounts, if any, awarded for:

(1) Nonpecuniary damages;

(2) expenses for the care of the decreased caused by the injury; and

(3) pecuniary damages other than those itemized under subsection (c)(2).

(d) Where applicable, the amounts required to be itemized pursuant to subsections (c)(1) and (c)(3) shall be further itemized by the trier of fact to reflect those amounts awarded for injuries and losses sustained to date and those awarded for injuries and losses reasonably expected to be sustained in the future, and shall state the period of time in years over which payment of damages is necessary.

(e) In any wrongful death action, the trial court shall instruct the jury only on those items of damage upon which there is some evidence to base an award.

Section 15. K.S.A. 40-3003, 60-262, 60-1903, 60-2103, 60-3408, 60-3409, and 1987 Kan. Sess. Laws Ch. 224 Section 1 are hereby repealed.

Section 16. This act shall be in force from and after its publication in the statute book.

PUNITIVE DAMAGES

The new Kansas Punitive Damages Bill amends and consolidates the two previous punitive damage laws. K.S.A. 60-3402, the law applying to punitive damages in medical malpractice cases and the general punitive damages award statute enacted in 1987 are amended so that they apply only to causes of action accruing before the effective date of this act. The two laws are then consolidated into this act.

Under the new act, punitive damages are recoverable in civil tort cases when the claimant shows by clear and convincing evidence that the tortfeasor acted with intent to injure, fraudulently or with malice. The ability to recover punitive damages is determined during the initial trial, but the amount of punitive damages to be awarded is determined during a separate proceeding. During that separate proceeding evidence of the financial condition of the party against whom damages are to be assessed is heard, along with evidence of aggravating or mitigating factors. Evidence presented during the initial trial, relevant to the punitive damage award, may also be considered.

Punitive damages awarded under the act may not exceed 25% of the party's highest annual gross income for the preceding five years, or three million dollars. Fifty percent of any punitive damage award is paid to state general fund.

Attachment VI

1-6-88

BILL NO. _____

AN ACT concerning exemplary damages in civil actions, amending K.S.A. 60-3402, 1987 Kan. Sess. Laws Ch. 216, Section 1 and repealing K.S.A. 60-3402, 60-3404 and 1987 Kan. Sess. Laws Ch. 216, Section 1.

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

Section 1. K.S.A. 60-3402 is hereby amended to read as follows: 60-3402. Exemplary or punitive damages; procedure; proof; limitations; disposition of damages recovered.

(a) In any medical malpractice liability action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted to the court to determine the amount of such damages to be awarded.

(b) At a proceeding to determine the amount of exemplary or punitive damages to be awarded under this section, the court shall hear evidence of the financial condition of any party against whom such damages have been allowed. Such evidence may include the party's gross income earned from professional services as health care provider but shall not include any such income for more than five years immediately before the act for which such damages under this section are awarded. At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded, but not exceeding the amount provided by subsection (d), and shall enter judgment for that amount.

(c) In any medical malpractice liability action where claims for punitive damages are included, the plaintiff shall have the burden of proving by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.

(d) No award of exemplary or punitive damages shall exceed the lesser of: (1) Twenty-five percent of the annual gross income earned by the party against whom the damages are awarded from professional services as a health care provider, as determined by the court based upon the party's highest gross annual income earned from such services for any one of the five years immediately before the act for which such damages are awarded; or (2) three million dollars.

(e) If exemplary or punitive damages are awarded pursuant to this section, 50% of such damages recovered and collected shall be paid to the party awarded them and 50% of such damages recovered and collected shall be paid to the party awarded them and 50% of such damages recovered and collected shall be paid to

the party awarded them and 50% shall be paid to the state treasurer for deposit in the state treasury and shall be credited to the health care stabilization fund established pursuant to K.S.A. 40-3403 and amendments thereto.

(f) In no case shall punitive damages be assessed pursuant to this section against:

(1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or

(2) a professional corporation for the acts of a shareholder of that corporation unless such professional corporation authorized or ratified the questioned conduct.

(g) The provisions of this section shall apply only to an action based upon a cause of action accruing on or after July 1, 1985 and before July 1, 1988.

Section 2. 1987 Kan. Sess. Laws Ch. 216, Section 1 is hereby amended to read as follows: (a) In any civil action in which exemplary or punitive damages are recoverable, the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.

(b) At a proceeding to determine the amount of exemplary or punitive damages to be awarded under this section, the court may consider:

(1) The likelihood at the time of the alleged misconduct that serious harm would arise from the defendant's misconduct;

(2) the degree of the defendant's awareness of that likelihood;

(3) the profitability of the defendant's misconduct;

(4) the duration of the misconduct and any intentional concealment of it;

(5) the attitude and conduct of the defendant upon discovery of the misconduct;

(6) the financial condition of the defendant; and

(7) the total deterrent effect of other damages and punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, compensatory, exemplary and punitive damage awards to persons in situations similar to those of the claimant and the severity of the criminal penalties to which the defendant has been or may be subjected.

At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded and shall enter judgment for that amount.

(c) In any civil action where claims for exemplary or punitive damages are included, the plaintiff shall have the burden of proving, by clear and convincing evidence in the initial phase of the trial, that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.

(d) In no case shall exemplary or punitive damages be assessed pursuant to this section against:

(1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or

(2) an association, partnership or corporation for the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct.

(e) Except as provided by subsection (f), no award of exemplary or punitive damages pursuant to this section shall exceed the lesser of:

(1) The annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five years immediately before the act for which such damages are awarded; or

(2) $5 million.

(f) In lieu of the limitation provided by subsection (e), if the court finds that the profitability of the defendant's misconduct exceeds or is expected to exceed the limitation of subsection (e), the limitation on the amount of exemplary or punitive damages which the court may award shall be an amount equal to 1 1/2 times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct.

(g) The provisions of this section shall not apply to any action governed by another statute establishing or limiting the amount of exemplary or punitive damages, or prescribing procedures for the award of such damages, in such action.

(h) As used in this section the terms defined in K.S.A. 60-3401 and amendments thereto shall have the meaning provided by that statute.

(i) The provisions of this section shall apply only to an action based upon a cause of action accruing on or after July 1, 1987 . and before July 1, 1988.

Section 3. (a) Exemplary or punitive damages shall be recoverable only as permitted by this statute in any civil tort action and the trier of fact shall determine, concurrent with all other issues presented, whether such damages shall be allowed. If such damages are allowed, a separate proceeding shall be conducted to the court to determine the amount of such damages to be awarded.

(b) At a proceeding to determine the amount of exemplary or punitive damages to be awarded under this section, the court shall hear evidence of the financial condition of any party against whom such damages have been allowed. The court may also consider evidence presented at the initial trial, and any aggravating or mitigating circumstances. Such evidence may include the party's gross income but shall not include any such income for more than five years immediately before the act for which such damages under this section are awarded. At the conclusion of the proceeding, the court shall determine the amount of exemplary or punitive damages to be awarded, but not exceeding the amount provided by section (d), and shall enter judgment for that amount.

(c) In any civil tort action where claims for exemplary or punitive damages are included, the claimant shall have the burden of proving by clear and convincing evidence in the initial phase of the trial, that the party against whom such damages are sought acted toward the claimant with the intent to injure, fraud or malice.

(d) No award of exemplary or punitive damages shall exceed the lesser of (1) Twenty-five percent of the annual gross income earned by the party against whom the damages are awarded, as determined by the court based upon the party's highest gross annual income for any one of the five years immediately before the act for which such damages are awarded; or (2) three million dollars.

(e) If exemplary or punitive damages are awarded pursuant to this section, 50% of such damages recovered an collected shall be paid to the party awarded them and 50% shall be paid to the state treasurer for deposit in the state treasury and shall be credited to the state general fund.

(f) In no case shall exemplary or punitive damages be assessed pursuant to this section against: (1) A principal or employer for the acts of an agent or employee unless the questioned conduct was authorized or ratified by a person expressly empowered to do so on behalf of the principal or employer; or (2) an association, partnership or corporation for

the acts of a member, partner or shareholder unless such association, partnership or corporation authorized or ratified the questioned conduct.

(g) In any action seeking damages under this section, the State of Kansas shall not be permitted to intervene to request exemplary or punitive damages.

(h) The provisions of this section shall apply to all actions based upon a cause of action accruing on or after July 1, 1988.

Section 4. K.S.A. 60-3402 and K.S.A. 60-3404 and 1986 Kan. Sess. Laws Ch. 216, Section 1 are repealed.

Section 5. This act shall take effect and be in force from and after its publication in the statute book.

SUMMARY OF S.B. 264
(As Amended by the Senate Committee on Public Health and Welfare)

Senate Bill No. 264 permits an applicant or recipient of medical assistance who enters an institution or begins receiving home-and community-based services (HCBS) to divide the aggregate resources and income of the applicant/recipient and his or her spouse into separate shares. By doing so, only the separate resources and income of the applicant/recipient will then be considered for eligibility purposes.

Two written agreements between the spouses are required; one to divide their resources and one to divide their income. Both spouses or their personal representatives must sign the agreement and then formally carry out the division. In the case of resources, the division will be presumed to have been made at the time the agreement is filed with the agency so long as evidence of the completed division is provided within 90 days of the filing date. Additional time can be allotted for good cause.

The aggregate amount of income as well as the aggregate amount of exempt resources of the spouses shall be divided 50-50. For nonexempt resources, if the aggregate amount is less than $50,000, the applicant/recipient's spouse shall be allowed to gain ownership of up to $25,000 of the resources. If the aggregate amount is $50,000 or more, the resources shall be divided 50-50.

Divisions of resources which occur in accordance with this legislation shall not be considered under the Department's transfer of property provisions. In addition, the Department is prevented from recovering any amounts paid for future medical assistance or subrogating any future rights to medical support on behalf of the applicant/recipient from his or her spouse's resources. The Department may, however, establish, enforce, and foreclose liens on the real property of the recipient and his or her spouse for purposes of later recovery as authorized under federal statute.

For divisions of income, the applicant/recipient's spouse shall still have a duty to provide future medical support to the applicant/recipient if the spouse's share of the income exceeds $8,600/year. As a result, the Department is prevented from recovering future medical support from the applicant/recipient's spouse if his or her income is less than $8,600/year. If the income is greater than $8,600/year, the Department may only recover from that amount which exceeds $8,600. By the same token, the Department's subrogation rights are subject to the same limitations.

The Department must inform all qualified applicants and recipients of their right to divide resources and income under the provisions of the bill. The bill will take effect upon approval by the federal Department of Health and Human Services of the State's Medicaid State Plan implementing the provisions.

Attachment VII

COMPARISON OF DIVISION OF ASSETS/INCOME LEGISLATION

PROVISION	FEDERAL PROPOSALS		KANSAS PROPOSAL
	H.R. 2470	S. 1127	S.B. 264
I. Treatment of resources and income.	A. 1/2 of combined spousal resources are considered available to each spouse.	A. Same as H.R. 2470.	A. No provision. See item II below.
	B. Income received solely in name of community or institutional spouse considered available to that spouse only. Income received in name of both spouses shall be considered 1/2 available to each spouse.	B. Same as H.R. 2470.	B. See item II below.
II. Protected resources for community spouse.	A. The greater of $12,000 OR 1/2 of the combined resources of both spouses not to exceed $48,000.	A. Same as H.R. 2470.	A. If combined resources of spouses less than $50,000 , community spouse can have up to $25,000. If combined resources of spouses is $50,000 or more, community spouse can have 1/2 of total. No dollar limit.

PROVISION	FEDERAL PROPOSALS		KANSAS PROPOSAL
	H.R. 2470	S. 1127	S.B. 264
II. (Continued)	B. If a greater amount is awarded by a court in support order, that amount shall be protected.	B. If a greater amount is awarded by a court in a support order or awarded in a fair hearing, that amount shall be protected.	B. No provision.
	C. Protected resources must be actually transferred to name of community spouse.	C. Protected resources are not considered available to institutionalized spouse whether they have been transferred to community spouse or not.	C. Protected resources must be actually transferred to name of community spouse and such transfer must be evidenced by a written interspousal agreement.
	D. Resources are attributed at the time of institutionalization, not at time of application.	D. Same as H.R. 2470. In addition, couple can ask Medicaid agency to assess resources at the time of institutionalization for record keeping purposes.	D. Resources are attributed at the time the interspousal agreement is signed.

PROVISION	FEDERAL PROPOSALS		KANSAS PROPOSAL
	H.R. 2470	S. 1127	S.B. 264
II. (Continued)	E. After eligibility determination, no resources of community spouse are deemed to institutionalized spouse.	E. Same as H.R. 2470.	E. Same as H.R. 2470. However, Department has recommended that only those resources received by the community spouse through the division be considered not available. Resources later obtained by the community spouse could then be considered for future medical support.
	F. No provision.	F. Resources needed to generate protected income (per item II) are exempt and would not be divided.	F. No provision.

PROVISION	FEDERAL PROPOSALS		KANSAS PROPOSAL
	H.R. 2470	S. 1127	S.B. 264
III. **Protected income for community spouse.**	A. 150% of federal poverty level for 2 persons ($925 in 1987). PLUS excess shelter allowance PLUS 1/2 of remaining income of institutionalized spouse. Formula capped at $1500.	A. 122% of federal poverty level for 2 persons ($750 in 1987). PLUS excess shelter allowance Formula capped at $1500.	A. Up to $8600/yr. ($717/mo.) based on equal split of combined income (cap based on LIEAP income standard for 1 person in 1987 which exceeded 150% of federal poverty level). NOTE: Current LIEAP standards are $9704/yr. ($808/mo.) for 1 person and $12,692/yr. ($1075/mo.) for 2 persons. Both standards are in excess of 150% of 1987 federal poverty level.
	B. If greater amount awarded in a fair hearing upon showing financial duress or awarded by a court in a support order, this amount would be protected instead.	B. Same as H.R. 2470.	B. No provision.

PROVISION	FEDERAL PROPOSALS H.R. 2470	FEDERAL PROPOSALS S. 1127	KANSAS PROPOSAL S.B. 264
III. (C. Continued)	C. No income deemed from community spouse from date of institutionalization.	C. Same as H.R. 2470.	C. Medicaid income deeming rules applied--combined spousal income considered for month of entrance. Thereafter, only the institutionalized spouse's share of the income is considered. Income of the community spouse exceeding $8600 considered available for future medical assistance paid on behalf of institutional spouse.
	D. Community spouse may elect to use State rules in effect on March 1, 1987 if they are more beneficial to him/her.	D. No provision.	D. No provision.
	E. No provision.	E. No provision.	E. Income division must be evidenced by a written interspousal agreement.
IV. Transfer of Property	A. States must penalize transfers of assets of institutionalized persons for less than fair market value.	A. Same as H.R. 2470.	A. No provision. However, State has current transfer provision.

PROVISION	FEDERAL PROPOSALS		KANSAS PROPOSAL
	H.R. 2470	S. 1127	S.B. 264
IV. (Continued)	B. Transfers can affect eligibillity for up to 24 months. Ineligibility related to uncompensated value and cost of institutional care.	B. Same as H.R. 2470 except transfers can affect eligibility up to 26 months.	B. If uncompensated value is less than $12,000, transfer can affect eligibility for up to 24 months. If uncompen- value is $12,000 or more, transfer can affect eligibility for up to 60 months.
	C. Transfer of houses to spouse or dependent or disabled child excluded.	C. Same as H.R. 2470. In addition, transfer of house to sibling with interest or caretaker child also excluded.	C. Transfer of nonexempt home for less than fair market value can affect eligibility per above provision.

SUMMARY OF SHL RESOLUTION NO. 403

SHL 403 encourages enactment of 1987 S.B. 264 which deals with the division of spouses income and resources for purposes of determining medical assistance eligibility.

As drafted, S.B. 264 would enact new law which would permit spouses to divide resources and income and yet not affect Medicaid eligibility. The main elements of the bill include the following:

I. Division of nonexempt resources

A. Nonexempt resources valued at less than $50,000.

1. Resources of less than $25,000. Well spouse owns all.

Example: Resources valued at $21,000. Community spouse would own the entire resource.

2. Resources worth more than $25,000 but less than $50,000.

Example: Resources valued at $35,000.

a. Community spouse would own resources worth $25,000.

b. Sick spouse would own resources worth $10,000.

B. Nonexempt resources valued at $50,000 or more.

1. Community spouse would own one-half.

Example: Resources valued at $80,000.

a. Community spouse would own resources valued at $40,000.

b. Sick spouse would own resources valued at $40,000.

II. Division of nonexempt income under S.B. 264. Aggregate income of both the sick spouse and the well spouse may be divided into separate equal shares.

A. All income of the sick spouse would be subject to consideration in determining medical eligibility.

Attachment VIII

B. Income of the well spouse would be subject to recovery by Social and Rehabilitation Services to the extent that the well spouse's annual income exceeds $8,600.

Example:

a. Well spouse's annual income is $7,000. The well spouse would be able to keep the entire income.

b. Well spouse's annual income is $10,000. Recovery would be possible for $1,400, the difference between the exempt amount ($8,600) and the amount of income ($10,000).

In addition, the bill would provide the following:

1. Upon application, SRS will give notice of the right to divide resources, income, or both.

2. In the instance of a division of resources, and not income, the state could recoup the cost, after the death of the spouse who received Medicaid, by imposing a lien against the property of the applicant spouse and the surviving spouse.

3. A division of resources can be done only once.

S.B. 264 was referred to the Senate Committee on Public Health and Welfare where various technical amendments were made. However, one such amendment would delay the effectiveness of the bill until the state plan for medical assistance has been revised to reflect provisions of S.B. 264 and the revision has been approved by the federal Department of Health and Human Services.

After the bill passed out of the Senate, it was ultimately referred to the House Committee on Judiciary, where it is presently.

AA86-251.403

MEMORANDUM

March 30, 1987

TO: House Judiciary Committee

FROM: Kansas Legislative Research Department

RE: Division of Resources and Income According to Senate Bill No. 264

Introduction

S.B. 264 deals with the spousal division of only nonexempt resources and income in determining eligibility for medical assistance. Examples of exempt property include the following:

Real Property Exemptions

-- The home, defined as the "tract of land upon which the house or other improvement, essential to the use or enjoyment of the home are located and contiguous real property."

Personal Property Exemptions

Totally exempt personal property items are:

-- personal effects
-- one vehicle (per family)
-- life insurance with a face value less than $1,500
-- burial plots and vaults (normal burial)
-- revocable burial funds up to $1,500
-- irrevocable burial trusts
-- retroactive social security benefits (for the six months following receipt)

Partially exempt personal property includes:

-- the cash proceeds from the sale of home held to purchase a new home exempt for six months

-- the equity value of income producing property other than cash if the equity value does not exceed $6,000 and a net annual return of 6 percent is realized

Attachment IX

Income Exemptions

-- $25.00 personal monthly allowance for the sick spouse
-- interest
-- minimum income amounts, primarily for sheltered workshop employees
-- $341.00 monthly income for the well spouse

I. Division of nonexempt resources under S.B. 264.

A. Nonexempt resources valued at less than $50,000.

1. Resources of less than $25,000. Well spouse owns all.

Example: Resources valued at $21,000. Well spouse would own the entire resource.

2. Resources worth more than $25,000 but less than $50,000.

Example: Resources valued at $35,000.

a. Well spouse would own resources worth $25,000.

b. Sick spouse would own resources worth $10,000.

B. Nonexempt resources valued at $50,000 or more.

1. Well spouse would own one-half.

Example: Resources valued at $80,000.

a. Well spouse would own resources valued at $40,000.

b. Sick spouse would own resources valued at $40,000.

II. Division of nonexempt income under S.B. 264. Aggregate income of both the sick spouse and the well spouse may be divided into separate equal shares.

A. All income of the sick spouse would be subject to consideration in determining medical eligibility.

B. Income of the well spouse would be subject to recovery by Social and Rehabilitation Services to the extent that the well spouse's annual income exceeds $8,600.

Example:

a. Well spouses's annual income is $7,000. The well spouse would be able to keep the entire amount.

b. Well spouse's annual income is $10,000. Recovery would be possible for $1,400, the difference between the exempt amount ($8,600) and the amount of income ($10,000).

PROPOSED AMENDMENT TO S.B. 264
(As Amended by Senate Committee)

On page 6, by striking lines 206 through 210;

On page 8, by striking lines 285 through 289 and inserting:

New Sec. 4. (a) No provision of this act shall be considered to be in conflict with any federal statute or regulation until after a final determination by the secretary of the United States department of health and human services finding such a conflict.

(b) If the secretary of the United States department of health and human services makes an initial determination that any provision of this act is in conflict with any federal statute or regulation, the secretary of social and rehabilitation services shall take all available and necessary steps to obtain a final determination reversing that decision. If a final determination is made that this act conflicts with federal law, the secretary of social and rehabilitation services shall immediately request that the attorney general seek judicial review of the determination and shall immediately notify the appropriate policy and fiscal committees of the legislature."

By renumbering sections 4 through 8 as sections 5 through 9

Attachment X

TESTIMONY OF PATRICK H. DONAHUE
BEFORE THE HOUSE JUDICIARY COMMITTEE
ON SB-264 "DIVISION OF ASSETS"

January 20, 1988

My name is Pat Donahue. I am the Kansas Legal Services, Inc., coordinator of Senior Citizens Law Projects. My appearance here is at the request of the Committee as a follow-up to the testimony I gave before this committee on March 30, 1987, during the last session of the legislature. The purpose of my testimony is to: (1) advise the committee on the present federal "division of assets" initiatives; (2) explain the U.S. 9th Circuit Court of Appeals' decisions upholding the rights of medicaid states to permit spouses to divide income; and (3) review the issues which remained unresolved at the end of the last session.

CONGRESSIONAL PROPOSALS

In 1987 both the U.S. House and Senate passed separate pieces of umbrella legislation designed to provide protection from the financial impact of catastrophic illness. The House version is HR 2470, which passed July 22, 1987. The Senate version is S 1127, which passed October 27, 1987. Each of these bills contains special division of assets medicaid language designed to prevent spousal impoverishment. A side-by-side summary of the key features of the two proposals compared to the Kansas' SB-264 is as follows:

HR 2470	S 1127	SB 264
- ASSETS -		
Well spouse returns greater of first $12,000 or one-half of non-exempt resources up to $48,000 cap.	Same as HR 2470	Well spouse retains greater of first $25,000 or 1/2 of total resources.
- INCOME -		
Well-spouse retains first $925/month plus extra housing allowance up to a maximum of $1500/month plus family allowance plus 1/2 of remaining income if any.	Well-spouse retains first $750/month plus extra housing allowance up to a maximum of $1200 or greater amount determined under state law plus family allowance.	Well-spouse retains first $717/month, no extra housing allowance, no family allowance.

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HR 2470	S 1127	SB 264
- COST OF LIVING ADJUSTMENT -		
Income increases with OMB poverty guidelines. Asset limits indexed to CPI.	Same as HR 2470.	No provision.
- ASSET/INCOME CONVERSION -		
No provision.	Well-spouse can ask for fair hearing to keep extra assets necessary to bring income up to adequate level.	No provision.
- COURT ORDERED SUPPORT -		
Court ordered support obligation of either spouse is not considered available income.	Same as HR 2470.	No provision.
- RECAPTURE -		
No provision. (Already permitted under existing medicaid statute.)	Same as HR 2470.	Lien on excess income, recover cost of care as 4th class claim against estate.

Both congressional proposals must now go to conference committee. The conferees have been named. Congress will reconvene with the State-of-the-Union address on January 25, 1988. Conference is expected to begin in early to mid-February. Assuming approval of the conference report, a bill could be passed into law and signed by the President as early as late spring - early summer 1988.

JUDICIAL DECISIONS

A number of states have amended their medicaid plans to provide for a division of assets ~~and~~ or income. These states include Washington, California, Minnesota, Colorado, Illinois, Indiana, New York, and Maryland.

As expected, HHS disapproved the first of these plan amendments. This forced Washington and California to seek judicial review of the disapprovals by appealing to the U.S. Circuit Court of Appeals for the 9th Circuit under the process outlined in the medicaid statute. In each case, HHS challenged only the division of income provisions, not the division of assets provision. Both of these cases were decided in favor of the states as follows:

Washington v. Bowen, 815 F.2d 549 (9th Cir. 1987)

Court upheld Washington plan which considered each spouse to own one-half of aggregate marital income regardless of name on check. The court rejected the HHS argument that state control over family property was preempted by the federal medicaid law. The court stated "(f)amily and property law for good reason are the provence of state law." The court also noted that Washington's plan "did no major damage to clear and substantial federal interests" and found the HHS decision to disapprove Washington's plan "arbitrary, capricious, and an abuse of discretion."

Department of Health Services of California v. Secretary of HHS, 823 F.2d 323 (9th Cir. 1987)

Court upheld two California medicaid plan amendments. These amendments permitted California to use community property law to determine medicaid eligibility and to treat court ordered child support payments as "unavailable" income to medicaid recipients. The California plan, except for the child support provision, was almost the same as the Washington plan. The court approved the application community property law on the basis of its earlier decision in Washington v. Bowen. On the child support issue, HHS argued that since congress had not expressly authorized states to exclude child support payments from income in either the SSI or the medicaid laws, the states could not do so. The court noted the cooperative state/federal nature of medicaid and ruled that income used to pay court-ordered child support or alimony could not be used to reduce a recipients medicaid benefits.

STATUS OF SB-264 AT END OF 1987 SESSION

At the end of the 1987 session several technical and substantive amendments were brought forward. The substantive amendments included:

1. extending the bill's coverage to include both nursing home care and home and community based care (for those who receive assistance in staying in their own homes).

2. requiring SRS to seek HCFA approval for the division of asset plan amendment within 30 days of the effective date of the act.

3. directing SRS and the Attorney General to defend the act against HHS/HCFA disapproval in court.

4. prevent any interpretation of the act which would result in the act being in conflict with federal law/regulation until a final determination finding a conflict has been made to competent federal authority.

A cap on the asset transfer portion of the act was discussed but it did not appear as a formal amendment to the division of assets bill.

OTHER MATTERS

In light of the federal initiatives on division of assets, I believe that Kansas should consider:

- adopting a statutory architecture congruent with the two federal proposals.

- language which will permit SB 264 to operate "unless preempted or replaced by express provisions of the federal medicaid statues which are applicable to Kansas or unless found to conflict with federal law after judicial review."

- indexing the income and asset limits to cost-of-living.

- excluding court ordered support from consideration as "income" by either spouse.

- make provision for effecting division where institutionalized spouse is incapacitated.

This concludes my testimony. Thank you for your invitation to appear today.

Medicaid and Long-Term Institutional Care For The Victims of Catastrophic Disabling Illness

By Patrick H. Donahue

With increasing frequency estate planners are being asked to address their client's concerns about financing the prolonged nursing home care of some family member with a catastrophic disabling illness. Today, there are about 18,000 Kansans who reside permanently in nursing homes.[1] Over half of these, approximately 11,000 persons, require a Medicaid subsidy to pay for their residency and care.[2] Of these 11,000 persons needing assistance about 75% were able to pay their own way when they first entered the nursing home. Facts like these suggest that prolonged institutionalization can be the undoing of a cleverly crafted estate plan. As a practical matter, Medicaid is the only source of help available for persons without sufficient life savings to support an indefinite stay in a nursing home. Although some long-term care insurance plans have appeared on the market, most of these plans are not adequately comprehensive to help those who are presently at risk. Medicare is no remedy since it only provides short-term transitional coverage after a period of hospitalization.[3] To counsel older clients and their families effectively, it is essential to understand the basics of Medicaid.

At the outset it is important to recognize the distinction between **Medicare** and **Medicaid**. For our purposes here, a brief outline of Medicare will be sufficient.[4] Medicare is federally sponsored **health insurance**. It is the health care component of Social Security. In general, one who can receive Social Security can participate in Medicare. Medicare has two parts: **Part A** covers hospital expenses and **Part B** covers medical bills. Part A is pre-funded through Social Security payroll deductions but Part B is voluntary and requires enrollees to pay a monthly premium of $17.90 (for 1987) which is generally deducted from the Social Security check.

Medicaid, unlike Medicare, is a welfare program. To remember the distinction between Medicaid and Medicare you can use the mnemonic device Medic-AID. The suffix AID indicates welfare. Recipients of Medicaid must establish eligibility based upon financial and medical need. Many persons are eligible for both Medicare and Medicaid. In such cases Medicaid only covers expenses not paid by Medicare.

How Medicaid Works

Medicaid is a component of the federal social security law.[5] Under this law, the federal government makes grants to the states to provide medical assistance to the needy. States are reimbursed quarterly by federal grants-in-aid according to a formula for "federal financial participation." Federal financial participation is dependent upon the state's **per capita** income and ranges from not less than 50 nor more than 83 percent of program cost.[6] Presently, the respective federal and state contribution percentages are roughly 50% each.[7]

At the federal level, Medicaid is administered by the Health Care Financing Administration (HCFA) of the U.S. Department of Health and Human Services (HHS). HCFA issues regulations which appear in **42 C.F.R. §430 et seq.** and in policy and procedure manuals for HCFA staff use.

The Medicaid law requires states to establish a comprehensive state plan for providing medical assistance which designates a single state agency that will be responsible for administration of the Medicaid program in the state. The state plan must meet the federal requirements and be approved by the Secretary of HHS.[8] The designated state agency in Kansas is the State Department of Social and

FOOTNOTES

1. **Adult Care Home Annual Statistics**, Kansas Department of Health and Environment, Office of Information Systems and Computing. On December 31, 1985 there were 17,717 nursing home residents in Kansas.

2. **Kansas Medical Assistance Statistical Report**, Kansas Department of Social and Rehabilitation Services, p. 17 (December 15, 1986). Nursing home Medicaid recipients ranged from 10,662 to 11,198 between July and December, 1986.

3. The Medicare hospital insurance component (Part A) covers up to 100 days of extended care in a skilled nursing facility (SNF) per Medicare benefit period in cases when a doctor has transferred a patient from a hospital to an SNF for extended post hospital rehabilitation. There is not Medicare coverage for long-term custodial care in an intermediate care facility (ICF). An ICF is the technical jargon for what is commonly known as a "nursing home."

4. Title XVIII of the Social Security Act, (Health Insurance for Aged and Disabled), 42 U.S.C.A. §1395; 42 C.F.R. §405 et seq.

5. Title XIX of the Social Security Act, "Grants to States for Medical Assistance Programs," 42 U.S.C.A. §1396a et seq.

6. 42 U.S.C.A. §1396b(a), 42 U.S.C.A. §1396d(b).

7. **51 Fed. Reg. 39,915 (1986)**. The federal share set by HHS beginning October 1, 1986 was 51.39%.

8. 42 U.S.C.A. §1396a, 42 C.F.R. §431.10 et seq.

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Rehabilitation Services (SRS).[9] The State issues state Medicaid Regulations which appear in the Kansas Administrative regulations and publishes manuals for field use. Within SRS, Medicaid is under the jurisdiction of the Commissioner of Income Maintenance and Medical Services.[10] Changes in the state Medicaid program are implemented by documents called Commissioner's Letters. Practitioners dealing with Medicaid problems will need to familiarize themselves with the federal law **42 U.S.C.A. §1396(d)**, the federal regulations[11] **42 C.F.R. §430 et seq.**, the state administrative regulations and **The Kansas Public Assistance Manual (K.P.A.M.)**. The K.P.A.M. is the field manual used by the SRS social workers for day-to-day guidance in program operation. The K.P.A.M. is available for review at the local SRS office or a copy can be purchased from SRS.

Medicaid recipients do not receive direct cash awards to pay for their medical needs. Instead, the health care provider is directly reimbursed by SRS for giving care to each Medicaid recipient. To receive payment for treating Medicaid patients, health care providers must voluntarily elect to participate in the Medicaid program. Participation requires the provider to meet certain conditions and enter into an agreement with SRS.[12] Medicaid participation requires acceptance of HCFA regulated Medicaid reimbursement rates. Reimbursement rates will often fall below the rates the same provider customarily charges its patients who are not receiving Medicaid. Private pay nursing home care in Kansas in 1985 cost from $25.37 to $49.41 per day.[13] The average 1986 Medicaid reimbursement rate for nursing home care was $32.70 per patient per day.[14]

Medicaid payments in Kansas are substantial. Last year (FY-86) SRS reported spending $235,202,515 or 35.82% of its entire budget on Medicaid. Nursing homes were the biggest expense category costing $101,501,153 or 42.56% of the total state Medicaid expense. The other major expense categories were hospitals which by comparison received $53,630,856 (24.48%); physicians, $23,511,282 (9.86%), and prescription drugs, $20,697,227 (8.68%).[15] Average expenditures per Medicaid nursing home patient in FY-86 were $703.93 per month.[16]

Covered Services

The federal Medicaid law establishes certain mandatory health care services which must be provided to qualified needy persons. These **mandatory services** are:[17]

- Inpatient hospital services;
- Outpatient hospital services;
- Rural health clinic services;
- Other laboratory and X-ray services;
- Skilled nursing facility services and home health services for individuals 21 and older;
- Early and periodic screening, diagnosis and treatment for individuals under 21;
- Family planning; and
- Physician services.

After a state has fulfilled its mandatory service requirements it can elect to provide optional medical services and the federal government will help support the cost of the optional services according to the federal financial participation formula. In Kansas there are 24 optional services. The current optional services are:[18]

- Podiatrists' services
- Optometrists' services
- Chiropractors' services
- Other practitioners' services
- Clinic services
- Dental services
- Physical therapy
- Occupational therapy
- Speech, hearing & language disorder therapy
- Prescribed drugs
- Dentures
- Prosthetic devices
- Eyeglasses
- Rehabilitative services
- **Intermediate care facility (ICF) i.e. (nursing home services)**
- Inpatient hospital for 65 + with TB
- ICF for 65 + with TB
- Inpatient hospital for mentally ill
- ICF for 65 + for mentally ill
- ICF for mentally retarded
- Inpatient psychiatric service for under age 22
- SNF for under age 21
- Emergency hospital services
- Personal care services

Note that nursing home care (intermediate care) is an **optional** not a mandatory service.

Eligibility Requirements

To be eligible for Medicaid an individual must be a citizen of the United States or a person who resides here "under color of law."[19] A Kansas applicant must be a Kansas resident who is not receiving assistance from another state.[20] An application is required and it can be submitted by any person authorized to act on behalf of the applicant.[21] To qualify for assistance an applicant must be either **categorically needy** or **medically needy.** Eligibility determinations are made within 45 days of the application (60 days if a determination of disability is required).[22] The eligibility determinations are based upon information provided by the applicant,[23] and the applicant has the duty both to release information and to report changes in circumstances

9. K.S.A. 39-708c.
10. K.S.A. 75-5306d et seq.
11. K.A.R. 30-5-58 et seq.; K.A.R. 30-10-1 et seq.
12. K.A.R. 30-5-58 et seq., K.A.R. 30-5-59.
13. Performance Audit Report: Private Pay Rates for Adult Care Homes (Appendix A) Report of Legislative Post Audit Committee, State of Kansas, Legislative Division of Post Audit (July 1986).
14. Post Payment Reports, State Department of Social and Rehabilitation Services, Adult Care Home Reimbursement Section, (unpublished reports for 1986). After October 1, 1986 the maximum is $34.97 per patient day. Reimbursement rates are dependent on nursing home operation costs.
15. 1986 SRS Annual Report, pp. 98, 114.
16. SRS "Kansas Medical Assistance Statistical Report, December 15, 1986, p. 17.
17. 42 U.S.C.A. §1396 a(a)(10); 42 U.S.C.A. §1396 d(a)(1), (2), (3), (4), (5) and (17).
18. U.S. Dept. of Health and Human Services, HCFA Pub. No. 02155-86 (October 1, 1985). Note, a SNF is a skilled nursing facility and an ICF is an intermediate care facility (nursing home).
19. 42 C.F.R. §435.402; K.A.R. 30-6-54; K.P.A.M. Sec. 2170 Rev. No. 9.
20. K.A.R. 30-6-54(c); K.S.A. 39-709(c) and (f).
21. K.A.R. 30-6-35(b).
22. K.A.R. 30-6-35(d).
23. K.A.R. 30-6-36.
24. K.A.R. 30-6-39. Changes must be reported in 10 days.
25. K.A.R. 30-4-140(d).
26. K.A.R. 30-4-140(c).

affecting eligibility.[24] A recipient can become ineligible for Medicaid as a penalty for an act or omission which contravenes the Medicaid rules.[25] Applications are not granted during the ineligibility periods. When a recipient receives benefits in error an **overpayment** is created.[26] Eligibility terminates until the condition causing the overpayment has been cured. To safeguard against inappropriate use of Medicaid, SRS is required to conduct periodic redeterminations of financial eligibility,[27] and to conduct initial and periodic on-going reviews to ensure that the utilization of Medicaid by each recipient is medically necessary.[28]

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Categorically Needy and Medically Needy Eligibility

There are two ways to become eligible for Medicaid. An applicant can qualify by being either **categorically needy**[29] or by being **medically needy**. The **categorically needy** are blind, aged, disabled or poor persons who become automatically eligible for Medicaid as an extension of meeting the requirements for federal welfare provided by the SSI[30] or AFDC[31] programs. The **medically needy**[32] are defined to be persons who are not categorically needy but nevertheless either (1) meet the income and resource (asset) requirements of SSI or (2) are persons who meet the SSI resource test and have medical expenses at least equal to the difference between total income and the SSI income level.[33] Mildly oversimplified, the medically needy are persons who simply don't have the income, assets or insurance to pay their regular medical expenses. Most nursing home residents seeking Medicaid fall into the **medically needy** category and most entered the nursing home paying their own way before their resources were consumed by the cost of prolonged custodial care.

Financial Eligibility

Both categorically needy and medically needy persons must pass a two-part financial eligibility test. The categorically needy must pass a **resource** and an **income** test. The medically needy must pass a **resource** test and meet a **spenddown** requirement. The resource tests for both groups are generally the same. However, the **income** test and **spenddown** requirement operate differently. The spenddown requirement functions as a substitute for a strict income threshold. The resource limit for both the categorically needy and the medically needy is presently $1,800 in non-exempt resources for single person and $2,700 for a married couple (where both are seeking assistance).[34] For the **categorically needy** the income levels are those established by either the SSI or the AFDC regulations. A discussion of these somewhat involved income standards is beyond the scope of this article.

Spenddown

It is impractical to define financial eligibility for medically needy applicants in terms of some specific income threshold. By definition, the medically needy person always has an income which always falls short of meeting medical expenses. To insure that the expense-greater-than-income relationship exists, Kansas defines medically needy eligibility in terms of an amount the applicant must spend out-of-pocket on his or her own care before any assistance will be provided. This amount is called the **spenddown.** In SRS language "spenddown means the amount of applicable income that exceeds the protected income level in the eligibility base period that is available to the applicant to meet medical costs."[35] Medicaid recipients with a spenddown requirement receive a formal **Spenddown Notice** from SRS.[36] This notice will specify the amount of spenddown that the recipient must pay to remain eligible.

In SRS language "spenddown means the amount of applicable income that exceeds the protected income level in the eligibility base period that is available to the applicant to meet medical costs."

The "protected income level" refers to an exempt $25 per month for personal needs for nursing home residents.[37] All other income must be spent on nursing home bills and other necessary medical expenses. The "eligibility base period" for long-term care Medicaid recipients is one month but for most other Medicaid recipients the period is six months.[38] To apply a medical bill toward the spenddown requirement the bill need only to have been incurred within the accounting period — it need not have been paid.[39] Allowable expenses for spenddown include: long-term care bills; medical insurance premiums; Medicare Part B premiums and all expenses for medical services "paid or incurred."[40]

27. 42 C.F.R. §435.916, K.A.R. 30-4-36, K.A.R. 30-4-40(b)(1).
28. 42 C.F.R. §456.60, 42 C.F.R. §456.21.
29. 42 U.S.C.A. §1396a(a)(10)(A)(i); 42 C.F.R. §435.100.
30. SSI "Supplemental Security Income," 42 U.S.C.A. §1381 et seq., Title XVI of the Social Security Act.
31. AFDC "Aid to Families with Dependent Children" 42 U.S.C.A. §601 et seq., Title IV-A of the Social Security Act.
32. 42 U.S.C.A. §1396a(a)(10)(A)(ii); 42 C.F.R. §435.300.
33. 42 C.F.R. §435.301(a)(1) and (2).
34. This is the SSI limit. See 42 U.S.C.A. §1382(a)(1)(B).
35. K.A.R. 30-6-53(a)(2).
36. SRS Form PA 3106.4.
37. 42 C.F.R. §435.725.
38. K.A.R. 30-6-53(a)(1) and (b).
39. K.A.R. 30-6-53(d)(4); K.P.A.M. Sec. 3491 Rev. No. 11. Note: The bill is not considered spenddown if it is paid by some third-party obligor rather than the applicant. K.P.A.M. Sec. 3491 Rev. No. 11, K.A.R. 30-6-53(c).
40. K.P.A.M. Sec. 3491.2 Rev. No. 11.

Income Measurement

Although medically needy eligibility is stated in terms of a spenddown requirement rather than an income limit, income must be measured to compute the spenddown requirement. There are several interesting aspects of income measurement which merit attention. First, it is important to note that SRS computes the spenddown requirement based on prospective budgets of the applicant. Thus, the spenddown requirement is established upon future expected income rather than actual income.[41] Both earned and unearned income is considered applicable income.[42] Lump sum payments and intermittent income will normally be considered income in the eligibility base period in which they were received.[43] If these payments are not expensed in the same eligibility base period in which they were received, then any portion of the payment that remains on hand at the end of the period will be considered a resource rather than income in the next period.[44] Self-employment income (gross less production expense) is averaged over the prospective benefit eligibility period.[45]

Resources (Assets)

As previously noted, Medicaid permits the ownership of non-exempt real or personal property with an aggregate resource value not in excess of $1,800 for a single recipient and not exceeding $2,700 for two or more persons receiving assistance under a single medical assistance plan. The most frequently encountered Medicaid eligibility problem for persons seeking assistance with long-term care is the problem of excess resources. Spenddown, on the other hand, is rarely a problem because it is relatively easy to have nursing home and medical bills which exceed income.

Resource "Deeming" (Relative Responsibility)

Medicaid eligibility rules require the state to consider the financial responsibility of relatives.[46] This requirement means that SRS must consider the income and resources of the marriage partners to be available to each other. In addition SRS may consider resources to be available between the spouses even if they are not contributed in fact.[47] This process is called "deeming" since the resources of one family member are deemed to be available to the other.[48] Kansas Medicaid implements deeming by requiring that the combined assets of both spouses be reviewed in aggregate regardless of whether one or both apply for assistance.[49] As long as the husband and wife live together their aggragate resources are deemed to be available to each spouse individually, regardless of actual ownership.[50] The extension of financial responsibility to relatives stops with the parents (of children under 21 or blind and disabled adults) and with spouses.[51] The automatic deeming of resources between spouses stops when the husband and wife are no longer living together — a condition which is fulfilled when one or both spouses enter an institution and reside there one month.[52]

Real Estate Exemptions

The chief object of exempt real estate is the home. The home is exempt from consideration as a resource if the applicant is living in the home or only temporarily absent. There is no time limit on the exemption as long as the applicant has signed a Statement of Intent to Return Home. The applicant's Statement of Intent to Return Home is not challenged unless it is clearly contradicted by the applicant's action. Where it is clear that the applicant has no intent to return home, the home remains exempt for three months after the owner enters long-term care.[53] The home will be exempt indefinitely if it is occupied by any person who is a "dependent member of the [applicant's] immediate family." The regulation says the "dependency may be of any kind (e.g. financial or medical, etc.)."[54] When a home is no longer exempt it becomes "other real property." By definition "other real property" is a resource. The definition of "home" for Medicaid purposes is somewhat unusual. The home includes the "tract of land upon which the house or other improvement, essential to the use or enjoyment of the home is located, and contiguous real property." The total acreage comprising the home for medically needy Medicaid applicants is not defined.[55] The home is exempt regardless of value.[56] In addition to the home, income producing property with a combined equity value not exceeding $6,000 and which provides a return of at least 6% per annum is also exempt.[57]

Personal Property Exemptions

Some personal property is totally exempt from the eligibility determination while other personal property is only partially exempt.

Totally exempt personal property items are:[58]

- personal effects,
- one vehicle per family,
- life insurance with a face value less than $1,500,[59]
- burial plots and vaults (normal burial),
- revocable burial funds up to $1,500,

41. K.A.R. 30-4-110(c)(1); K.P.A.M. Sec. 3461 Rev. No. 3.
42. K.A.R. 30-6-110(a).
43. K.A.R. 30-6-110(b)(2); K.P.A.M. Sec. 3413, 3414 Rev. No. 13; However, the same property can't be considered both as income and a resource in the same month. K.A.R. 30-6-106(e). It should also be noted that in the "long-term care situation, the payment shall be considered as income in the month following the month of receipt due to Field Payments and/or timely notice requirements. Medical services eligible for payment prior to the counting of a lump sum payment are not considered overpayment." K.P.A.M. SEc. 3414 Rev. No. 3.
44. K.A.R. 30-6-110(b).
45. K.A.R. 30-6-111(3); K.A.R. 30-6-110(b)(1).
46. 42 C.F.R. §435.845(a).
47. 42 C.F.R. §435.822(b).
48. The deeming practice was upheld in Schweiker v. Gray Panthers, 453 U.S. 34, 101 S.Ct. 2633, 69 L. Ed.2d 460 (1981).
49. K.P.A.M. Sec. 3200(7) Rev. No. 12.
50. K.A.R. 30-6-106(f). The combined resources of husband and wife, if they are living together, shall be considered in determining eligibility of either or both for the medical assistance program, unless otherwise prohibited by law. A husband and wife shall be considered to be living together if they are regularly residing in the same household. Temporary absences of either the husband or the wife for education or training, working, securing medical treatment or visiting shall not be considered to interrupt the couple's living together. A husband and wife shall not be considered as living together when they are physically separated and not maintaining a common life, or when one or both enter into a care situation, whether or not the facility is Medicaid approved. Despite the above provision, if both spouses are eligible and are applicants or recipients and one or both enter a care situation, their resources shall be considered to be available to each other for the first six months following the month of entry into the care situation.
51. 42 U.S.C.A. §1396a(a)(17)(D); 42 C.F.R. §435.821.
52. Id., K.P.A.M. Sec. 3200(10) Rev. No. 15 provides that where only one spouse is receiving assistance the combined resources of the husband and wife are considered only for the month in which the care arrangement begins. Thereafter, only those resources in which the recipient has an ownership interest shall be considered in the eligibility determination. If both spouses are recipients in the 7th month after care begins only the pro rata share of jointly owned resources is considered.
53. K.A.R. 30-6-108(a)(4); K.P.A.M. Sec. 3214(1) Rev. No. 15.
54. Id. Immediate family dependents include the individual's children, grandchildren, stepchildren, in-laws, parents, stepparents, grandparents, aunts, uncles, siblings, stepsiblings, half-siblings, nieces, nephews, and cousins of any degree.
55. K.A.R. 30-6-108(a)(1), K.P.A.M. Sec. 3213 Rev. No. 12.
56. K.P.A.M. Sec. 3213, Rev. No. 12.
57. K.A.R. 30-6-108(c).
58. K.A.R. 30-6-109, K.P.A.M. Sec. 3222 Rev. No. 12.
59. When a life insurance policy has a face value over $1,500 the total cash surrender value of the policy counts as a resource. K.A.R. 30-6-109(c)(12); K.P.A.M. Sec. 3222(3); Rev. No. 12 In re: K. SRS No. 83-AH-275 MA, August 30, 1983.

• irrevocable burial trusts, and
• retroactive social security benefits (for the six months following receipt),

Partially exempt personal property includes:
• the cash proceeds from the sale of home held to purchase a new home exempt for 3 months,[60] and
• the equity value of income producing property other than cash if the equity value does not exceed $6,000 and a net annual return of six percent is realized.[61]

Resource Availability

Most long-term care Medicaid denials occur when SRS finds that the applicant has excess[62] available resources. The matter of resource "availability" can be confusing since "availability" is broadly defined and is not entirely a matter of ownership. To be considered as an available resource, the applicant must have a legal interest in the property and the legal ability to make it available.[63] It is not necessary for property to be liquid before it is counted as an available resource. Ownership is determined by legal title, or absent title, then by possession.[64] The resource value is the value of the applicant's equity interest.[65] Notwithstanding these rules, SRS income maintenance workers (Medicaid qualification personnel) may consider resources to be technically available even though the applicant has little real control over the property involved. For example, SRS may find that the entire corpus of a trust is "available" to the applicant even though the applicant's interest in the trust property is only an equitable life interest in income. Similarly, the state agency has taken the position that all of the money in a joint account was available to a "for convenience only" joint tenant who neither contributed to nor exercised control over the account.

SRS income maintenance workers (Medicaid qualification personnel) may consider resources to be technically available even though the applicant has little real control over the property involved.

Kansas' Medicaid rules do create some well defined, narrow exceptions which permit benefits to be paid even though the applicant has excess resources. In these situations, the resources are considered technically unavailable. The first exception is the legal impediment exception. The SRS rule in its present form states at K.P.A.M. Sec. 3200(3) Rev. 15:

However, a resource shall be considered unavailable when there is a legal impediment that precludes the disposal of the resource. Examples of legal impediments would include property which is inaccessible pending the disposition of divorce proceedings, jointly owned property which cannot be disposed of due to the refusal of the other owners to agree to a sale, or inability to obtain clear title. The applicant or recipient shall pursue reasonable steps to overcome the legal impediment unless it is determined that the cost of pursuing legal action would be more than the applicant or recipient would gain or the likelihood of succeeding in the legal action would be unfavorable to the applicant or recipient. There is no time limitation in regards to efforts made to overcome a legal impediment and the property shall be regarded as unavailable throughout this period. If the impediment cannot be resolved, the property shall be exempted without requiring the legal action. If the impediment is overcome, the property would be considered in determining eligibility unless the client begins to make a bona fide effort to dispose of the property as noted below.

To take advantage of the exception, SRS requires that the applicant makes an ongoing bona fide, documented effort to dispose of the excess property.[66] Another exception is a grace period allowed for the disposal of an applicant's home. The home is exempt from consideration as a resource for three months regardless of whether a dependent continues to live in it. After this three-month period expires, the nine-month bona fide-effort-to-dispose rule applies. The combination of home exemptions means that a single applicant can receive assistance for a total of 12 months even though the applicant owns a home which is considered an available excess resource.[67] A third exception involves income producing property. Property which produces income is exempt up to an equity value of $6,000, provided that the property produces a return on equity of at least six percent.[68] The catch is that the return on equity is counted as income and this extra income is used to increase the size of the spenddown.

It is a curious feature of Medicaid that the availability of marital property is affected by the timing of the application. If the application is filed before the applicant has been institutionalized for at least one month then the combined resources of the husband and wife are considered available to the applicant. If, on the other hand, the application is filed after the applicant has been institutionalized for at least one month, only those resources specifically pertaining to the applicant will be used to establish eligibility.[69]

This is an example of Medicaid "deeming" at work. Prior to institutionalization all marital resources are deemed to be available to the applicant. This "deeming" no longer takes place once the applicant or recipient has been institutionalized for one month or more.

Disqualifying Transfers

The transfer of real or personal property for the purpose of creating Medicaid eligibility or for less than fair consideration can trigger an ineligibility penalty. If the impermissibly transferred property has a fair market value of less than $12,000, the ineligibility period is for up to two years. If the transferred property has a value greater than

60. K.A.R. 30-6-109(a)(18); K.P.A.M. Sec. 3222(7) Rev. No. 12.
61. K.A.R. 30-6-109(c)(15); K.P.A.M. Sec. 3214(2) Rev. No. 12.
62. Resources over the $1,800 or $2,700 limits.
63. K.A.R. 30-6-106(c); K.P.A.M. Sec. 3200(3) Rev. No. 12.
64. K.A.R. 30-6-106(a); K.P.A.M. Sec. 3200(4) Rev. No. 15.
65. K.A.R. 30-6-106(d); K.P.A.M. Sec. 3200(5) Rev. No. 15.
66. K.P.A.M. Sec. 3200(3)(b) Rev. No. 12, see also Sec. 3214(1) Rev. No. 15 and In re E, S.R.S. No. 85R0353M, April 29, 1985.
67. K.P.A.M. Sec. 3214(1) Rev. No. 15. Note: There is also a grace period if the applicant has a spouse living in the home who decides to sell the home. If the resident community spouse sells the home he or she is given 6 months to reinvest in a new home. K.A.R. 30-6-109(c)(18). During this period the institutionalized spouse's benefits will not be interrupted. Home sold on contract for deed proceeds are considered income K.A.R. 30-6-109(c)(7).
68. K.A.R. 30-6-108(c)(2); K.P.A.M. Sec. 3214(2) Rev. No. 12. K.A.R. 30-6-109(c)(15); K.P.A.M. Sec. 3222(2) Rev. No. 12.
69. K.A.R. 30-6-106(f); K.P.A.M. Sec. 3200(10) Rev. No. 15; see 42 C.F.R. Sec. 435.723 (c)(1).

$12,000, the ineligibility period is for up to five years. The ineligibility period begins from the month of the offending transfer. The pertinent part of the disqualifying transfer rule as it appears in the regulations states:

The period of ineligibility due to the transfer of property for the purpose of making an applicant eligible for medical assistance shall not in any event exceed two years from the month of the transfer of the property in question when the uncompensated value of the disposed resource is $12,000.00 or less, or five years when the uncompensated value of the resource exceeds $12,000.00. The period of ineligibility shall be subject to re-evaluation on the basis of additional evidence or other justification for authorization of assistance. K.A.R. 30-6-56(e)(2)[70]

The focus of the regulation is on the **uncompensated** value of the property transferred. In applying the rule, SRS eligibility screeners use a **Transfer of Property Worksheet** to compute the uncompensated value or "UV". The uncompensated value is the lesser of (1) Fair market value minus sale price, or (2) Fair market value minus encumbrances. The UV is then divided by a "living arrangement divisor" to determine the period of ineligibility. The living arrangement divisor is a dollar per month figure set by SRS to approximate the monthly SRS cost of assistance in various care arrangements.

The living arrangement divisor for long-term care is presently $1,300 per month. Thus, when an applicant residing in a nursing home has made a transfer with a UV of $20,000 the period of ineligibility is $20,000 divided by $1,300 or 15.4 months. If the applicant's private pay nursing home rate is more than $1,300 per month the result is harsh because the $20,000 UV is not enough to pay for 15.4 months of care.

Estate planners must be especially mindful of the transfer rules whenever there is an indication that long-term custodial care may be required before death. The same inter vivos transfer that appears sound for gift and estate tax and estate conservation purposes may operate to deny a client access to Medicaid when it is badly needed.

Problem Areas in Resource Availability

The problem areas in resource availability are life estates, commonly owned property, and trust property. Each merits some discussion.

Life Estates

The value of a life estate is determined by using the **American Experience Table.** The applicant's age decimal equivalent is multiplied by the aggregate resource value to determine the value of the applicant's available life interest.[71] Sometimes, however, the threshold question is whether the available resource is a life estate or some larger interest. The Medicaid eligibility of a life tenant was the subject of **Neaderhiser v. State Department of Social and Rehabilitation Services.**[72] In **Neaderhiser,** the applicant, an 89-year-old woman, was a joint tenant with her son in real estate having a total value of $70,000. Shortly before applying for Medicaid, the applicant quit claimed her interest to her son but reserved for herself possession and income for life. The applicant asserted that all she had was a life estate valued at $3,734.64. The court held that the applicant's interest in the property was an undivided one-half, joint tenancy interest valued at $35,000 rather than a life estate and that joint tenancy was not disturbed by the reservation for a life estate in the grantor. The SRS Medicaid denial was affirmed.

Jointly Held Property

The Medicaid view of joint tenancy property has been the subject of much criticism. Medicaid treats joint tenancy real property differently than joint tenancy personal property. With real property, only the applicant's **pro rata** share is considered available. With personal property, the full equity value of the resource is considered available to the applicant. [73] This view is in contrast to the emerging judicial view that joint ownership in personal property creates only a rebuttable presumption of ownership of the res [74] and that joint bank accounts are simply business expedients for the benefit and protection of banks.[75] The Medicaid view of jointly held personal property produces harsh results for many applicants. Consider a nursing home resident whose entire non-exempt property consists of a $10,000 certificate of deposit held jointly with his wife. Before becoming eligible for Medicaid he must reduce the entire $10,000 to the $1,800 available resource maximum. If, on the other hand the property had been placed in two separate accounts of $5,000 each for husband and wife, the institutionalized spouse would be required to spend only $3,200 not $8,200 before becoming eligible. The result seems unfair — especially in situations where the non-institutionalized spouse is the person who created the resource in the first place. Although the logical remedy would seem to be to sever the joint tenancy, SRS may consider the severance to be a "disqualifying transfer" which in turn triggers many months of Medicaid ineligibility.

The motivation for a division of assets law lies in the need to find relief for the community spouse who will otherwise be reduced to poverty before the institutionalized spouse can receive benefits.

In response to pressure from senior citizen organizations and groups like the Alzheimer's and Related Diseases Association, several states have considered adopting "division of assets statutes"[76] or regulations. Kansas is considering such a law.[77] A division of assets law permits the institutionalized spouse to transfer some resources (held jointly or otherwise) and income back to the at-home spouse without upsetting eligibility. The motivation for a division of assets law lies in the need to find relief for the commu-

70. See also, K.P.A.M. Sec. 2130 Rev. No. 11; K.S.A. 39-709(a)(2); 42 U.S.C.A. §1396p(c).
71. K.P.A.M. Sec. 3212.1(5) Rev. No. 11.
72. Neaderhiser v. State Department of Social and Rehabilitation Services, 9 Kan. App. 2d 115, 673 P.2d 462 (1983).
73. K.A.R. 30-6-106(d); K.P.A.M. Sec. 3200(4) Rev. No. 15.
74. Walnut Valley State Bank v. Stovall, 223 Kan. 459, 574 P.2d 1382 (1978).
75. In re: Estate of Wood, 218 Kan. 630, 545 P.2d 307 (1976). A federal decision addressing this issue is the SSI case Cannuni v. Schweiker, 740 F.2d. 260 (3rd Cir. 1984). Cannuni suggests that there is no resource availability until survivorship becomes a fact.
76. California, Minnesota, Colorado, Illinois, Indiana, New York, Maryland and New Mexico.
77. See, Rowland, "Division of Assets: A Status Report," 55 The Kansas Bar Journal, No. 7 at p. 4, (September 10, 1986).

nity spouse who will otherwise be reduced to poverty before the institutionalized spouse can receive benefits. The 1987 session of the Kansas Legislature considered but failed to adopt a division of assets law which would have allowed the at-home spouse to return the greater of $25,000 or one-half of the marital assets and income of up to $717 per month. Excess assets and income were subject to recapture by SRS. Assets remaining in the decedent estate of the surviving spouse were subject to a fourth class claim for the cost of care. In addition, all at-home spouse income over $717 per month was subject to subrogation.[78]

The federal Medicaid administrators have been quick to challenge any attempts by states to relax the interspousal availability rules. The first federal judicial decision, however, went in favor of the states. In **State of Washington vs. Bowen**, the Ninth Circuit Court of Appeals recently held that HHS' action disapproving a Washington plan which permitted spouses to divide **income** was arbitrary, capricious and an abuse of discretion and that the federal Medicaid rules did not preempt state family property law.[79]

Remedies

Some Medicaid disqualifying conditions can be corrected. There are six forms of potential remedy available. These are: (1) transfer of resources with prior approval; (2) reconveyance; (3) removal of name from title; (4) severance of joint tenancy; (5) transfer of assets to a trust, and (6) divorce/separate maintenance. Of these six remedies, only prior approval, reconveyance, removal of name and to a limited extent, trusts, are recognized by the Medicaid regulations.

Transfers with Prior Approval

The Kansas Administrative Regulations give SRS the discretion to grant prior approval to applicants who wish to transfer away excess resources, **provided** that the transfer is (1) for adequate consideration and (2) the transfer is a **bona fide** transfer.[80] Permission is requested by filling out and submitting to SRS a form called **Application for Consent to Transfer Property.**[81] The form requires listing the property, its value, method of conveyance, grantee, consideration and the reason for the transfer. As a practical matter this remedy is of limited use. SRS will also permit income to be transferred from one spouse to another in situations where the institutionalized spouse has a modest income and the healthy spouse almost none. To qualify for income transfer from the institutionalized spouse, the well spouse must have an income below the $341 a month protected income level (1987). The amount that can be transferred to the well spouse is the difference between the well spouse's income and the $341 limit.[82]

Reconveyance

When a transfer has been made which triggers the two or five year disqualification, the gifted property can subsequently be transferred back to the grantor and the disqualification will be cured.[83] The disqualification can also be cured by having the grantee pay the grantor fair market value. The fair market value payment, when received, becomes a resource of the grantor.

Removal of Name from Title

In situations where an applicant or recipient is disqualified because someone other than a spouse has placed his or her name on the title of property "for convenience," the SRS rules permit eligibility to be reestablished by removing the name from the title.[84] The person seeking assistance must (1) show that his or her name was put on the title solely for convenience of the other owner(s); (2) that said person did not create the resource; and (3) that the resource was not diverted to his or her own use. Extrinsic evidence can be used to establish that the joint ownership was "for convenience only." In some cases medicaid benefits have been ordered to be paid without the added formality of removing the name from the signature card or title.[85] The SRS regulations **do not** permit name removal between "legally responsible persons." Thus, spouses cannot create eligibility for themselves by removing their name from jointly owned property.

Severance of Joint Tenancy

Medicaid claimants' advocates argue that a husband and wife can formally sever their interest in jointly owned property and that this severance is not a "transfer" within the meaning of the Medicaid rules. Kansas law permits "any person" who is a joint tenant in real estate or personal property to petition a court to terminate the joint tenancy.[86] Whether this severance by court order is a disqualifying transfer or not is an open question. To date SRS has not decided a case of this nature. A strong argument can be made that when joint tenants divide the whole which they commonly own neither has transferred anything to the other. In nursing home cases where one spouse's property is not considered available to the other after the first month of institutionalization, the severance remedy merits consideration. Attorneys who advise their clients to sever joint tenancy should also advise their clients that the remedy is not certain and that SRS will very likely contest the severance and deny benefits by calling it a transfer. At this point the applicant would have to either (1) prove that as a matter of law severance is not a transfer, (2) establish that the facts of the severance do not indicate that any property changed hands for less than fair market value — or both.

78. **S.B. 264, 1987 Session of the Kansas Legislature.** The bill passed the Senate 40-0 but failed to gain approval in the House. SRS's fiscal note indicated that the measure could increase Kansas' overall Medicaid cost by up to $2.2 million. Kansas' share of the increase would be about one-half of this amount.

79. **State of Washington vs. Bowen, 815 F.2d 549 (9th Cir. 1987).** Washington, a community property state, filed a Medicaid plan amendment which permitted the state to calculate the available income for married Medicaid applicants according to community property law, whereby the applicant and the community spouse would each have a one-half interest in the aggregate income. The Secretary rejected the plan amendment insisting that the federal "name-on-the-check rule" preempted the state's family property law. The court discussed the fact that the name on the check rule generally ". . . puts the husband, whose wife enters a nursing home in a much better position than the wife who does so," because most retirement income is received in the husband's name. After reviewing the Supremacy Clause and noting that Medicaid embodied the principal of cooperative federalism, and the presumption that Congress will not interfere with state family property law, the court rejected the Secretary's argument of federal preemption.

80. **K.A.R. 30-6-56(d); K.P.A.M. Sec. 2133, Rev. No. 9.**

81. **SRS Form PA-3175.**

82. **K.P.A.M. Sec. 3443(7) Rev.No. 9.** An adult receiving Medicaid for long-term care can make limited transfers to his spouse and minor children in order to provide for the care of these dependents. The amount which can be transferred is the amount necessary to bring the dependent's income up to the "federal protected income level." For a spouse the federal protected income level is $341 per month. Thus, a hypothetical applicant with a wife who has an income of only $250 per month could transfer $341 minus $250 or $91 a month to his wife.

83. **K.A.R. 30-6-56(e)(3); K.P.A.M. Sec. 2132, Rev. No. 9.**

84. **K.A.R. 30-6-56(c)(3)(D); K.P.A.M. Sec. 2132, Rev. No. 9.**

85. **DeLeon v. Harder**, No. 85-CV-723, Shawnee County D.C., Memorandum Decision and Order of September 11, 1985, affirming SRS No. 85-R-0280 ADC/FS.

86. **K.S.A. 59-2286.**

Medicaid Qualifying Trusts

In the 1986 Consolidated Omnibus Budget Reconciliation Act of 1986, Congress defined the "Medicaid qualifying trust."[87] The law was passed to prevent affluent persons from sheltering resources in an **inter vivos** trust for the dual purpose of creating Medicaid eligibility and preserving the corpus for their putative heirs. Prior to the new law, financial planners were drafting special **inter vivos** trusts which, upon the settlor's disability automatically (1) became irrevocable, and (2) ordered the trustee to secure all available public benefits for the settlor before applying trust resources toward the settlor's care. On death of the settlor the trust remainder poured forward to the settlor's heirs. The new law limits the use of trusts for such purposes but does not eliminate their utility entirely. Under the new law the property placed in trust by the Medicaid applicant or recipient may be considered an available resource. The value of the trust property which is "available" is determined by the degree of discretion that the trustee has. If the trustee has any discretion to invade the corpus, the entire corpus is considered available. It is sufficient that the trustee has the power — it is not a defense that the power has never been used. The new rule applies to both revocable and irrevocable trusts. The new law also permits states to waive the application of the new rule in individual cases where "undue hardship" results. To date SRS has not incorporated the new rule into its regulations, however SRS administrative decisions were consistent with the new law well before its enactment.[88] The new law clarifies the conditions under which trusts can be used but it does not completely eliminate their usefulness in difficult cases where the unhealthy spouse holds individual title to most of the family property.

Divorce and Separate Maintenance

In extreme cases the only way to prevent the impoverishment of the stay-at-home spouse may be to obtain court ordered support from the institutionalized spouse. Divorce is one mechanism which will achieve the result — assuming that the divorce court can be convinced that the parties should be granted divorce. The viability of a separate maintenance agreement is untested. Divorce and separate maintenance remedies are extreme but they constitute the only certain way of dividing husband/wife assets and income absent a division of assets rule.

Appealing Eligibility Denials and Terminations

Applicants denied Medicaid or recipients whose benefits have been terminated have a right to a **fair hearing** review of the adverse decision.[89] The requirements of the **fair hearing** process appear in the federal regulations[90] and in the Kansas Administrative Regulations.[91] The process is initiated by filing a form called a **Request for Fair Hearing.**[92] The fair hearing takes place in person or by telephone[93] and it is conducted by an SRS hearing officer. Applicants can appear in person or by an authorized representative.[94]

The decisions of the SRS hearing officers are reviewable by the SRS State Appeals Committee. Applicants and recipients dissatisfied by SRS decisions which result from State Appeal Committee[95] review can obtain judicial review in State District Court.[96] An appeal to a district court must be filed within 30 days of the date of the final administrative order.[97] In 1986 the Kansas Legislature amended venue for such appeals so that venue is proper either where the order being appealed was entered or where the order is effective.[98]

Conclusion

With more people living longer under conditions requiring nursing home care, it becomes necessary for lawyers to understand the basics of Medicaid. A stroke or a diagnosis of Alzheimer's disease can instantly defeat a carefully crafted retirement plan and make Medicaid eligibility the paramount client concern. The regulatory structure of Medicaid is multi-layered, constantly changing, formidable and sometimes ambiguous. This article is designed to give the lawyer a basic understanding of Medicaid as it presently operates and to offer a framework for problem analysis and planning. It is a point of departure, not a substitute for independent contemporary research. As the Medicaid program matures, lawyers will play an increasingly prominent role in the decision-making process.

87. Pub. L. No. 99-273 §9506, 103 Stat. 82, 210 (1986).

88. In re: R., SRS No. 9751 MA, March 24, 1983 — both income and corpus of irrevocable trust are available to beneficiary, a Medicaid recipient, where trustee has power to invade.
In re: L. Trust Officer., SRS No. 9631 MA, June 13, 1983 — held where trustee had power to invade for "actual necessity" in best interest of beneficiary, trustee could not place duty to remaindermen above duty to beneficiary by putting beneficiary on Medicaid rather than using corpus to provide care.

89. 42 U.S.C.A. §1396a(a)(3); K.S.A. §75-3306; K.A.R. 30-7-53. The requirement arises from Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d.

90. 45 C.F.R. §205.10 et seq.

91. K.A.R. 30-7-1 et seq.

92. SRS Form AH-1105.

93. K.A.R. 30-7-40.

94. 45 C.F.R. §205.10(a)(3)(iii); K.A.R. 30-7-30(e); K.P.A.M. Sec. 1511(3).

95. K.A.R. 30-7-49 and 50.

96. K.S.A. 77-601 et seq.

97. K.S.A. 60-2101(d).

98. K.S.A. 60-2101(d), Act of July 1, 1986, ch. 318, 1986 Ks. Session Laws 1963.

About the Author

PAT DONAHUE is an attorney with Kansas Legal Services Inc. of Topeka. In this capacity, he is active as an attorney representing senior citizens and he coordinates Kansas Legal Services' 10 Senior Citizens' Law Projects. He also manages the Kansas Bar Association's Lawyer Referral Service.

Mr. Donahue received his BA and MS degrees from Emporia State University and his JD degree from the University of Kansas in 1979. He is a Marine Corps veteran of Vietnam and taught English for a year in Lima, Peru. He is the past Chairman of the KBA's Committee on Legal Issues Affecting the Elderly. He presently serves on that committee and on the Continuing Legal Education and the Legal Aid and Referral Committees. He has been a KBA CLE speaker at seminars related to law and the elderly.

To: Robert S. Wunsch, Rep.
Chairman Judiciary Comm. Rm 175 W
Topeka, Ks. 66612

Dear Sir.
Please be advised we would like very much and appreciate your help with Division of Assets Bill SB # 264. It is of great importance to all Senior Citizens. We "thank you" and we are as listed.

Sylvia Tate	121 Spring Valley	66012
Irene Deshman	111 E Kump	66012
Lloyd Hill	405 East Marse	66012
Don Coffman	457 Jamison Dr Bonner Springs	66012
Grace Watkins	516 Coronado Bonner Spgs.	
Chester Watkins	516 Coronado Bonner Spgs. Ks	66012
[illegible] Ulmer	RR-2 Bonner Spgs.	66012
Mrs Mary Ulmer	RR#2 Bonner	66012
Joseph V. Ash	48 Southwest Dr. Bonner Spgs Ks	66012
Nadine Ash	48 Southwest Dr Bonner Spgs	6602
Jim Graham	455 N. Nieni Bonner Springs	66012
Marie Graham	455 N. Nieni Bonner Springs	66012
Edith L. Lynn	527 N. Nettleton Bonner Springs	66012
Oliver E. Lynn	527 N. Nettleton Bonner Springs	66012
LeRoy McRae	111 Kump Bonner Springs Ks	66012
Helen McRae	111 Kump Bonner Springs Ks.	66012

ATTACHMENT XIII

Anna Grigsby	801 No. 80th Place	K.C. Ks.	66112
Anna Grigsby	801 No. 80th Place	K.C. Ks.	66112
B.R. Lollar	7328 Miami	KC Ks.	66111
Lavina Lollar	7328 Miami	KC Ks.	66111
Helen Thompson	111 E. Kemp apt 201	Bonner Spg. Ks.	66012
Kenneth K. Thompson	111 E. Kemp Apt 201	Bonner Spg Ks.	66012
Wallace H. Wren	650 oth 74	Kan City Ks	66111
Ethel A. Wren	6 South 74	Kan City Ks	66111
Clyde Chancellor	1600 So 87	Kansas City Ks	66111
Evelyn Chancellor	1600 So 87	Kan City Ks	66111
Lion Roberts	1817 No 78	KC Ks	66112
Elbert R Woolf	427 N NETTLETON	BONNER SPR.	66012
Alva Berry	9 S. 78th	K.C. Ks.	66111
Dorothy H. Berry	9 So 78th	K.C. Ks	66111
Lucile G. Crookham	6217 Rowland	K.C. Ks.	66104
Johnd Lunkel	8530 Sandusky	KC Ks	66112
John Guillaume	1046 S 55th	KC Ks	66106
Nadean Janney	9520 Hurrelbrink Rd.	K.C.K.	66109
John + Mapine Lee	RR3	Tonganoxie Ks.	66086
Lloyd Knackstedt	3625 N. 63	K.C. Ks.	66104
Mapine Gordon	1911 N 86th St	KC Ks	66112
Howard & Anna Selk	1308 S. 58th Dr.	K.C. Ks.	66107
Helen M. Ray	2712 No. 85 St	K C Ks	66109
Cedric Ray	2712 N 85 St	KCK	66109
Eleanor Hartman	3621 N. 131	KCK	66109
Geraldine Janney	9430 Hurrelbrink	KCK	66109
Ida Kline	7330 Troup #13		66112
Duran Chaffee	3641 No. 60 St		66104
Gene Chaffee	3641 No. 60 St		66104

Bernard H. Holinger 6420 Fairview Kansas City Ks 66104
Barbara J. Rogers 5527 Fairview Kansas City, Kn. 66104
Gerald M. Rogers 5527 Fairview- K.C. Kansas City Ks 66104
Alberta L Kensinger 1852 N. 41st Terr KCK 66102
Harold L Kensinger 1852 N 41st Terr KCK 66102
Ida E. Smith 111 E. Kumps Apt. 503 Bonner Springs, Ks. 66012
Ray Young 8011 Elizabeth K.C Ks 66112
Dennis L Young 8011 ELIZABETH K.C. KS 66112
Francis A. Sunkelmann, 212 North 12th St. KCK 66102
Charles M Johns, 7521 Eaton Prairie Village, KS. 66208
Richard E Bronson 1522 W. 91st Terrace Lenexa, Kansas, 66219
Nicholas Ventura 2606 No. 82nd TERR KANSAS CITY KS. 66109
M. George Bejort II 8244 ORIENT DR. KANSAS CITY KS, 66112
Harold J Fitzgerel 2832 S. 8th Ter KCKs 66103
James H Glenwood 1416 So 50th KCK 66106
Frank A. Mufich 513 Shorp KCK 66102
Gale Hogue 3120 307th St Terr 66103
Ed Grindel 8011 Corona K.C.K. 66112
Bill R Roberts 6528 Nogard, K.C.K. 66104
Mike Sams 1619 N 81 KCK. 66112
Manuel Mojica 1944 N 83 KCKs. 66112
Arthur Hoskins 312 N 12 KCK 66102
Tom Williams 8455 Lowell OPKs 66212

Robert L. Flatley	117 Groves	Bonner Springs Ks 66012
Margaret F Flatley	117 Groves	B.S., Ks. 66012
Bud Hepner	238 Emerson	B.S. Ks. 66012
Lil Hepner	238 Emerson	B.S. Ks 66012
Willehelmina allen	455 Garfield	B S ks 66012
Reba Shaw	753 N. Nettleton	B. S. Ks 66012
Frank W. Shaw	753 N. Nettleton	Bonner Spgs Ks 66012
Charley Byers	100 Sheidley	Bonner Springs 66012
Voncile Byers	100 Sheidley	Bonner Spg, Kans 66012
Lawrence Hayden	633 N. Nettleton	Bonner Spgs. Ks 66012
Harrison R. McDowell	515 Kump	Bonner Spgs 66012
Bernice M. McDowell	515 Kump	Bonner Spgs 66012

12

Total names 80

Submitted by Kenneth R. Thompson, President
of Bonner Springs Senior Citizens Club.

MR. & MRS. K.R. THOMPSON
111 E. KUMP, APT. 201
BONNER SPRINGS, KANSAS 66012

REVISED

364 Fiscal Note
1988 Session

264 Bill No.

January 20, 1988

The Honorable Roy Ehrlich, Chairperson
Committee on Public Health and Welfare
Senate Chamber, 3rd Floor
Third Floor, Statehouse

Dear Senator Ehrlich:

SUBJECT: Revised Fiscal Note for Senate Bill No. 264 by Committee on Public Health and Welfare

In accordance with K.S.A. 75-3715a, the following revised fiscal note concerning Senate Bill No. 264 is respectfully submitted to your committee.

Senate Bill No. 264 is an act relating to the determination of the eligibility for medical assistance provided by the Department of Social and Rehabilitation Services. The bill would allow a qualified applicant or recipient and such person's spouse to divide their aggregate resources and income into separate shares. Only the separate resources or income of the applicant/recipient will then be considered in determining the eligibility for medical assistance.

Senate Bill No. 264 would increase medical assistance program expenditures since the financial support provided by the spouse would be reduced by the amount of exempt resources and/or income.

During the fall of 1987, representatives of the Department of Social and Rehabilitation Services and the Department on Aging agreed to a new set of assumptions for determining the fiscal impact of Senate Bill No. 264. The total revised fiscal impact for the bill is $1,394,478 of which $627,515 is state general funds. This revised amount represents the least costly estimate.

The Governor's Budget Report contains funds totaling $1.3 million in FY 1989 for division of assets legislation.

Sincerely,

Michael F. O'Keefe
Director of the Budget

MFO:SD:sr
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Attachment XIV