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September 14, 1979

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ATTORNEY GENERAL OPINION NO. 79- 203

Mr. Charles V. Hamm
General Counsel
Kansas Department of Social and
Rehabilitation Services
State Office Building
Topeka, Kansas 66612

Re: Probate Code--Care and Treatment for Mentally Ill
Persons--Disclosure of Records

Synopsis: The last sentence of subpart (2)(B) of K.S.A. 59-2931(a) vests unlimited discretion in the head of a treatment facility concerning disclosure of medical or treatment records of a deceased patient to the patient's next of kin, but creates no statutory right to disclosure of such records in favor of the next of kin.

* * *

Dear Mr. Hamm:

You request our opinion as to whether Topeka State Hospital must release medical and treatment records of a former patient, now deceased, to a newspaper reporter investigating the death of the patient, which newspaper reporter has the written consent of the mother of the deceased patient.

The disclosure of the subject records is restricted by K.S.A. 59-2931. Subsection (a) of that statute provides, in part, as follows:

"The district court records, treatment records or medical records of any patient or former patient that are in the possession of any district court or treatment facility shall be privileged and shall not be disclosed except (1) as otherwise provided in this act; or

. . . .

(B) Upon the sole consent of the head of the treatment facility who has the records after a statement, in writing, by such head that such disclosure is necessary for the treatment of the patient or former patient. However, such head may make such disclosure to the patient or former patient, the patient's next of kin, any state or national accreditation agency, or scholarly investigator without making such determination except that the head of the treatment facility shall require, before such disclosure is made, a pledge from any state or national accreditation agency or scholarly investigator that such agency or investigation [sic] will not disclose the name of any patient or former patient to any person not otherwise authorized by law to receive such information."

You raise the following questions relating to construction of the statute:

"(1) Since the statute says the information 'may' be disclosed to the patient's next of kin, do the next of kin have any right to this information which would mandate the release of the information by the hospital upon the consent, in writing, of the next of kin.

"(2) What is the definition of 'next of kin?'"

In your letter, the following statements are made regarding the administrative interpretation given to this statute by the Department of Social and Rehabilitation Services:

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"Since the next of kin may be in an adversary role with the patient or former patient (the typical case of the estranged spouse who wants the information for purposes adverse to the patient's interest for divorce or other purpose), it had been our in-house interpretation of this portion of subsection (B) that the disclosure to the patient or next of kin was authorized only if the disclosure was necessary for the treatment of the patient or former patient and the balance of the subsection after the word 'however' modified the first sentence by not requiring the head of the treatment facility to state in writing each time the information was disclosed to the next of kin that the disclosure was necessary for the treatment of the patient, but that it still could be disclosed to the next of kin only if it assisted in the treatment of the patient. That part of the statute merely relieved the head of the treatment facility from putting a written slip in the file each time disclosure was made to the next of kin. In the case of a deceased patient, our interpretation has been that information could not be released without a court order (subsection C) since it would not be released for treatment purposes."

In our judgment, the administrative interpretation adopted by the Department of Social and Rehabilitation Services conflicts with the plain and unambiguous language of the statute. As was previously stated in Attorney General Opinion No. 75-194, the last sentence of subpart (2)(B) of the statute vests virtually unlimited discretion in the head of a treatment facility concerning disclosure to the patient, the patient's next of kin, any state or national accreditation agency, or scholarly investigator. Disclosure of records under that provision is not subject to the requirement that the disclosure be necessary for the treatment of the patient or former patient, nor is it statutorily mandated that a deceased patient's records be disclosed only upon court order. However, since disclosure under the provision is entirely discretionary, the next of kin has no statutory right to the release or disclosure of the subject records.

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With regard to your request for a definition of the phrase "next of kin," as used in the statute, there are two cases construing the phrase in relation to other statutes. In both of those cases, the court construed the phrase to mean "those who inherit from a decedent under the law of descent and distribution." In re Estate of Seeger, 208 Kan. 151 (1971), 154; Ellis v. Sill, 190 Kan. 300 (1962). In the absence of any indication that the legislature intended otherwise, it is our opinion that the usage of the term in the subject statute must be construed to conform to the definition set forth in the Seeger and Ellis cases.

In summary, it is our opinion that the last sentence of subpart (2)(B) of K.S.A. 59-2931(a) vests unlimited discretion in the head of a treatment facility concerning disclosure of medical or treatment records of a deceased patient to the patient's next of kin, but creates no statutory right to disclosure of such records in favor of the next of kin.

Very truly yours,

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