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ATTORNEY GENERAL OPINION NO. 86- 74

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7th Floor, State Office Building
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Re: Intoxicating Liquors and Beverages -- General
Provisions -- The History and Intent of the
Language of K.S.A. 1985 Supp. 41-104

Synopsis: The State of Kansas is in compliance with the National Minimum Drinking Age Act (N.M.D.A.A.). Clearly delineated exceptions to the Kansas liquor laws parallel federal liquor law exceptions. Each exception complies with the N.M.D.A.A. Exceptions for doctors, dentists, recognized religions, heads of households, private clubs, pharmacists and hospitals are found in both Kansas and federal law. The long history of stringent enforcement of Kansas liquor laws by Kansas law enforcement agencies, the volumes of statutory, regulatory and case law expounded to compel compliance, and the legislature's passage of law to comply with the N.M.D.A.A. all indicate that the State of Kansas has gone above and beyond the standards required by the federal government to comply with the N.M.D.A.A. Cited herein: 23 U.S.C. §158 (The National Minimum Drinking Age Act); K.S.A. 1985 Supp. 21-3610; 21-3610(a); 41-102(k); 41-104; 41-104(2); 41-407; 41-727; 41-1103; 41-2601 et seq.; 41-2701 et seq.; 41-2701(g); 60-455; 1935 G.S. 21-2116; 23 C.F.R. §1208.3; 26 U.S.C.A.

§5053; L. 1949, ch. 242, §§ 1-125 (The Kansas
Liquor Control Act); L. 1949, ch. 242, §4.

* * *

Dear Mr. Rees:

As Chief Counsel for the Kansas Department of Transportation, you request our opinion on a question concerning K.S.A. 1985 Supp. 41-104. Specifically, you inquire whether Kansas is in compliance with the National Minimum Drinking Age Act, despite a possible problem with the language of the statute in question.

K.S.A. 1985 Supp. 41-104 states:

"No person shall manufacture, bottle, blend, sell, barter, transport, deliver, furnish or possess any alcoholic liquor for beverage purposes, except as specifically provided in this act or in article 27 of chapter 41 of the Kansas Statutes Annotated, except that nothing contained in this act shall prevent:

"(1) The possession and transportation of alcoholic liquor for the personal use of the possessor, the possessor's family and guests except that the provisions of K.S.A. 41-1103 and amendments thereto relating to transportation and the provisions of K.S.A. 41-407 and amendments thereto shall be applicable to all persons;

"(2) the making of wine, cider, or beer by a person from fruits, vegetables or grains, or the product thereof, by simple fermentation and without distillation, if it is made solely for the use of the maker and his or her family;

"(3) any duly licensed practicing physician or dentist from possessing or using alcoholic liquor in the strict practice of his or her profession;

"(4) any hospital or other institution caring for the sick and diseased persons,

from possessing and using alcoholic liquor for the treatment of bona fide patients of such hospitals or institution;

"(5) any drugstore employing a licensed pharmacist from possessing and using alcoholic liquor in the compounding of prescriptions of duly licensed physicians;

"(6) the possession and dispensation of wine by an authorized representative of any church for the purpose of conducting any bona fide rite or religious ceremony conducted by such church; or

"(7) the purchase, possession or sale of alcoholic liquor by a club licensed pursuant to article 26 of chapter 41 of the Kansas Statutes Annotated."

Considered in isolation, the above statute may appear to allow possession of alcoholic liquor by anyone in possession of alcohol for personal use. However, to ascertain legislative intent, courts are required to construe all parts of legislation in pari materia. Brown v. Keill, 224 Kan. 195 (1978). Thus, the legislative history of a statute often reveals legislative intent, as demonstrated by the sections of law outlined below.

A. Interpretation of the Statutes Cited in K.S.A. 1985 Supp 41-104.

There are four statutes cited in K.S.A. 1985 Supp. 41-104. Article 27 of Chapter 41 of the Kansas Statutes Annotated refers to cereal malt beverages. K.S.A. 41-2701 et seq. The drinking age of eighteen for cereal malt beverages, or 3.2% beer, was raised in 1985 by the Kansas Legislature to comply with the N.M.D.A.A. See K.S.A. 1985 Supp. 41-2701(g). Prior to this legislation, 3.2% beer was the only alcoholic beverage a person in Kansas under the age of twenty-one could buy. Six percent beer, wine and liquor have always been sold only to persons twenty-one years or older. K.S.A. 1985 Supp. 41-102(k) defines a minor as any person under 21 years of age. K.S.A. 1985 Supp. 41-727 states:

"(a) No person under 21 years of age shall obtain or purchase, or attempt to obtain

or purchase, alcoholic liquor from any person except as authorized by law.

"Violation of this subsection by a person 18 or more years of age but less than 21 years of age is a misdemeanor punishable by a fine or not less than \$100 or not more than \$250 or by 40 hours of public service, or by both.

"(b) No person under 21 years of age shall possess or consume alcoholic liquor except as authorized by law.

"Violation of this subsection by a person 18 or more years of age but less than 21 years of age is a misdemeanor punishable: "

"(1) By a fine of not less than \$100 and not more than \$250 or by 40 hours of public service, or by both, if committed on premises licensed pursuant to article 26 of chapter 41 of the Kansas Statutes Annotated;

"(2) by a fine of not less than \$25 and not more than \$250 or by 10 hours of public service, or by both, if committed on any other premises.

"(c) Any person less than 18 years of age who violates this section is a juvenile offender under the Kansas juvenile offenders code and, upon adjudication thereof, shall be required as a condition of disposition to pay the fine or perform the public service, or both, specified as punishment for the offense under subsection (a) or (b).

"(d) This section shall be part of and supplemental to the Kansas Liquor Control Act."

K.S.A. 21-3610 states:

"(1) Furnishing intoxicants to a minor is directly or indirectly, selling to, buying

for, giving or furnishing any intoxicating liquor to any person under the age of twenty-one (21) years.

"(2) Furnishing intoxicants to a minor is a class B misdemeanor.

Finally, K.S.A. 1985 Supp. states:

"(a) Furnishing cereal malt beverage to a minor is buying or selling, giving or furnishing, whether directly or indirectly, any cereal malt beverage to any person under the legal age for consumption of cereal malt beverage.

"(b) Furnishing cereal malt beverage to a minor is a class B misdemeanor.

"(c) This section shall not apply to the furnishing of cereal malt beverage by a parent or legal guardian to such parent's child or such guardian's ward.

"(d) As used in this section, 'cereal malt beverage' and 'legal age for consumption of cereal malt beverage' have the meanings provided by K.S.A. 41-2701 and amendments thereto.

"(e) This section shall be part of and supplemental to the Kansas criminal code."

As you can see, the laws of Kansas encompass all alcoholic beverages, comply with the N.M.D.A.A. and raise the age accordingly.

The second statute cited in K.S.A. 1985 Supp. 41-104 is K.S.A. 41-1103. K.S.A. 41-1103 refers to one of the one-hundred and twenty five sections of the Kansas Liquor Control Act of 1949, enacted when Kansas changed from a "dry" state to a "wet" state after the return of the World War II veterans. K.S.A. 41-1103 was intended to penalize people transporting large quantities of liquor into Kansas without paying Kansas tax and duty, while allowing a reasonable personal transportation of liquor (up to three gallons). The language "possession and transportation of alcoholic liquor for personal use shall be legal" is but one phrase of K.S.A. 41-1103 as a whole, and but one phrase of Chapter 41 as

a whole. Read in context, the law prescribes personal use within the law, while proscribing liquor tax and duty evasion. See K.S.A. 41-1103. The phrase was never intended to mean, and has never been construed to mean, that anyone can violate the Kansas Liquor Control Act so long as they possess less than 3 gallons. The phrase was drafted with tax intentions and has been construed as such.

The third statute, K.S.A. 41-407, refers to the same Kansas taxes and duties upon liquor. The fourth and final statute, Article 26 of Chapter 41, refers to the licensing and regulation of private clubs, of which a person must be twenty-one years of age or older to join. K.S.A. 41-2601 et seq. In all contexts, all of the statutes referred to in K.S.A. 1985 Supp. 41-104 are drafted to enforce Kansas liquor laws, laws which are in compliance with the N.M.D.A.A.

B. Comparison of Federal Regulations and Kansas Law

The pertinent section of the N.M.D.A.A. for our purposes is 23 C.F.R. §1208.3, which states:

"'Alcoholic beverage' means beer, distilled spirits and wine containing one-half of one percent or more of alcohol by volume. Beer includes, but is not limited to, ale, lager, porter, stout, sake, and other similar fermented beverages brewed or produced from malt, wholly or in part or from any substitute therefor. Distilled spirits include alcohol, ethanol or spirits or wine in any form, including all dilutions and mixtures thereof from whatever process produced."

"'Public possession' means the possession of any alcoholic beverage for any reason, including consumption on any street or highway or in any public place or in any place open to the public (including a club which is de facto open to the public). The term does not apply to the possession of alcohol for an established religious purpose; when accompanied by a parent, spouse or legal guardian age 21 or older; for medical purposes when prescribed or administered by a licensed physician, pharmacist, dentist, nurse,

hospital or medical institution; in private clubs or establishments; or to the sale, handling, transport, or service in dispensing of any alcoholic beverage pursuant to lawful employment of a person under the age of twenty-one years by a duly licensed manufacturer, wholesaler, or retailer of alcoholic beverages.

"Purchase" means to acquire by the payment of money or other consideration."
(Emphasis added.)

The federal provision, drafted in the 1980's, parallels K.S.A. 1985 Supp. 41-104, originally drafted in 1949. The exceptions of "established religious practice," "medical purposes," "private clubs" and "when accompanied by a parent, spouse or legal guardian age 21 or older" are closely aligned to the exceptions listed in K.S.A. 1985 Supp. 41-104. For example, the phrase "established religious purpose" of the federal regulations is akin to "bona fide rite or religious ceremony" of K.S.A. 1985 Supp. 41-104. The intent to allow a recognized religion to conduct a ceremony is clear.

The same intent in the federal phrase "when accompanied by a parent, spouse or legal guardian age 21 or older" is mirrored in the Kansas phrase "the personal use of the possessor, the possessor's family and guests." Misreading the federal phrase could lead the reader to believe the "age 21 or older" applies only to the "legal guardian." This would allow a person to circumvent the clear meaning of federal law by becoming a "parent" or "spouse." This extrapolation of the federal phrase completely misses federal intention, which is that a person must be 21 to drink unless accompanied by an of-age parent, guardian or spouse.

C. Interpretation of K.S.A. 1985 Supp. 41-104 in Light of Federal Law

A reasonable interpretation of Kansas law commands the conclusion that Kansas law conforms to the N.M.D.A.A. K.S.A. 1985 Supp. 41-104 allows "personal use of the possessor, the possessor's family and guests." The 1949 Kansas Legislature intended this language to have the same effect as the exception found in 23 C.F.R. §1208.3 allowing possession when accompanied by a parent, spouse or legal guardian, i.e. a person over the age of twenty-one as a "head of household" pouring a drink for his or her guests and family while in the

family home. To interpret the phrase to mean a sixteen-year old entertaining guests in his automobile is sheer folly. (See for example, 26 U.S.C.A. §5053. The federal government recognizes a "head of household" exception in its internal revenue tax code. The exception grants a 100 or 200 gallons of beer per year relief from federal taxation for the "adult" head of the house. The federal law refers to an "adult" as one who has attained 18 years of age. While the federal law is not a model of clarity and is in need of updating, the intent is clear--heads of households are recognized as such and are granted a federal tax exemption. See also K.S.A. 1985 Supp. 41-104(2), which recognizes a similar "home fermenter" exemption.)

Along the same vein, had the legislature intended "the possessor" to be exempted from the Kansas Liquor Control Act, the phrase would not have referred to "family and guests." Furthermore, had the legislature intended to exempt the very party being regulated, the Kansas Liquor Control Act would have never have been drafted in the first place.

The statute's genesis derives from legislation entitled the Kansas Liquor Control Act. L. 1949, ch. 242, §§1-125. As with all law, a phrase must be read in its entirety with the applicable surrounding body of law. Statutes are to be interpreted so as to give effect if at all possible. A legislature does not intend ridiculous results.

In reality, Kansas has been exemplary in liquor control and in federal compliance. The weight of history and enforcement of these laws pervade Kansas regulatory, statutory and case law. (See for example 1935 General Statute 21-2116, making it a criminal offense for a law enforcement officer or prosecutor to be negligent in not enforcing and prosecuting liquor laws and violations.) Kansas is in compliance with the N.M.D.A.A. in both the spirit and letter of the law.

D. Absence of Record

Kansas courts do not allow prior acts of a defendant into evidence unless an exception occurs. One of these exceptions is "absence of mistake or accident." K.S.A. 60-455. Lack of a record is good evidence in a Kansas court of law.

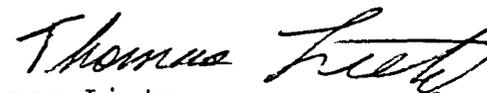
The same reasoning applies to the case at bar. The State of Kansas has stringently prosecuted thousands of defendants violating liquor laws before and after 1949. Reams of statutes and regulations have been promulgated and

legislated. In the course of all of the juvenile alcohol violations, liquor tax evasions, driving under the influence cases, etc., the notion that the phrase "personal use of the possessor" exempts everyone from every Kansas liquor law has never surfaced. The thought that this phrase would delete all Kansas liquor law is ludicrous, and the non-action by every Kansas defense attorney since 1949 is good evidence buttressing this conclusion. Kansas has been exemplary among the fifty states in liquor control, and continues to do so in its compliance with N.M.D.A.A.

In summary, the State of Kansas is in compliance with the N.M.D.A.A. Clearly delineated exceptions to the Kansas liquor laws parallel federal liquor law exceptions. Each exception complies with the N.M.D.A.A. Exceptions for doctors, dentists, recognized religions, heads of households, private clubs, pharmacists and hospitals are found in both Kansas and federal law. The long history of stringent enforcement of Kansas liquor laws by Kansas law enforcement agencies, the volumes of statutory, regulatory and case law expounded to compel compliance, and the Kansas Legislature's passage of law to comply with the N.M.D.A.A. all indicate that the State of Kansas has gone above and beyond the standards required by the federal government to comply with the N.M.D.A.A.

Very truly yours,


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