STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

July 31, 1989

ATTORNEY GENERAL OPINION NO. 89- 96

The Honorable William W. Bunten
State Representative, 54th District
1701 W. 30th
Topeka, Kansas 66611

Re: Mentally Ill, Incapacitated and Dependent Persons; Social Welfare -- Adult Care Homes -- Licensure and Receivership

Synopsis: Where an owner of a building which is leased by an adult care home business does not have an express or implied interest in the business of operating the adult care home, it is our opinion that the legislature did not intend to impose a duty upon the owner to assume such an interest. Rent moneys owed to such an owner should be paid to the owner by a receiver unless such moneys are otherwise subject to valid legal claims. However, where a landlord has an interest in the operation of the adult care home and merely seeks to escape licensure requirements or financial responsibility for operation of an adult care home business, that landlord should be on the license and will be subject to cost recovery procedures set forth at K.S.A. 39-960 and 39-961. Cited herein: K.S.A. 39-923; 39-926; 39-954; 39-959; 39-960; 39-961; 39-962; 39-963.

* * *

Dear Representative Bunten:

You request our opinion concerning interpretation of K.S.A. 39-954 et seq. as it relates to the authority of a receiver to retain lease payments claimed by a co-licensee who is not involved in the management of the affairs or operation of an adult care home but is rather a mere landlord. You specifically ask that we address these questions:

"(a) May a lessor, who is not involved in the management of the affairs or the operation of the adult care nursing home, be held liable for program deficiencies in a receivership pursuant to K.S.A. 39-360?

"(b) Whether a lessor who is not involved in the management of the affairs or the operation of the adult care home, may be required by the Secretary of Health and Environment to be a co-licensee under the provisions of 39-954, et seq., so as to make that lessor liable for program deficiencies in a receivership pursuant to K.S.A. 39-960?

"(c) May the Secretary of Health and Environment withhold lease payments to a lessor who is not involved in the management of the affairs or the operation of the adult care home, in a receivership pursuant to K.S.A. 39-960?"

We note that these issues have been the subject of litigation which we understand has been dismissed without prejudice. We also understand that the district court continues to exercise jurisdiction over this matter pursuant to K.S.A. 39-954 et seq. and the resulting receivership. Many of the issues discussed herein cannot be resolved without examination of specific facts. We cannot act as a fact finder and therefore defer such fact questions to the proper state agency or the district court.

You ask whether a lessor may be required to be a co-licensee pursuant to K.S.A. 39-954 et seq. K.S.A. 39-926 makes it unlawful to operate an adult care home without a license. K.S.A. 39-927 sets forth who must sign the application for a license:

> "An application for a license to operate an adult care home shall be made in writing to the licensing agency upon forms provided by it and shall be in such form

> and shall contain such information as the licensing agency shall require, which may include affirmative evidence of the applicant's ability to comply with such reasonable standards and rules and regulations as are adopted under the provisions of this act. The application shall be signed by the person or persons seeking to operate an adult care home, as specified by the licensing agency, or by a duly authorized agent of any person so specified. . . ." (Emphasis added).

Thus, anyone seeking to operate an adult care home must sign the application for licensure. K.S.A. 39-923(a)(13) defines the term "operate an adult care home":

> "(13) "Operate an adult care home" means to own, lease, establish, maintain, conduct the affairs of or manage an adult care home, except that for the purposes of this definition the word "own" and the word "lease" shall not include hospital districts, cities and counties which hold title to an adult care home purchased or constructed through the sale of bonds." (Emphasis added).

A problem arises because, while K.S.A. 39-923(a)(13) defines operation of an adult care home to mean "to own . . . an adult care home," it is not clear from the language of the statute whether "to own an adult care home" means to own an interest in the building or facility itself or to own an interest in the business of the adult care home.

The words chosen by the legislature are the most persuasive evidence of the purpose of the statute. However, if the plain meaning of the statute is not clear or leads to futile or unreasonable results, courts may look beyond the words to the purposes of the act. Atchison, Topeka and Santa Fe Ry. Co. v. U.S., 628 F.Supp. 1431, mod. on reconsideration 660 F.Supp. 29 (Kan. 1986); State v. Adee, 241 Kan. 825 (1987); Ludwick v. Johnson County, 233 Kan. 79 (1983). When a statute is susceptible to more than one construction, it must be given the construction which gives expression to the intent and purpose of the legislature, even though such construction is not within the strict literal interpretation of the statute. Reeves v. Board of County Commissioners of

Johnson County, 226 Kan. 397 (1979). In determining legislative intent, the court may not look to statements made years after the enactment, but may properly look to historical background, circumstances pending passage, purposes to be accomplished, and the effect the statute will have under the various suggested constructions. Board of Education of Unified School District 512 v. Vic Regnier Builder's, Inc., 231 Kan. 731 (1982); State v. Freeman, 236 Kan. 274 (1984); State v. Phifer, 241 Kan. 233 (1987). When a statute is ambiguous, the courts consider and give great weight to the interpretation of the appropriate administrative agency. Matzke v. Block, 564 F.Supp. 1157, affd. in part, rev. in part, 732 F.2d 799 (Kan. 1983); Dennison v. Topeka Chambers Indus. Dev. Corp., 527 F.Supp. 611, affd. 724 F.2d 869 (10th Cir. 1981); Board of County Commissioners of Johnson County v. Greenshaw, 241 Kan. 119 (1987). However, where an agency interpretation is clearly erroneous, in contravention of the law, or not consistent, a court may depart from agency interpretation. DSG Corp. v. Shelor, 239 Kan. 312 (1986); Appeal of Sterling Drill Company, 9 Kan.App.2d 367 (1981).

The Kansas Department of Health and Environment (KDHE) provides forms to applicants seeking to operate an adult care home. These forms include a disclosure statement which requires information concerning the owner of the land and building. If the applicant and the owner of the land are different entities, KDHE requires the owner of the property or building to join in the application for a license. Thus, KDHE requires such owners to become co-licensees. The issue thus becomes whether the legislature intended to mandate that owners of property obtain a license to operate an adult care home where such owners do not otherwise seek or possess authority to control, operate or own an interest in the separate legal entity providing the adult care.

Attorney General Opinion No. 84-66 discussed whether a foreign corporation licensed to operate and manage an adult care home in the state of Kansas should register pursuant to K.S.A. 17-7301 et seq. We opined that such corporate registration was required because of the active part the company in question took in the operations of the adult care home and considered the fact that this out-of-state corporation had entered into a management contract for the purpose or providing for the day-to-day affairs of the adult care home. This opinion did not discuss a situation involving a company that merely owned the building and which did not otherwise have or seek to exert any control or interest in the

operation of the adult care home. Similarly, in response to a March 17, 1982 letter from KDHE, this office addressed the authority to hold principals accountable as licensees. The principals discussed in this letter were indirectly involved in the operation of an adult care home through a contract for the performance of the day-to-day functions by a management group. We advised that in such a fact situation it seemed reasonable to require a real estate investment corporation to be licensed to operate an adult care home. Our advice was predicated upon the operation of an adult care home by the agent of the principal, and thus both entities were, to some degree, engaged in and legally responsible for the operation of the adult care home. Thus, we believed both entities should be required to obtain a license to operate that adult care home because both had a legal interest in the the adult care home.

Following our 1982 letter, L. 1982, ch. 189, § 1 amended K.S.A. 39-923(a) to include section (13) as it currently reads and to define "operate an adult care home" to include "to own . . . an adult care home". Unfortunately, legislative history in the form of committee meeting reports or minutes is virtually nonexistent because this amendment was introduced on April 28, 1982 and final action was taken on the same day. However, in determining legislative intent, statutory construction rules permit consideration of the circumstances and history surrounding the enactment. See State v. Phifer, 241 Kan. 233 (1987).

It is our understanding that in enacting the 1982 emergency amendment to K.S.A. 39-923, legislators apparently believed the amended language countered the problem of the adult care home property owner who violated standards but was not on the license. This was regarded as necessary legislation because some owners of property were suspected of playing a role in and having an interest in the management and operation of the home. The amendment required all parties involved in the ownership and operation of an adult care home business to be on the license. The question of whether mere ownership of the building was enough to trigger licensure requirements was not clearly addressed. KDHE proffers the legal principle inclusio unius est exclusio alterious as support for the proposition that if the legislature had not intended for mere property owners to be liable in receivership, it would have written into the receivership law the type of exception it included in K.S.A. 39-923(a)(13) for hospital districts, cities and counties. We note, however, that other entities peripherally involved in an adult care home are also not

included in the exception but are nevertheless excluded from licensure requirements: e.g., health care professionals providing services; equipment lessors or suppliers who own property located in the building; employees, residents and staff at the adult care home. These entities are involved in the ownership of adult care home property or the daily operation of the facility, but are not required to be on the license to operate, perhaps because of their relative lack of interest or control over business operations.

Licensure by the government is an exercise of police power:

> "The right to engage in a legitimate employment or business receives recognition as a portion of the individual freedoms secured by the due process provisions of the federal and state constitutions. However, this fact does not close the door to all legislative control over the exercise of the right. A state's police power with regard to the protection of health, morals, and welfare of the public includes the right to regulate, by requiring a license as a prerequisite to the carrying on of certain activities, commonly designated as businesses, occupations, vocations, trades, or callings.
>
> The right of personal liberty and the right to earn a livelihood in any lawful calling and to pursue any lawful trade or vocation is subject to the governmental right to require a license where justified under the police power." 51 Am.Jur.2d License and Permits, § 14 (1970); See also 16A C.J.S. Constitutional Law, § 454 (1984).

License means permission or authority, and a license to do any particular thing is permission or authority to do that thing. Federal Land Bank of Wichita v. Board of County Commissioners of Kiowa County, State of Kansas, 368 U.S. 146, 82 S.Ct. 282, 7 L.Ed.2d 199 (1961). The legislature may require a license in order to engage in certain occupations or businesses. However, statutes restraining the exercise of a trade, operation or business must not be deemed to extinguish or restrain private rights unless that is clearly the

legislatively intent. State v. Gillen, 126 Kan. 368 (1928). We must therefore determine whether there is a clear legislative intent to license the private right to own a building which is used as an adult care home.

KDHE believes that a license is required in order to own and lease a building to a non-profit corporation that operates an adult care home. The state obviously has a legitimate interest in the care given and the maintenance of adult care homes. The 1982 amendments to K.S.A. 39-923 et seq. sought to assure the state, and those residing in adult care homes, that those entities involved in providing such a service and maintenance could be held to certain standards. Prior to 1982, owners of adult care homes were occasionally using "straw men" as fronts, thus escaping responsibility for operation and maintenance. It is clear that the legislature intended to provide a mechanism whereby all the proper entities were required on a license.

It is not as clear whether a landlord of an adult care home is such an entity. Determining the future extent and nature of involvement in operations or maintenance by a facility owner could be difficult, especially before operations and maintenance actually commence or if an owner seeks to avoid such responsibility or hide such a relationship. Thus, application for license and disclosure forms require information concerning each person who has a direct or indirect ownership in an adult care home.

Given the deference afforded to agency interpretation and the compelling state interest in insuring that all adult care home operators and owners are held to certain standards, it is our opinion that K.S.A. 39-923 et seq. may be read to include a requirement of licensure for the owner of the building in which an adult care home is operated. However, such a requirement is not without limitation. The legislature clearly intended to require licensure of an owner who uses another entity to operate his or her business. A landlord will not necessarily have, seek or be able to exert any control over a separate legal entity which is completely independent in its operation of an adult care home occupying the property.

Requiring a landlord to be on the license could be characterized as allowing the landlord to permit the tenants to make this particular specialized use of the property. If the financial disclosure forms, application for license and the license itself assure the state that persons connected

with ownership and operation of the adult care home can be adequately monitored and enables enforcement of compliance with all applicable standards by those entities possessing such authority or responsibility, the state may require the owner of a building to obtain a license. A license for these purposes is within the scope of state police power. However, if requiring a landlord to be on a license mandates that the landlord assume some sort of additional control over or responsibility for operations, where none was heretofore intended, sought, or even available, it is our opinion that this goes beyond the intent of the legislature. Thus, whether a particular entity has or should have some responsibility concerning the operation of an adult care home becomes a fact question dependent upon the extent of legal interest, involvement or responsibility of each entity. Such fact questions fall within the province of authority delegated to KDHE. Therefore, that agency may require an owner of an adult care home to be on the adult care home license when there is factual evidence that the owner is using another entity to operate an adult care home business for which the owner of the building is or should be responsible.

The second issue is whether the receiver and KDHE must pay rent to a landlord, or whether such payments may be suspended or denied because of costs incurred by the state due to the receivership status of the adult care home.

If an adult care home is unable to continue for one or more of the reasons enumerated under K.S.A. 39-954 et seq., a court may appoint a receiver, who essentially runs the adult care home until the fulfillment of one of the circumstances listed under K.S.A. 39-963. A receiver is "a ministerial officer, agent, creature, hand or arm of, and temporary occupant and caretaker of the court and he represents the court appointing him and he is the medium through which the court acts." Blacks Law Dictionary 1140 (5th ed. 1979); see also Cates v. Musgrove, 190 Kan. 609 (1962); W-V Enterprises, Inc. v. Federal Savings and Loan Insurance Corporation, 234 Kan. 354 (1983). The receiver remains subject to the supervision of the district court under K.S.A. 39-962, and we note that the court appointing this receiver has continuing jurisdiction and authority to advise, supervise and authorize a receiver to either retain or pay over rent moneys claimed by an owner of the adult care home property. This review by the court provides due process notice and hearing opportunity.

In addition to those authorized or imposed by the district court, K.S.A. 39-959 sets forth the powers and duties of a receiver:

> "A receiver appointed in accordance with the provisions of this act shall have the following powers and duties:
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> (a) Conduct the day to day business operations of the adult care home;
>
> (b) reimburse the owner or licensee, as appropriate, a fair monthly rental for the adult care home, taking into account all relevant factors, including the condition of such adult care home and set-offs arising from improvements made by the receiver;
>
> (c) give fair compensation to the owner or licensee, as appropriate, for all property taken or used during the course of the receivership if such person has not previously received compensation for the property being taken or used;
>
> . . .
>
> (g) honor all existing leases, mortgage, chattel mortgage and security interests." (Emphasis added).

Thus, when appropriate and taking into account all relevant factors, the receiver is clearly authorized to pay the owner or licensee a fair monthly rental. The receiver also has the power and duty to honor all existing leases. We note the two separate provisions discussing these reimbursements. This may indicate that some persons having a mortgage or lease arrangement with an adult care home may differ from the owner or licensee; e.g. the building or equipment lessor; the bank holding a mortgage, etc.

Subsection (g) of K.S.A. 39-954 requires the receiver to honor all existing leases, and thus a receiver may step into the preexisting contractual relationship as a party. Subsection (b) permits reimbursement to an owner or licensee to be affected by certain factors. Thus, one issue becomes whether the entity claiming a payment from a receiver is an owner or

licensee. The factual determinations discussed under the first issue impact upon this question. If an owner is required to be on an license, K.S.A. 39-959(b) permits consideration of all relevant factors and rent payments may be withheld "when appropriate". "Appropriate" is not defined by statute and what is appropriate must therefore be determined in light of all relevant factors. If an owner is not or should not be on a license, K.S.A. 39-954~~(g)~~ allows the receiver to make rent payments, subject to any restrictions imposed by the district court or by restrictions on funds available to the receiver. However, K.S.A. 39-954 discusses the power and authority of the receiver, not KDHE. While the statutes permit the state to fund the costs of receivership, KDHE is a separate entity. Thus, the obligation of the state to pay rent moneys to a landlord must be established pursuant to other authority.

The third issue concerns liability for costs and necessarily involves elements discussed under the first two issues. In addition to retention of reimbursement as authorized by K.S.A. 39-959(b), K.S.A. 39-960 and 39-961 discuss costs incurred as a result of an adult care home going into receivership. Both the secretary of KDHE and the secretary of the Social and Rehabilitation Services (SRS) are statutorily authorized to recover costs resulting from expenditures by the state due to the receiver's operation of the adult care home. These amounts "shall be owed by the owner or licensee . . . and until repaid shall constitute a lien against all nonexempt personal and real property of the owner or licensee." Thus, a lien arises by operation of law and creates a right or claim which the state, as creditor, has in order to secure the payment of a debt or obligation. See Blacks Law Dictionary 832 (5th ed. 1979). K.S.A. 39-963 authorizes the court to make additional orders to recover costs and expenses incurred pursuant to receivership. These statutes evidence a clear legislative intent to allow and facilitate recovery of costs incurred by the state. However, determining from whom such costs may be recovered requires analysis of the statutory language and legislative intent.

While K.S.A. 39-959 remains unchanged from the original 1978 enactment, K.S.A. 39-960 and 39-961 were added to the act pursuant to L. 1984, ch. 158 (1984 Senate Bill No. 656). Testimony received on Senate Bill No. 656 from KDHE and SRS indicates that these agencies saw this amendment as a means by which the state could recover costs of a receivership when costs paid by the state exceeded the revenue generated by the adult care home. These agencies believed that the

amendment allowed payments made by the state to be recovered from the owner or licensee. Testimony does not evidence a discussion of whether "the owner" included a "mere landlord" or rather, was directed at an owner who sought to escape responsibility by using another entity to operate the business. Testimony before the committee does exhibit a strong desire to recover costs expended by the state due to an adult care home going into receivership. The state was obviously seeking a method by which to impose and recover a debt. When the adult care home goes into receivership because of insolvency, recovery of debt from the bankrupt business becomes problematic if not impossible.

Liability for or the obligation to pay a debt may be created in many ways: by contract (implied or express); through a judgment; or through enforcement of a statutory obligation. See 26 C.J.S. Debt § 2 (1956). There has not been a judicial order concerning the payment of this obligation. Therefore, the possible theories upon which this debt may be based are contractual or statutory.

The landlord in question has a lease agreement with the tenant, but the contract does not express contractual agreement by the owner to assume responsibility for debts. Therefore, it becomes necessary to imply such contractual liability. Financial responsibility for a debt may be implied or arise because of special relationships; i.e. parents may be held liable for the actions of their children, masters or principals for the actions of their servants or agents and partners for their co-partners. These relationships are either based on consensual agreement, joint action or ability to control. These types of relationships will not necessarily exist between a landlord and tenant unless there is joint action, the landlord expressly or impliedly agrees to be financially responsible for the debts of a tenant or the landlord exercises some control over the business of the tenant.

The agreement in question does not expressly seek to assume or exert any control or interest in the day-to-day operation, or other business aspects of the adult care home. However, joint action or ability to control may be implied from facts outside the scope of the agreement. Such a fact determination must be made by the appropriate authority. If joint action or ability to control is not evidenced, individual liability must be present. Individual liability may exist if there is some indication that the landlord agreed to assume liability for debts owed to the state.

A surety contract represents a type of agreement whereby one entity agrees to assume liability for a debt. Surety is defined as "one who undertakes to pay money or to do any other act in the event that his principle failed therein." Blacks Law Dictionary 1293 (5th ed. 1979). See also U.S. v. Gonzales, 541 F.Supp. 783 (Kan. 1982). A bond is a contract, and a surety is bound to the extent it has agreed to be bound. Fink v. Allen, 11 Kan.App.2d 27 (1985). Introduced in the same year as Senate Bill No. 656, 1984 House Bill No. 2368 did not pass. This bill sought to require a surety bond in order to protect against financial failure of an adult care home. If this bill had been enacted, the costs incurred by the receiver could be in part recovered from the surety. The failure of this bill could mean that such financial surety was not intended or required by the legislature or that the legislators believed that other enactments provided for such assurances.

If a landlord agrees to pay the debts of a tenant, creditors of that tenant may look to the landlord for payment. Requiring a landlord to be on a license could arguably imply a consensual agreement on the part of a landlord to act as surety for that tenant. Where a surety contract does not exist and cannot be implied, recovery for costs must be predicated upon other authority. From the facts available to us, there does not appear to be an express or implied contract between these parties whereby the landlord promised the tenant or creditors that he would assume responsibility for the debts owed to the state.

Thus, the issue becomes whether the statutes create an obligation on the part of the landlord. K.S.A. 39-960 and 39-961 establish a statutory obligation on the part of the owner or licensee of an adult care home. As previously discussed, the legislature clearly intended to impose some liability upon those owners of adult care homes who sought to escape responsibility through the use of another entity who conducted the day-to-day operations of the adult care home in which the facility owner had a legal interest. Legislative history indicates that K.S.A. 39-960 and 39-961 were enacted with the support of the state agencies as a counter to situations wherein a for-profit entity reaped the benefits of owning or operating an adult care home but escaped the responsibilities connected with this type of business. Personal and real property become subject to a lien pursuant to these statutes until amounts owed are paid by the owner or licensee. The statutes seek, in effect, to "pierce the corporate veil" and insure financial responsibility on the

part of those who directly or indirectly have an interest in the adult care home. Thus, the statutes dictate that an owner of an adult care home may be individually or jointly liable for the costs incurred by the state as a result of the adult care home going into receivership.

While a landlord may own the building which houses an adult care home, not all such landlords own or operate any part of the business conducted on their property. Some property owners may neither seek nor possess responsibility for the activities conducted on their premises, nor will they always have the prerequisite capability to conduct such a business. Thus, there may be no joint undertaking. However, licensing procedures may notify a landlord that, if they choose to permit a tenant to make a certain use of their property, they are acquiescing to assumption of some responsibility for the actions of the tenant. Such statutory imposition of responsibility for the obligations and debts of a separate legal entity not connected with or controlled by the debtor resembles absolute liability principles.

The federal government has legislatively created absolute liability in certain situations involving environmental protection: 43 U.S.C.S. § 1814(d) requires the owner or operator of a vessel from which a pollutant discharges to pay all removal costs incurred by federal or state governments or agencies; 33 U.S.C.S. § 497 enacted the refuse act which is a criminal strict liability statute providing for attachment of the liability without regard to the question of mistake or innocence. However, a defendant may show that someone else is responsible for the discharge, and thus escape strict liability. See 61A Am.Jur.2d Pollution Control, § 214 (1981); 42 U.S.C.S. § 6973 and § 7003 amended the solid waste disposal act and, under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), owners of landfill property purchased several years after all dumping of hazardous materials have ceased can be held liable for costs. United States v. Price, 523 F.Supp. 1055, 1073 (1981). This liability can be assessed unless the subsequent owners "could not reasonably be expected to have actual knowledge of the presence of hazardous waste at such facility or site and of its potential for release." Id. at 1074. Moreover, legislative history concerning enactment of CERCLA indicates that, in the interests of fairness, courts may apply common law joint and several liability on a case by case basis. United States v. A & F Materials Co., Inc., 578 F.Supp. 1249, 1256 (1984). Thus, legislation can dictate liability without fault or negligence.

However, absolute liability, while not requiring proof of negligence, is a judicial doctrine which imposes liability upon proof of statutory violation. See United States v. A & F Materials Co., Inc., 578 F.Supp. 1249 (Ill. 1984). When an adult care home goes into receivership for insolvency reasons, a statutory violation has not necessarily occurred. Additionally, absolute or strict liability is premised on some degree of involvement. Persons who have absolutely no connection with an adult care home would not be subject to the terms of the statute or absolute liability. The issue becomes whether the legislature intended to impose absolute liability upon a landlord who rents to a non-profit tenant when that for-profit landlord's only connection with the adult care home is ownership of the specially built building and collection of rent moneys.

It is our opinion that legislative history does not support the imposition of strict or absolute liability against owners of property in which adult care homes are operated. Rather, K.S.A. 39-954 et seq. gives the state a statutory cause of action allowing recovery of costs from owners, operators or licensees who have some express or implied duty concerning the adult care home. The extent to which a specific entity is actually responsible for the finances or operations of an adult care home requires a determination concerning the nature of the relationship between the entity owning the building and the entity operating the adult care home. Such fact questions are properly addressed by the appropriate state agency or a court of law.

Where an owner of a building which is leased by an adult care home business does not have an express or implied interest in the business of operating the adult care home, it is our opinion that the legislature did not intend to impose a duty upon the owner to assume such an interest. However, where a landlord merely seeks to escape licensure requirements or financial responsibility for operation of an adult care home business in which the landlord has an interest, that landlord is required to be on the license and will be subject to cost recovery procedures set forth at K.S.A. 39-960 and 39-961.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
ATTORNEY GENERAL OF KANSAS

Theresa Marcel Nuckolls

Theresa Marcel Nuckolls
Assistant Attorney General

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