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ATTORNEY GENERAL OPINION NO. 92-128

The Honorable Elizabeth Baker
State Representative, Eighty-Second District
601 Honeybrook Lane
Derby, Kansas 67037

Re: State Boards, Commissions and Authorities--Public
Employees Retirement Systems; Kansas Police and
Firemen's Retirement System--Disability Benefits;
Procedures and Reports; Conservators

Synopsis: Pursuant to K.S.A. 1991 Supp. 74-4960, as amended
by L. 1992, ch. 321, § 14, and 74-4960a, as
amended by L. 1992, ch. 321, § 15, the Kansas
public employees retirement system (KPERS) is
obligated to make payment of the 10% benefit due a
minor child of a disabled member of the Kansas
police and firemen's retirement system (KP&F)
only to a legally appointed conservator. It is
necessary, therefore, that a conservator be
appointed for each minor child of the member's
family. Unless the divorce decree provides
otherwise, a member of KP&F who is making child
support payments pursuant to a divorce decree is
entitled to credit toward those payments the amount
of the 10% benefit paid by KPERS to the conservator
of the minor child. If the 10% benefit exceeds the
amount owed pursuant to the divorce decree, the
excess will be considered a gratuity under the
divorce decree. If the court determines that
payment of the 10% benefit to a conservator somehow
results in a material change in circumstances, the
court may modify the order fixing child support.
Cited herein: K.S.A. 20-165, as amended by L.
1992, ch. 312, § 1; K.S.A. 1991 Supp. 59-3004;

60-1610, as amended by L. 1992, ch. 273, § 2;
74-4916, as amended by L. 1992, ch. 321, § 8;
74-4927h; 74-4959, as amended by L. 1992, ch.
321, § 13; K.S.A. 74-4960, as amended by L. 1992,
ch. 321, § 14; 74-4960a, as amended by L. 1992,
ch. 321, § 15.

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Dear Representative Baker:

As representative for the eighty-second district, you request our opinion regarding the effect of 1992 amendments on disability benefits due under the Kansas police and firemen's retirement system (KP&F) to minor children of members of KP&F. Specifically, you ask:

"1. Must a legally appointed conservator be appointed in all cases, including those where the minor child is currently receiving the full amount of the KP&F disability benefits that are due and owing to them?

"2. If a conservator is required to be appointed, must multiple conservators be appointed if the disabled KP&F member has more than one dependent?

"3. If a conservator is required to be appointed, will this new requirement have any impact on child support payments of disabled police officers and firefighters of KP&F?"

During the 1992 legislative session, legislators were made aware of instances in which members of KP&F were retaining the 10% benefit due minor children under K.S.A. 1991 Supp. 74-4960 or 74-4960a. In response, the legislature amended K.S.A. 1991 Supp. 74-4960 and 74-4960a in L. 1992, ch. 321, §§ 14, 15 respectively, adding a provision requiring that "[a]ll payments due under this section to a minor child shall be made to a legally appointed conservator of such minor."

A fundamental rule of statutory construction is that the intent of the legislature governs when the intent can be ascertained from the statute. Steele v. City of Wichita, 250 Kan. 524, 529 (1992). In construing a statute, courts are not justified in disregarding the clear intent of the statute appearing from its plain and unambiguous language. Boaldin v. University of Kansas, 242 Kan. 288, 291 (1987). Where a

statute is clear and unambiguous, it must be applied accordingly without judicial construction. Capital Electric Line Builders, Inc. v. Lennen, 232 Kan. 379, Syl. ¶ 4 (1982); Batt v. Globe Engineering Co., 13 Kan.App.2d 500, 503 (1989).

The provision in question mirrors provisions existing in: K.S.A. 1991 Supp. 74-4916, as amended by L. 1992, ch. 321, § 8 (death benefit; KPERS); 74-4927h (accidental death benefit; employees of state board of regents and institutions; KPERS); and 74-4959, as amended by L. 1992, ch. 321, § 13 (death benefit; KP&F). The provision is clear and unambiguous. It provides no exceptions. Therefore, pursuant to K.S.A. 1991 Supp. 74-4960, as amended, and 74-4960a, as amended, KPERS is obligated to make payment of the 10% benefit due a minor child only to a legally appointed conservator. The conservator may be an individual or a corporation who is appointed by the court to act on behalf of the minor child. K.S.A. 1991 Supp. 59-3004. It is not necessary that a different individual or corporation be appointed as conservator for each minor child of a member's family. See In re Conservatorship of LMS, 12 Kan.App.2d 725 (1988). However, as the 10% benefit may be paid only to a legally appointed conservator, it is necessary that a conservator be appointed for each minor child.

Prior to determining the effect this requirement may have on child support paid by a disabled member of KP&F, it is necessary to consider the opinion of the Kansas Supreme Court expressed in Andler v. Andler, 217 Kan. 538 (1975). In that case, the court was asked to determine whether unqualified social security disability payments made for the benefit of minor children because of their father's total disability constitute a satisfaction of child support payments required by a divorce decree.

"The Social Security Administration provides benefits for minor children whose parent(s) is (are) disabled. The minor children are considered beneficiaries of the benefits earned and paid for by their parents under the Social Security Act. The money given under this program is an unqualified grant of money to be used as the minor's guardian determines. (42 U.S.C.A. 402[d][1].)" Andler, 217 Kan. at 539.

The court acknowledged that the fundamental nature of the social security system is a form of insurance and that benefits paid thereunder are not gratuitous. Id. at 543. The court then determined that:

"[W]hen a father who has been ordered to make child support payments becomes totally and permanently disabled, and unconditional Social Security payments for the benefit of the minor children are paid to the divorced mother, the father is entitled to credit for such payments by the government against his liability for child support under the divorce decree. The father is entitled to credit, however, only up to the extent of his obligation for monthly payments of child support, but not exceeding it. [The excess] must be regarded under the divorce decree as a gratuity to the children." Id. at 544.

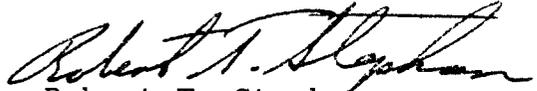
An overwhelming number of state courts that have passed on the issue have found that an absent parent's child support obligation is fulfilled by insurance benefits paid by social security on behalf of the parent. Todd v. Norman, 840 F.2d 608, 614 (8th Cir. 1988) (dissent).

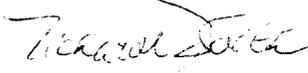
The 10% benefit payable under K.S.A. 1991 Supp. 74-4960, as amended, or 74-4960a, as amended, is analogous to the social security benefit reviewed in Andler. Therefore, unless the divorce decree provides otherwise, a member of KP&F who is making child support payments pursuant to a divorce decree is entitled to credit toward those payments the amount of the 10% benefit paid by KPERS to the conservator of the minor child. If the 10% benefit exceeds the amount owed pursuant to the divorce decree, the excess will be considered a gratuity under the divorce decree.

Pursuant to K.S.A. 1991 Supp. 60-1610, as amended by L. 1992, ch. 273, § 2, the court may issue an order making provisions for the support of the minor child. The amount of child support is to be established pursuant to the guidelines adopted by the supreme court. K.S.A. 20-165, as amended by L. 1992, ch. 312, § 1. Orders fixing child support are subject to the continued jurisdiction of the trial court, and may be modified in the future when a material change in circumstances is shown. K.S.A. 1991 Supp. 60-1610, as amended; Clark v. Clark, 236 Kan. 703, 709 (1985). Therefore, if the court

determines that payment of the 10% benefit to a conservator somehow results in a material change in circumstances, the court may modify the order fixing child support.

Very truly yours,


Robert T. Stephan
Attorney General of Kansas


Richard D. Smith
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