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ATTORNEY GENERAL OPINION NO. 88-165

Winston Barton, Secretary
Social and Rehabilitation Services
6th Floor, Docking State Office Bldg.
Topeka, Kansas 66612

Re: Mentally Ill, Incapacitated and Dependent Persons;
Social Welfare -- Social Welfare -- Eligibility
Requirements of Applicants for and Recipients of
Assistance; Compliance with Federal Standards

Synopsis: Certain portions of K.S.A. 39-709, as amended by L.
1988, ch. 143, § 8, conflict with sections of the
Medicare Catastrophic Coverage Act of 1988, 42
U.S.C. § 1396p. In order to comply with the more
restrictive federal eligibility standards, and thus
remain eligible for participation in the federal
medicare program, state legislative action is
necessary to amend those portions of the statute
that directly conflict with federal requirements.
Cited herein: K.S.A. 39-709, as amended by L.
1988, ch. 143, § 8; 42 U.S.C. § 1396p (Supp.
1988).

* * *

Dear Secretary Barton:

You request our opinion concerning a potential conflict
between K.S.A. 39-709(a)(2) and (d)(4), and 42 U.S.C. §
1396p. You ask whether a legislative amendment to K.S.A.
39-709 is necessary in order to bring state law into
compliance with federal provisions.

K.S.A. 39-709, as amended by L. 1988, ch. 143, § 8, establishes eligibility requirements for state financial assistance to needy persons. Subsection (a) discusses assistance for which federal moneys are expended while subsection (d) deals with eligibility requirements for assistance, the cost of which is not shared by the federal government.

An applicant is entitled to Medicaid if he or she satisfies the eligibility criteria established by the applicant's state. Schweiker v. Gray Panthers, 453 U.S. 34, 36, 101 S.Ct. 2633, 2636, 69 L.Ed.2d 460 (1981). However, in order to participate in federal Medicare programs, state plans must comply with the requirements imposed by the Medicare Act and the implementing federal regulations. Id. at 453 U.S. at 37, 101 S.Ct. at 2636. See also, Lewis v. Hegstrom, 767 F.2d 1371, 1378 (10th Cir. 1985).

K.S.A. 39-709(a) states in pertinent part:

"Subject to the additional requirements below, assistance in accordance with plans under which federal moneys are expended may be granted to any needy person who:

. . .

(2) Is a citizen of the United States or is an alien lawfully admitted to the United States and who is residing in the state of Kansas. If any person transfers or assigns property without adequate consideration or for the purpose of becoming eligible for assistance (A) within the two-year period immediately preceding the application if the value of the property so transferred or assigned is \$12,000 or less or (B) within a period of time in excess of two years, as established by rules and regulations of the secretary, if the value of the property so transferred or assigned is in excess of \$12,000, such person shall thereby become ineligible to receive assistance for such period of time as the value of the property assigned or transferred would have reasonably maintained such person at a standard

compatible with decency and health."
(Emphasis added.)

This statute discusses assistance in accordance with plans under which federal moneys are expended. The same language is substantially contained in subsection (d)(4), which concerns expenditures not involving federal funds.

42 U.S.C. § 1936p discusses the eligibility of persons to receive Medicare assistance through a state plan. The provisions of the federal Medicare Catastrophic Coverage Act of 1988, which affects eligibility of persons with resources disposed of on or after July 1, 1988, provides in pertinent part:

"(c)(1) In order to meet the requirements of this subsection for purposes of section 1902(a)(51)(B), the State plan must provide for a period of ineligibility in the case of an institutionalized individual (as defined in paragraph (3)) who, at any time during the 30 month period immediately before the individual's application for medical assistance under the State plan, disposed of resources for less than fair market value. The period of ineligibility shall begin with the month in which such resources were transferred and the number of months in such period shall be equal to the lesser of --

"(A) 30 months, or

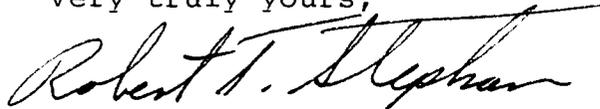
"(B) (i) the total uncompensated value of the resources so transferred, divided by (ii) the average cost, to a private patient at the time of the application, of nursing facility services in the State or, at State option, in the community in which the individual is institutionalized."
(Emphasis added.)

State eligibility requirements place a two-year (24 month) limitation period during which certain applicants may not transfer property valued at \$12,000 or less for less than adequate consideration or for the purpose of becoming eligible for assistance. This 24 month period appears to conflict with

the 30 month period established at the federal level. Applicants and transfers meeting the applicable definitions and descriptions contained in both state and federal provisions may be potentially subject to two different time periods during which they may not transfer property valued at \$12,000 or less for less than adequate consideration. While state law would allow such transfers if made outside a 24 month period, federal law would preclude the same transfer unless it occurred more than 30 months prior to application for assistance. This represents a conflict between state and federal eligibility standards that occurs when an individual applicant's eligibility status is governed by and defined under both laws.

It is therefore our opinion that certain portions of K.S.A. 39-709, as amended by L. 1988, ch. 143, § 8, conflict with sections of 42 U.S.C. § 1396p, as amended in 1988. In order to comply with the more restrictive federal eligibility requirements, state legislative action must be taken to amend the conflicting portions of K.S.A. 39-709. Such amendment is not required if the state does not participate in the federal Medicare program, but is necessary for participation when federal law mandates that the state must comply with federal standards.

Very truly yours,



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