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December 17, 1992

ATTORNEY GENERAL OPINION NO. 92-156

Thomas H. Sullivan
Phillips County Counselor
Phillips County Courthouse
Phillipsburg, Kansas 67661

Re: Mentally Ill, Incapacitated and Dependent Persons; Social Welfare--Social Welfare-- Eligibility Requirements for and Recipients of Assistance

Probate Code--Probate Procedure; Allowance of Demands--Claims Against Estate

Synopsis: In granting the department of social and rehabilitation services a claim against the estates and payable on death accounts of certain decedents who had received assistance, the legislature intended that the claims be enforced by existing provisions of the probate and civil codes and did not intend to grant the department independent authority to order payment. Cited herein: K.S.A. 9-1215, as amended by L. 1992, ch. 150, § 1; 9-1216, as amended by L. 1992, ch. 150, § 2; 17-2263, as amended by L. 1992, ch. 150, § 3; 17-2264, as amended by L. 1992, ch. 150, § 4; 17-5828, as amended by L. 1992, ch. 150, § 5; 17-5829, as amended by L. 1992, ch. 150, § 6; K.S.A. 1991 Supp. 39-708c, as amended by L. 1992, ch. 322, § 5; 39-709, as amended by L. 1992, ch. 150, § 7; K.S.A. 58-3901; K.S.A. 1991 Supp. 58-3910; 58-3912; K.S.A. 58-3914; K.S.A. 1991 Supp. 59-102; K.S.A. 59-514; 59-1301, as amended by L. 1992, ch. 150, § 8; K.S.A. 1991 Supp. 59-901; 59-1401; 59-2236; 59-2239; 42 C.F.R. § 483.10.

* * *

Dear Mr. Sullivan:

As Thomas county counselor you ask our opinion concerning the provisions of L. 1992, ch. 150, § 7, amends K.S.A. 39-709 regarding recovery of medical assistance from a decedent's estate. Section 7(g)(2) of L. 1992, ch. 150 provides that the state has

> "[a] claim against the property or any interest therein belonging to and a part of the estate of any deceased recipient or if there is no estate, the estate of the surviving spouse, if any, shall be charged for such medical assistance paid to either or both, and (B) a claim against any funds of such recipient or spouse in any account under K.S.A. 9-1215, 9-1216, 17-2263, 17-2264, 17-5828 or 17-5829 and amendments thereto. . . ."

The various statutes cited refer to payable on death accounts at banks (K.S.A. 9-1215, 9-1216), credit unions (K.S.A. 17-2263, 17-2264) and savings and loans (K.S.A. 17-5828, 17-5829).

You ask two questions concerning L. 1992, ch. 150, § 7(g)(2):

"(1) Is a nursing home required to pay personal needs funds of any resident who has received medical assistance to the executor or administrator of a decedent's estate in accordance with the provisions of 59-1401 or to the Department of Social and Rehabilitation Services in accordance with the instructions of the letter dated October 20th, 1992, which is attached?

"(2) Does a bank, credit union, or savings and loan association have any liability to the State Department of Social and Rehabilitation Services if the bank, without actual knowledge of an SRS claim, pays account balances to the named payee of a 'payable on death account' and if so, how is a bank, credit union, or savings and loan association to know whether SRS has a claim against a payable on death account?"

PERSONAL NEEDS FUNDS

A personal needs fund is an account, held by a nursing home for a resident, in which the resident may deposit and withdraw

money. Nursing homes which house residents receiving medicare or medicaid are required to establish such funds. 42 C.F.R. § 483.10 (1991). The code of federal regulations sets forth requirements for funds at covered nursing facilities including the requirement that

> "[e]ffective October 1, 1990, upon the death of a resident with a personal fund deposited with the facility, the facility must convey promptly the resident's funds, and a final accounting of those funds, to the individual administering the resident's estate." 42 C.F.R. § 483.10(c)(6).

The Kansas department of social and rehabilitation services (SRS), apparently pursuant to K.S.A. 1991 Supp. 39-708c, as amended by L. 1992, ch. 322, § 5(b), attempted to exert jurisdiction over nursing facilities housing residents receiving federal assistance. SRS issued a letter, which provided, in part:

"Dear Administrator:

"During the 1992 legislative session, legislation was passed which allowed the state to file claims against the estates of recipients of medical assistance. The measure, which amends K.S.A. 39-709, had broad support in the Kansas legislature.

"Beginning July 1, 1992, SRS is authorized to recover medicaid expenditures from the estates of medical assistance recipients who have received long-term care services and who do not have a surviving spouse, or minor or disabled children. The medicaid claim is limited to the amount of medical assistance received after June 30, 1992. Further, the claim is a first class claim as defined in probate procedure. A claim will be filed even if there is a will or if there are heirs other than the surviving spouse or qualifying children.

"When there is a death of a resident of your facility who is a medicaid recipient and who has no surviving spouse or dependent children, I am requesting that your facility forward within 10 working days the personal needs funds of the deceased recipient resident to:

"Estate Recovery Unit
"Department of Social and Rehabilitation Services
"Docking State Office Building
"Room 624-S
"Topeka, KS 66612-1570

"In addition, a copy of the accounting record of the personal needs account for each deceased recipient of medical assistance should be forwarded to the Estate Recovery Unit within 30 days. The Estate Recovery Unit, as my designee, will assume responsibility for receiving the monies and advising the appropriate court or personal representative of its receipt. Should any priority claim arise, we will refund the funds received from the above account to the priority claimant."

Three distinct factual situations present themselves, each of which will be analyzed separately. First is the situation in which heirs or devisees exist and estate proceedings are to be opened in court. Under this scenario, K.S.A. 1991 Supp. 59-1401 provides, in relevant part:

> "The executor or administrator shall: (a) Have a right to the possession of all the property of a resident decedent, except the homestead and allowances to the surviving spouse and minor children; (b) marshal all tangible personal property owned by a resident decedent located in the state of Kansas and all intangible personal property owned by a resident decedent wherever located, either directly or by ancillary administration; (c) take possession, within six months from the date of appointment, of all tangible personal property located in this state and all intangible property wherever located, to be held, administered and finally distributed as provided by law, but nothing herein shall require an executor or administrator of a resident decedent to take possession of intangible personal property being administered in another jurisdiction, if the court in which such administration is pending refuses to authorize delivery of possession."

In short, this section quite unambiguously provides that the executor or administrator is to take possession of property. Does L. 1992, ch. 150, § 7 change this result? The new law only provides that SRS has "a claim" against the property of the decedent. L. 1992, ch. 150, § 8 amends K.S.A. 59-1301, which sets forth the order of payment of demands against estates. The amended statute now provides in part:

> "If the applicable assets of an estate are insufficient to pay in full all demands allowed against it, payment shall be made in the following classified order:
>
> "First class, the expenses of an appropriate funeral in such amount as was reasonably necessary, having due regard to the assets of the estate available for the payment of demands and to the rights of other creditors, and, following the allowance of such expenses, any claim for medical assistance paid under subsection (e) of K.S.A. 39-709 and amendments thereto. Any part of the funeral expenses allowed as a demand against the estate in excess of the sum ascertained as above shall be paid as other demands of the fourth class." (Underscoring represents amendments.)

The Kansas probate code provides specific procedures for claims to be filed against estates. See K.S.A. 1991 Supp. 59-2236 et seq. We believe that the intent of L. 1992, ch. 150, § 7 is not to override to probate code, but to provide SRS with a claim which may be assessed as a part of the probate proceeding. This interpretation is based on the express reference to the probate code in L. 1992, ch. 150, § 8. If the legislature had intended SRS to by pass probate, it would not have included this specific reference to the probate code. As such, when an administrator or executor is to be appointed within the statutory period, that representative has possessory rights to the money held in the needs funds; SRS does not.

Another scenario is presented by the common situation in which the value of the decedent's property is small, and the heirs decide not to file any sort of petition in court, but to settle the estate by agreement, as contemplated in K.S.A. 1991 Supp. 59-102(8). The problem the nursing home faces in this

case is whom they should turn over the personal needs funds. K.S.A. 1991 Supp. 59-1507b(b) provides a new solution:

> "(b) When a resident of the state dies, whether testate or intestate, if the total assets of the estate of the decedent do not exceed $10,000 in value, any personal property in the form of moneys, stock, evidence of indebtedness, interest or right transferable to the decedent's estate by any corporation or person shall be transferred to the successor or successors of the decedent, if entitled thereto by will or by intestate succession, without having been granted letters of administration or letters testamentary, upon such successor's or successors' furnishing the corporation or person with an affidavit showing entitlement thereto. Transfer of such personal property to the successor or successors shall be deemed to be a transfer to the personal representative of the decedent, and the receipt of the successor or successors shall constitute a full discharge and release from any further claim for such transfer to the same extent as if the transfer had been made to an executor or administrator of the decedent's estate. The affidavit required to be furnished under the provisions of this subsection shall be substantially as follows. . . ."

This statute, by it express terms, allows the nursing home to pay the money to a successor upon receipt of the affidavit, releasing the nursing home from further liability to any claimant.

K.S.A. 1991 Supp. 59-2239(1) provides, in relevant part:

> "No creditor shall have any claim against or lien upon the property of a decedent other than liens existing at the date of the decedent's death, unless a petition is filed for the probate of the decedent's will pursuant to K.S.A. 59-2220 and amendments thereto or for the

> administration of the decedent's estate pursuant to K.S.A. 59-2219 and amendments thereto within six months after the death of the decedent and such creditor has exhibited the creditor's demand in the manner and within the time prescribed by this section, except as otherwise provided by this section."

The result: if SRS wants to assert its claim when no petition has been filed, SRS must file the petition.

This leads to the third scenario -- the case of a decedent who was truly alone with no relatives, no will and minimal assets. What is the nursing home to do with any money in the personal needs funds? In all probability, even if SRS has a claim, it will often not file a petition because the cost of doing so would be greater than any potential award. With no petition for administration filed, the escheat provisions of the probate code can not come into play. See K.S.A. 59-514, K.S.A. 59-901 et seq. As such, we believe the nursing home has a duty to dispose of the property as provided in the disposition of unclaimed property act, K.S.A. 58-3901 et seq. We believe that eventually such funds become abandoned property under either K.S.A. 58-3901 or K.S.A. 1991 Supp. 58-3910. As such, when the property becomes abandoned, the nursing home is obligated to comply with reporting provisions of K.S.A. 1991 Supp. 58-3912 and the delivery provisions of K.S.A. 58-3914.

PAYABLE ON DEATH ACCOUNTS

You also ask our opinion whether a financial institution is liable to SRS for payment of a payable on death certificate to a named payee when SRS has a claim against the account but the financial institution is without notice of the claim.

Payable on death accounts are provided for in three different groups of statutes K.S.A. 9-1215, 9-1216 (banks); K.S.A. 17-2263, 17-2264 (credit unions); and K.S.A. 17-5828, 17-5829 (savings and loans). Except for referring to differing institutions, the statutes are virtually identical and each was amended by L. 1992, ch. 150.

The statutes authorize these financial institutions to enter written contracts where the balance of an owners deposit at the time of death of the owner is payable to a named beneficiary. Such transfers are "not to be considered

testamentary" and therefore are not part of any probate proceedings.

K.S.A. 9-1215, 17-2263 and 17-5828 were amended by L. 1992, ch. 150, § 1, 3, 5 to provide, in relevant part:

> "Every contract authorized by this section shall be considered to contain a right on the part of the owner during the owner's lifetime both to withdraw funds on deposit in the account in the manner provided in the contract, in whole or in part, as though no beneficiary has been named, and to change the designation of beneficiary. The interest of the beneficiary shall be considered not to vest until the death of the owner and, if there is a claim pursuant to subsection (g) of K.S.A. 39-709 and amendments thereto, until such claim is satisfied." (Underscoring represents amendments.)

K.S.A. 9-1216, 17-2264 and 17-5829 were amended to provide, in relevant part:

> "On the owner's death, the deposit account or any part of or interest on the account may be paid by the savings and loan association to the secretary of social and rehabilitation services for a claim pursuant to subsection (g) of K.S.A. 39-709 and amendments thereto or, if there is no such claim or if any portion of the account remains after such claim is satisfied, to the designated beneficiary or beneficiaries. . . ."

The amendments to these statutes do no more than grant SRS "a claim." Kansas statutes provide a mechanism for asserting claims against money held by third parties -- garnishment or related actions. Again, we believe that in granting SRS "a claim" against a payable on death account, the legislature did not intend to allow SRS to by pass statutory mechanisms for asserting its claim.

If, upon the death of the owner of the account, SRS files a garnishment action to assert a claim against the account, the bank must withhold sufficient funds to cover the claim, and

distribute the rest. If SRS fails to garnish the account by the time it is paid to the beneficiary, the financial institution is no longer holding money belonging to another and therefore is not liable to SRS.

We conclude that in granting SRS a claim against a decedent's estate, the legislature did not intent to allow SRS to ignore statutory mechanisms for asserting its claim. As such, if the money is part of the estate, the claim must be asserted through probate proceedings. If the money passes through nontestimentary means, SRS must attempt collection through means established in the code of civil procedure. If SRS delays in filing such a claim against a financial institution we believe that the financial institution may pay the entire account to the beneficiary with no liability to SRS.

Very truly yours,

Robert T. Stephan

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