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Legislative Testimony
House Judiciary Committee
HB 2742
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Mr. Chairman; Members of the Judiciary Committee:

My name is Ron Smith. I am a partner with Smith, Burnett & Larson, LLC of Larned, Kansas. Our four-person firm is well-established in Central Kansas. Glee Smith began practicing law in Larned in 1947, after the war. Don Burnett has practiced in Larned since 1958, and Jerry Larson since 1973. We have handled many probate and trust cases over time.

Part of my probate practice is working with the Kansas Department of Health & Environment- Division of Health Care Finance and Medicaid recovery cases. I work with Ben Sherber in most counties in Western Kansas. I believe the recovery program, when understood, is fair. As you know, it is the last years and months of life that, medically, are the most expensive. Taxpayers are called upon to assist needy persons in their last months of life financing medical needs with Medicaid, especially nursing home care. In return, the federal government allows Medicaid to recoup costs from the remaining assets of the recipient. There often are remaining assets. Sometimes recipients believe they can pass along a modest estate to their heirs and avoid using those assets as part of their support for these medical needs. They use probate avoidance devices such as Transfer on Death deeds. Or they sell their property to their children for a long term low-interest rate purchase contract. Unless real estate is subject to a valid mortgage and the mortgage covers most of the equity in the house, these interests remain.

Sometimes there is often a small house available to sell or auction off. The proceeds rarely cover the total amount of Medicaid provided, but even if you recover part of the Medicaid expenditures, it is a program that recovery effort is worthwhile.

Strengthening the program is important. That's what HB 2742 does.

Every year I know you agonize over how much to appropriate for Medicaid programs in Kansas. Over my 19-year lobbying career with Pete McGill and the Kansas Bar Association, I watched you do it. Each year. *The most important definition in this bill is the process in the sentence at page 10, line 22, defining what constitutes the medical assistance estate.* This is where you expand and contract the limits of the estate recovery effort. If you do anything with this section, expand it. Don't let anyone talk you into removing or limiting portions of that definition because limiting that section strikes squarely at our efforts to recoup your Medicaid funds.

Based on my practice, there are other things I would suggest be done to strengthen this program. Many of them require federal authorizing legislation or additional and significant reporting and action requirements by Kansas financial institutions, so we won't go into them today. They are my opinions and are not in this bill. Federal law requires that you engage in some form of Medicaid recovery. It is not optional. If that is the mandate from Washington, always take the opporotunity to strengthen the system. It makes no sense to have a mandate to collect funds for the Medicaid program and then do it in a benign way.

The five reform items are included in this bill are:

1. the time to file an estate as a creditor is expanded from 6 months to two years.
2. The state is allowed to use the Small Estates Affidavit, 59-1507b.

3. there is a mandatory notice of all probates to the state that includes notifications of trusts.

4. you are asked to adopt a method to calculate the value of a life estate.

5. you are asked to require that the state be notified when the settler of a trust dies.

Let me speak to the issues in the bill.

I.

One reform in the bill expands the time for KDHE to file the estate as a creditor to two years if the creditor is the Medicaid estate recovery unit. **Page 19, lines 8-12**. I understand WHY this change is needed. The state needs more than the current six months to research the decedentôs estate.

This is one approach among several options available to you.

First, the decedentôs heirs are probably not going to get anything from their loved oneôs estate if the state gets paid from decedentôs assets. So the heirs have little incentive to assist the state. But you also have to avoid unintended future title problems.

Assume the children wait 6 months for the creditor filing period to lapse. Then they file a determination of descent action under KSA 59-2250 (Section 10, HB 2742), which takes two to three months to complete. Notice is given by publication of the hearing date, but this is not a notice to creditors since the creditorsô filing time is up. The hearing is held in about a monthôs time and gives title to the heirs, who then can sell the little house to a third party. The party who buys the house gets deed overs from the sellers, and the buyer thinks he has good title. Then state comes in 12 or 18 months from death of the decedent and files and action for Medicaid recovery.

Can the state go back after the determination of descent decree and pull that title to the property away from the buyer?

Or do you try to collect from the heirs who sold the property? And do they have any of the money left?

The difference in periods for filing depending on the pedigree of the creditor and that difference create possible future litigation for the courts to sort out.

The other problem is that even if the ERU unit gets notice of a pending determination of descent case, what can the ERU unit ask the judge to do that the judge can do?

Old case law bears out this problem. Look at Section 7 of your bill, 59-2222(a). The notice to the state ERU unit is made when anyone probates a will, determining a spouse has a valid consent to a will, for refusal to grant letters, and for administration of an estate because there is no will. *Determination of descent is not listed. It is a separate type of action.* This makes sense because Determination of Descent by law is filed AFTER any creditors have failed to file their creditor probate action in the six month period. It is AFTER a will should have been filed to preserve probate actions in the future. It isnôt probate or administration because the court has no jurisdiction to order claims to be paid from estate assets. All the magistrate judge does in a DOD is determine heirship. The state has an interest in further titling of real estate so counties can continue to collect taxes if for no other reason.

Case law and treatises supports the theory that determination of descent is not a probate action as such. Such actions were authorized by statute in 1939 and heirs in determination of descent actions were given one year to file after the death of a decedent. Not six months.

In the widely quoted treatise, Barlettôs Kansas Probate, Revised Edition of 1953, we learn the purpose of determination of descent actions:

> '* * * The decree of descent does not create title; it merely declares who has acquired the title of the decedent. The function of the decree is to declare the title which accrues under the law of intestate succession. *It releases the title of the heirs from the conditions of administration, and furnishes the heirs with legal evidence to establish title*. The decree cannot originate title, but only releases it to the heirs from the condition of administration to which it was subject, *and furnishes the heirs legal evidence of such release. While the decree does not create the title, it is an adjudication as to who acquired the title of the decedent, and, if rendered upon due process of law, is final and conclusive upon that question.*' (§ 1356, pp. 232-233) (emphasis added)

Case law agrees. See *Jardon v. Price,* 163 Kan. 294, (1947) and Snedeger v Scharader, 183 Kan. 725 (1958).

There are three ways to correct this. One option, that Ben Sherber advocates, is to require the person filing a determination of descent action give notice to the state ERU unit. You would need to amend Section 7 of your bill, KSA 59-2222(a), to include determinations of descent as being among the actions where notice must given to the state ERU recovery unit. Iôm not sure what such notice will do for overall estate recovery, but you should do that.

A second option is presented by another person who testifies here today, to create at the death of a Medicaid recipient a lien in favor of the state on all property owned by the decedent. It clouds title to the property, especially real estate property, that the heirs then have to clear from the title in order to sell the property. It might create a clunky process for the state to invoke its lien and acquire the property, but it is a good option.

The third option is to allow the state time to step in and file a creditor action on its own that would preclude the determination of descent action by the heirs. To do that, simply allow all probates to be filed --- including DOD actions ï within **one year**. The longer time will keep heirs from waiting out all creditors and disposing of the property. The year would give the state the time it needs to investigate decedentôs assets and file the creditor probate. One year wonôt harm other creditors because if they donôt file a creditor probate within six months, they probably wonôt file within a year, either, but if they do, the state will get notice.

II.

Under this bill the state is allowed to use the Small Estate affidavit process, KSA 59-1507b. **Page 17, line 6-20.** If the estate is under $40,000 total value with no real estate, the heirs can prepare an affidavit that promises to pay the debts of the estate and they then take the cash out of the bank. *Sometimes this affidavit is requested by out of state children of the decedent who pause in town long enough to cremate the decedent and then they are requesting the affidavit be drafted before they leave the state after the funeral of their loved one.*

As an attorney I can tell them of the claim the State has for Medicaid recoupment, but believe me, many are in such a hurry they do not listen. And care less.

Iôm concerned however, that you might end up with competing affidavits ï one from the heirs and one from the state. The bank must choose which affidavit to honor. Iôm not sure you want the bankers put in that position. They are likely to honor the first affidavit presented to them.

Moreover, the children will ususlly get there first with their affidavit. Then the state has to chase down out of state heirs, or heirs that took the cash and went home to New Jersey by way of the Trump Tower Casino in Atlantic City. In short, by the time the state can find the money it is probably gone.

You may want to couple this change with a requirement the banks cannot release any cash funds pursuant to this 1507b affidavit for 60 or 90 days -- assuming that such a limitation would not offend rules and regulations of the Comptroller of the Currency or the state examiners. When a 1507b affidavit is filed by the heirs, the bank should inquire whether the monies belong to a Medicaid recipient, but I doubt the Bankers Association want their members asking those questions.

The problem is going to be to keep the children ï some of whom are estranged from the deceased -- from swooping in and taking the cash before the state gets its Medicaid claim mobilized.

This is a good change in the law and somehow it should be made.

III.

The mandatory notice to the state by a trust whose settler has died so the estate recovery office can check for Medicaid use is a good one. **Page 15, Line 11.** Probate executors and administrators now have to make these notifications. This is a routine notification the trustee can make when they publish notice to creditors as they are winding up the trust.

Winding up a trust or completing a probate have similar procedures, except the trust does its windup without need for a courthouse or a judge ï unless there are other issues involved. There is no reason why a trust cannot notify the state like the administrator or executor does. If

the only reason is that trust makers are told their trust administration is done without judicial involvement, thatôs fine. But it isnôt an excuse not to comply with this notification law.

Iôm not sure the bill requires it, but if you enact this notification requirement, you should include the requirement the trust obtain the certificate from Kansas Department of Health & Environment- Division of Health Care Finance that the settler or beneficiaries of the trust are not Medcaid users.

IV.

The life estate definition is at page 12, line 10. It is worded this way because not only do we encounter life estates as the only estate asset, but sometimes the decedentôs only interest in land is a remainder interest.

I have had three cases where the life estate of an individual was the primary estate asset in the Medicaid creditor probate. In one of them, a woman had had a life estate for ten years and received money from her son and crop shares at the Coop for ten years. Not all of the money from the crops went for Medicaid reimbursement. In other words, she was getting Medicaid assistance AND crop shares. When we convinced the attorney and judge that the full value of the life estate was appropriate, the family settled the reimbursement claim.

Two other estates, however, judges were convinced to severely limit the value of the life estate, to the stateôs detriment. Recovery was very low in one, and zero in the other. However the state had to pay expenses in both cases after the courtôs decisions.

I always told legislators when I lobbied that when crafting the legislation, do your defining and crafting of laws as best you can because it is at that point that the law keeps those powers with legislators. If you legislate ambiguous laws, then you delegate to the courts the right to legislate. The same is true here.

I told you earlier the importance of the sentence at Page 10, line 22. YOU should decide what ñlife estateò means in that definition of medical assistance estate.

Currently, it is left up to judges to be convinced that your statutes mean what they say. That the life estate of a decedent is the full value without diminishment because of age and

health conditions at the moment before their death. You are asked to adopt a method to calculate the value of a life estate by rule and regulation. Thatôs good.

V.

The provision at page 14, line 2 is good in that we often are able to convince heirs to quit claim deed to my Administratrix the house. Then we file deeds with the Register of Deeds and the estate then owns the house. We then get permission to sell it or auction it off to meet the demands that are filed. This provision codifies what we already do.

VI.

There is also a provision in here where the Medicaid ERU office must sign off on all final settlements of all estates. **Page 16, Lines 25-43.** At first glance this seems like the old Kansas Inheritance Tax system where there had to be a closing letter from the Department of Revenue before one could close the estate.

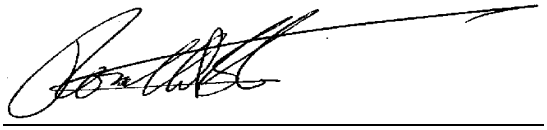
It is a change but I do not think it will be an onerous change. Here is the way I think it will work.

When I file a probate, I file a petition signed by the executor or Administratrix I want named by the Court. I get waivers of notice if I can, I publish the notice to creditors and I send letters to the heirs and also to the state of Kansas with copies of the Petititon. The petition identifies who the decedent is. In that manner I notify the state in the first weeks of an estate as to my decedentôs name and address. The state has their notice and can begin searching their databases. The Kansas Department of Health & Environment- Division of Health Care Finance sends me back a letter telling me the decedent is or is not a Medicaid recipient.

With the change in the law at page 16, all I would do differently is when I send out my letter to the ERU office now notifying them of the filing of the estate, I would ask to ALSO send

me a clearance letter for use in the hearing for the final settlement of the estate if the decedent is not a Medicaid recipient. In fact, Iõll probably make it as easy as possible by providing them with a form letter for Ben Sherber or Wendy Oxley ï in the ERU office ï to sign and send back to me. When I file my petition for final settlement of the estate, the judge can be shown the Medicaid waiver from the Kansas Department of Health & Environment- Division of Health Care Finance, and the estate can be closed.

I appreciate being here today and Iõll stand for questions.



Ronald D. Smith