

Kansas Department of

Social and Rehabilitation Services

Janet Schalansky, Secretary

Senate Federal and State Affairs Committee

March 28, 2003

SB 272 - Concerning repayment of medical assistance

Integrated and Service Delivery

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Mr. Chairman and members of the Committee, thank you for the opportunity to appear on SB 272. My name is Candy Shively, Deputy Secretary of the Department of Social and Rehabilitation Services. SB 272 makes a number of changes impacting Medicaid eligibility and the Department's estate recovery process. These changes originate from recommendations made by the President's Task Force on Medicaid Reform and are designed to help discourage asset sheltering with the intent to qualify for Medicaid coverage of long term care. We expect the full impact of these changes to both save state dollars as well as allow for increased recoveries of monies paid for coverage of medical costs that the State has shouldered. Although these changes are more restrictive in nature, in light of current budget realities, they are seen as critical to preserving the goal of the Medicaid program to serve those who are truly needy and to protect the State's right to recovery for its taxpayers.

There are two provisions that will directly impact eligibility for Medicaid coverage, particularly long term care. These are incorporated in 39-709, sections (e)(3) and (4). The first, in section (e)(3), regards availability of trust assets. Current Kansas case law holds that a Medicaid consumer who is the beneficiary of a trust may qualify for Medicaid if the trustee has any discretion to withhold funds from the consumer. Discretionary trusts are a common estate planning technique, but SRS contends that to use a trust as a shelter from the ordinary Medicaid eligibility rules is an abuse of the trustee's discretion. If a consumer needs medical care, and there is a trust that can pay for that care, the trust and not the State, should be the primary person responsible to pay those costs. This provision would view these trusts as available assets to the extent that the trustee by using his or her full discretion could make any of the income or principal available to the Medicaid consumer.

This amendment does not require a parent of an adult disabled child to disinherit the child. Instead, it specifically allows for a parent of an adult child to create a supplemental needs trust by making specific reference in the trust that the parent intends that the trust only supplement Medicaid.

The second change, in section (e)(4), regards placing of restrictions on use of what are called "life care" contracts. Recently, SRS has seen an increase in Medicaid planning, where typically family members devise methods to deplete the resources of a person so as to gain eligibility for Medicaid without all the funds being spent down on nursing home bills.

One method used is to have the person enter into a “life care contract,” where the relative would provide certain services, such as visiting the person in a nursing home. Such a contract might be written so that if the person dies, some part of the contract payment, even if it had not yet been earned by the person providing life care services, would be forfeited.

SRS believes that this practice is contrary to public policy. This practice allows a person to have a double advantage; he or she can pay a relative to perform functions that the relative might provide anyway, while the State pays for all the cost of the nursing home.

This amendment imposes criteria that have to be met in such contracts in order for them to be considered as unavailable resources. It affects only those contracts involving provision of services by a non-licensed individual and requires such things as a written contract, payment for services after they have been rendered, and revocability. There is also the added provision regarding contracts for services provided by licensed professionals that monies paid in advance of receipt of services be considered an available resource. The goal of these provisions is to discourage use of such contractual arrangements for purposes of sheltering assets to meet Medicaid eligibility guidelines.

The remaining provisions help to increase the effectiveness of the estate recovery program and these are contained in 39-709 (e)(2) and g(3) and (4). As background, the Estate Recovery Program was initially authorized by the Legislature in 1992 and has since become a federally mandated process. The program allows the agency to recover Medicaid expenses properly paid on behalf of a Medicaid recipient from his or her estate if the recipient was either 55 years of age or older or in a long term care arrangement. It provides a means of giving back a portion of the expenses paid which make up the greatest proportion of the Medicaid program. Most recoveries are from probate actions and family agreements. Per federal and state law, no recovery action is taken if there is a surviving spouse or a minor or disabled child. Recoveries in FY 2002 were approximately \$5 million in Kansas and over \$25 million since the program’s inception. Approximately 40% of the recoveries are returned to Kansas.

In regards to the provisions of (e)(2), the state has begun seeing a practice of property being put into joint tenancy with a designated interest, specifically setting up 99% interest for the Medicaid consumer and 1% for the other owner. This practice is now being used by several private attorneys who specialize in estate planning. Such action does not result in ineligibility for the consumer but would technically remove that property from being recovered as part of the estate. To discourage such practices, this provision would allow the agency to count the full value of that property for eligibility purposes if such an arrangement occurred.

The provisions of (g)(3) provide that the estate for purposes of medical assistance shall include all real and personal property and other assets in which the deceased Medicaid recipient had interest in, including assets that are conveyed to a survivor or heir. The purpose of this provision is to expand the assets that can be viewed as available for recovery purposes and thus help increase collections in instances where many of the deceased's assets are held in joint tenancy or would pass to other beneficiaries. Such a change is allowable under the federal estate recovery law and a number of states have adopted such provisions over the last few years. The Department strongly believes in the goal behind estate recovery and that assets that have been owned by the Medicaid consumer should be available for recovery of medical expenses paid on that person's behalf while on assistance.

The final provision in (g)(4) would implement medical assistance lien authority. The Department has noted that a number of states who have such lien authority have increased both the effectiveness of and the recoveries for their estate recovery programs. Also in light of increased use of joint tenancy property ownership and homestead actions on behalf of children of the medical assistance recipient as a way to avoid estate recovery, we feel it is critical to pursue such authority.

The proposal would impose a lien on the real property of a recipient of medical assistance for the purpose of recovering previously paid medical assistance. This lien would be imposed primarily on medical assistance clients who have been in long term care. This proposal would use a 1 year residency in a medical facility as a threshold for examination of cases. Federal law allows liens to be placed on real estate owned by medical assistance consumers who have entered long term care. Further, no lien can be imposed when any of the following persons reside in the consumer's residence: recipient's spouse, recipient's child under the age of 21, recipient's child who is blind or disabled or a sibling with an equitable interest and who resided in the house for 1 year before the recipient's admission to a medical facility. Once the state has determined the propriety for a lien, the state would provide notice to the consumer and opportunity for a fair hearing. At the fair hearing, the issue, as required by federal law, would be whether the recipient can reasonably be expected to return home from the medical institution. Once a lien is allowed, the state would make the recovery when the property is sold.

Lien authority currently exists in about 20 states including Missouri, Oklahoma, Iowa and Colorado. In a survey of states with estate recovery programs conducted in 1997, the State of North Carolina found that lien authority was more common among the top 10 collection states than in the bottom 10 states. Of those 10 states, Minnesota, Oregon, Wisconsin, Iowa and North Dakota use both liens and probate recovery methods. Within our area, Missouri, Iowa and Colorado, also, use both methods.

In summary, the Department believes the changes made as a result of this bill will improve the integrity of the Medicaid program in Kansas by helping to prevent abuse of the system caused by Medicaid estate planning and increase the effectiveness of the estate recovery process. We ask for your support of these measures.