

**TESTIMONY OF LANCE A. WEEKS
TO THE KANSAS HOUSE JUDICIARY COMMITTEE
REGARDING HOUSE BILL 2742
MARCH 5, 2012**

Mr. Chairman and members of the Committee:

My name is Lance Weeks and I am an attorney at the law firm of COFFMAN, DeFRIES & NOTHERN, a Professional Association, Topeka, Kansas. I am a graduate of the University of Kansas School of Law in 1997, and received an *LL.M in Taxation* from the University of Missouri-Kansas City School of Law in 1998. My principal areas of practice are probate administration, trust administration, estate planning, and taxation, and I have been appointed as the Administrator of approximately fifteen (15) probate estates at the request of the Kansas Estate Recovery Contractor. I have been asked to testify regarding House Bill 2742 by the Kansas Estate Recovery Contractor, especially how the legislation seeks to address problems I have observed in my role as the Administrator of estates for which probate was initiated by the Kansas Estate Recovery Contractor.

H.B. 2742 seeks to lengthen the non-claim period from six months to two years and also extend the time period for which a determination of descent can be sought from six months to two years. Although I am not necessarily a proponent of a departure from the current six-month time periods set forth in the existing statute, it has been my observation that the current time frame presents a significant challenge to the Estate Recovery program in terms of referral of cases to prospective administrators.

K.S.A. 39-709(g)(2) only confers a claim, and not a lien, against the property of the estate of a deceased recipient or the estate of a surviving spouse. Because a deceased recipient of

medical assistance is only allowed \$2,000 of non-exempt resources, the primary asset remaining in the vast majority of cases is the decedent's residence. The real estate must be sold in order to pay administration expenses and satisfy the claim against the estate for medical assistance. In my experience, most residential real estate associated with these estates suffers from significant deferred maintenance and often has multiple years of unpaid real estate taxes. Occasionally, there will be a previously filed federal tax lien which is superior to the claim of the State of Kansas for medical assistance. Furthermore, the real estate may be subject to the homestead claim of an adult child that lived at the residence at the time of the medical assistance recipient's death. In other words, there are many factors which must be considered before making a determination whether it is financially worthwhile to pursue a probate proceeding in a particular case, and making such a determination within six months is a very difficult task in many circumstances, especially when the decedent's family has little, if any, incentive to volunteer information.

A possible solution to alleviate the unique challenges faced by the Kansas Estate Recovery Contractor would be to amend K.S.A. 39-709(g)(2) to provide that the State of Kansas has a lien which arises at death against the real estate owned by a deceased recipient of medical assistance or the surviving spouse of a deceased medical assistance recipient rather than a mere claim. The imposition of such a lien upon death may have the effect of protecting the ability of the State of Kansas to recover medical assistance without the need to alter the current time frames for estates which do not have issues with claims for medical assistance. Because Kansas law does not allow the Estate Recovery

Contractor to pursue non-probate assets of a surviving spouse of a medical assistance recipient, the post-mortem lien against the real estate of a deceased medical assistance recipient may also provide for recovery opportunities associated with the non-probate transfers a surviving spouse is able to make at his or her death which are currently only recoverable if such assets pass through the surviving spouse's probate estate.

H.B. 2742 also attempts to amend K.S.A. 58a-818, the Kansas Uniform Trust Code, by adding a provision which requires the successor trustee of a deceased settlor to provide notice to the Department of Health and Environment within 90 days of the death of the settlor and requiring the trustee to pay such claim. With the acknowledgment that the requirement of a notice provision to the Kansas Department of Health and Environment is necessary to enable the Kansas Estate Recovery Contractor to perform its designated function, there are a few problematic issues in this amendment in its present form.

The first issue is the procedure is not consistent with the procedure set forth by the Supreme Court in 2009 with its decision in the *Nelson v. Nelson* and *Draper v. Bank of America* cases. There is an apparent attempt to codify these procedures in Senate Bill 291 which would repeal K.S.A. 58a-818 altogether if enacted. Furthermore, real estate owned by a trust of which the medical assistance recipient may be a settlor is a non-exempt asset. While the provisions of such legislation may be necessary to capture instances in which the medical assistance recipient received such assistance by mistake, it will be rare that a medical assistance recipient will be the settlor of a trust which contains assets. The more likely case in which a trust will possess recoverable

assets will be a trust created by the surviving spouse of a medical assistance recipient; however, the legislation, as currently drafted, does not apply to the surviving spouse on its face. The surviving spouse of a medical assistance recipient may retitle the non-exempt assets he or she retains as part of the division of assets process in the name of a trust, as well as the residence and any income-producing real estate which may have been in joint tenancy with the medical assistance recipient. With proper notice, it may be possible for the Kansas Estate Recovery Contractor to establish a claim against the probate estate of the surviving spouse of the deceased medical assistance recipient and then pursue a claim against the trust estate of a surviving spouse. If K.S.A. 58a-818 is ultimately repealed, an alternative would be to place a requirement in K.S.A. 58a-813 requiring notification of the Kansas Department of Health and Environment by the trustee of a deceased medical assistance recipient or a deceased surviving spouse of a recipient in the same manner as a qualified beneficiary is required to be notified under the Kansas Uniform Trust Code.

Thank you for the opportunity to address the Committee today. As an attorney with a unique perspective of working on both sides of estate recovery issues, I believe there are gaps in the current law that frustrate the estate recovery process. H.B. 2742 is a starting point in addressing some of the gaps and with some refinements there may be possibilities to strengthen the state's ability to recover medical assistance paid without lengthening the probate process for estates that do not have estate recovery issues.