

The Kansas Elder Law Hotline Volunteer Handbook

Created by Kansas Legal Services Inc.

Revised 06/2007

Selected Parts Revised 02/2013

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KANSAS ELDER LAW HOTLINE PROCEDURES

The Hotline is open to receive calls from 9:00 a.m. to 4:30 p.m. weekdays except government holidays. Volunteer attorneys are scheduled to take calls in morning and afternoon shifts of three and one half hours (9:00 a.m. to 12:30 p.m. and 1:00 p.m. to 4:30 p.m.).

The centralized intake personnel in Wichita receives all calls. The intake personnel will take general demographic information from each caller. This information will be placed into the computer system of the Kansas Legal Services, Inc. The demographic information is printed out onto an intake sheet, which is faxed to the attorneys taking calls. If you do not have a fax machine or a dedicated fax line, please let us know and we can make other arrangements.

After completing the intake information, the intake personnel will determine the basic nature of the call (i.e. wills, bankruptcy, Medicaid, etc.) Then the call will be routed to the attorney taking calls at that time. The phone system allows the intake personnel to rout the call to the attorney without requiring the client to make an additional call.

Private volunteer attorneys and legal services attorneys both are available to take calls. The intake personnel will try to rout calls to the most appropriate source. For example, the private attorney would get a call regarding federal estate tax. The legal services attorney would take a call regarding Section 8 Housing. Kansas Legal Services will also provide a backup attorney to assist with excess calls or problems. This attorney will have experience with elder law issues.

When the call is complete, we ask:

1. Make any notes of your conversation on the intake form. This is important so that we can properly code the nature of the call.
2. Mark your time in quarter hour increments.
3. Mail the intake forms in the addressed envelopes provided or fax to Wichita at 316-265-5902.

Referrals

If the client needs additional legal assistance, attorneys have the following options:

General Information:

Callers who need written information on a certain topic may call the Hotline and request one of the standard packets of materials available.

Senior Citizen Law Projects:

All callers may contact the Legal Service Senior Citizen Law Project to see if the office will have available staff to assist them in their legal problem. Clients who are accepted are not charged for services provided. Contributions are accepted.

Reduced Fee:

The Kansas Bar Association sponsors the Reduced Fee Program. Persons who meet the income and asset qualifications may be assigned an attorney who will charge a reduced fee for standard legal assistance in certain case types. Clients who want to apply for low fee will need to call the Hotline to be qualified for Reduced Fee.

Elder Law Referral Panel:

The Kansas Bar Association in conjunction with the Elder Law Hotline developed the Elder Law Referral Panel. The panel is composed of private attorneys who wish to be referred cases involving senior citizens. Clients wishing a referral will need to call the Hotline to request a referral. The Kansas Bar Association's liability insurer does require that all attorneys listed on the referral panel have their own malpractice insurance.

In some cases volunteer attorneys may want to accept a case from the client they have advised. This is permissible with the following guidelines.

- Our insurance carrier requires that if you accept a case, you have your own malpractice insurance.
- Be clear that the free portion of the services has ended and that from this point forward the client will be billed for your services.

These guidelines are offered to protect volunteer attorneys from misunderstandings, which could lead to ethical complaints against them and fee disputes.

Malpractice Insurance

Kansas Legal Services, Inc. provides malpractice insurance to all volunteer attorneys in the act of providing advice to the Hotline. This permits us to recruit volunteer attorneys who do not have malpractice insurance. Our malpractice insurer, however, requires that we do not permit attorneys who do not have malpractice insurance to take referrals.

SPECIAL CONCERNS

Identifying the client

Many times, family members or friends will contact the Hotline on behalf of an older person. In cases where only general legal information is requested there is usually no problem. If the matter is more complicated, the intake attorney should proceed with caution.

Try to determine who the client actually is, the older person or the caller. Only the elderly person is eligible for this service. Determine if the older person is capable of contacting the Hotline. The Hotline is committed to making its services to persons regardless of disability. It is always preferable to talk directly to the client. If the person calling is not the client, the attorney may still offer advice, but be careful. Keep in mind the potential for conflict of interest between the caller and the client.

Establish if there is a legal relationship between the caller and the older persons. For example, is there a power of attorney or guardianship? Even in these cases, be clear to the caller that you may advise them only in the interest of the older person and that the caller is not entitled to confidentiality with regard to the client. If the

client asks, we will let the client know about the call. If an attorney does not feel comfortable advising the caller over the Hotline, the caller may still be eligible for referral and should contact the intake personnel for a referral.

Special Situations

If the caller is a social worker, the attorney may give legal advice to the worker. Remember the social worker is not the client and may be employed by a nursing home or other institution whose interest might be adverse to the client.

If the call involves guardianship or incompetence of the elder, proceed with caution. In Kansas, guardianship is an adversarial proceeding. The petitioner and the alleged ward are adverse parties. If the caller is not age 60 or older, but is seeking guardianship of someone who is age 60 or older, the caller is not eligible for the services through the Hotline. The caller may still receive a referral through the Hotline.

Problems affecting the ability to serve callers

If a caller is incapable of either expressing his problem clearly or understanding your advice, with the client's consent you may involve another party. Ask the client to have a family member call. If the client has no one, you may refer him or her to the Area Agency on Aging for case management or other assistance.

If the caller is hearing impaired, Kansas Legal Services, Inc. offers TDD communication. Written materials are available in alternative formats for persons with visual or cognitive impairments.

Clients who may need protective services

If a client appears so impaired that there is a concern for his welfare or the client expresses that he is a victim of abuse and is unable to protect himself, referral to Adult Protective Services may be appropriate. Verbal authorization from the client is sufficient. If the client cannot give authorization, the attorney may call without authorization. Let your conscience be your guide. The Elder Abuse Hotline is 1-800-922-5330.

REFERRAL SOURCES

Kansas has an extensive network of services available to Kansas seniors. The best way for seniors to access this network and other services for seniors is through their Area Agency on Aging (AAA). The AAA is funded by the Kansas Department of Aging through the Older Americans Act. They provide a variety of services to people age 60 or older from bath aid to social workers to home delivered meals. The AAA is an invaluable resource for older persons and their families who may need some assistance. There are 11 AAA in Kansas. A map of the areas, addresses and the phone numbers follows.

In addition to the AAA, you may wish to refer a client to any one of a number of agencies. These are some common referral sources.

| | |
|-----------------------------------|----------------|
| ELDER ABUSE HOTLINE | 1-800-922-5330 |
| NURSING HOME COMPLAINTS | 1-800-842-0078 |
| KANSAS DEPARTMENT ON AGING | 1-800-432-3535 |
| KANSAS COMMISIONER OF INSURANCE | 1-800-432-2484 |
| KANSAS ATTORNEY GENERAL | 1-800-432-2310 |
| KANSAS COMMISSION ON HUMAN RIGHTS | 1-913-296-3206 |

I. Consumer Contracts/Debt Collection

A. Consumer Contracts

[I am dissatisfied with the work performed by a home improvement contractor. What are my rights?](#)

[Are there any situations when I can cancel a contract which I have already signed?](#)

[How does a prepaid funeral contract work, and is it a good idea to have one?](#)

I paid for auto repairs, but my car still isn't working properly. What rights do I have?

I bought a new car, and it has continuously given my trouble. Can I return it and get another new car?

I ordered something by mail two months ago, and I still have not received it. What can I do?

I received something in the mail which I did not order. Do I have to end it back?

I had dentures made by a dentist, and they do not fit properly. I have gone back several times and have had to pay for additional work but, I am still not satisfied. What can I do?

How long must I keep canceled checks and receipts?

I have the basic cable service in my area. The cable company has notified me that the company is adding a number of new stations to the basic service and charging an increased fee. Do I have to pay the cable company for the extra stations if I don't want them?

B. Debt Collection

I received a bill from a creditor which I believe has a mistake in it. How do I get it straightened out?

I am being billed by a doctor for the balance over and above what my Medicare (and supplemental medical insurance) will pay. I cannot afford to pay. What should I do?

My spouse died recently. All of our property was jointly owned, and there was no formal estate proceeding. I am receiving medical bills. I did not authorize these charges. Am I responsible to pay these medical bills?

Are my social security or private pension benefits subject to attachment and/or levy by my creditors?

I am being harassed by a collection agency. What can I do?

I am summoned to appear for a debtor's exam. Do I have to go?

My spouse and I cosigned a loan for our son. Without our knowledge, our son stopped making payments on the loan. We did not receive any notice that the loan was in default until the creditor sent the loan to a collection agency. Now we have a bad credit rating. Shouldn't the creditor have given us some sort of notice before this matter went to collection?

C. Bankruptcy

Can I file for individual bankruptcy, or will my filing of a petition lead to the joinder of my spouse?

What assets would be in the bankruptcy estate when only one spouse files for bankruptcy?

When filing for bankruptcy, what can I exempt from the bankruptcy estate?

What is the scope and effect of the "automatic stay" in bankruptcy?

Is it possible to get relief from the automatic stay?

I AM DISSATISFIED WITH THE WORK PERFORMED BY A HOME IMPROVEMENT CONTRACTOR. WHAT ARE MY RIGHTS?

In most cases, the client will have paid all or most of the price directly to the contractor. In these cases where a client may need to sue the contractor for damages, the client needs to be advised as to how to proceed.

First, establish what the problem is and whether it has been reported to the contractor. Clients should contact the contractor about the problem and offer them a chance to fix it. It is important to make a demand on the contractor about the problem and offer them a chance to fix it. It is important to make a demand on the contractor to remedy any defect. This should be in writing. The client needs to keep a copy for their records.

If the client has attempted and failed to get a response or has received a negative response from the contractor, it is necessary to try to quantify the damage. The client should get a written estimate from another contractor as to the cost of the repair. This cost must be measured against the work description in the original contract. If a client wants a second contractor to do additional work, only the cost of correcting or completing the original contract is measurable as damages. The client may choose to have the work actually completed by the second contractor or proceed with legal action on the basis of the written estimate

Kansas has a three-year statute of limitations on oral contracts and a five-year statute of limitations on written contracts.

If the work performed has been financed, the client may still have to continue to make payments if the client arranged hi/her own financing. If the contractor arranged the financing, then the client may be able to assert a defense to payment against the lender.

Actions for amounts less than \$1,800 can be handled in small claims court without the assistance of an attorney. Some small claims courts offer mediation as a way to resolve these disputes between the parties.

If the amount in controversy exceeds \$1,800, clients should be advised to contact their local senior citizen law project or the lawyer referral service.

Clients should be advised to file reports of home repair complaints with the Kansas Attorney General's office or their local district or county attorney's consumer protection division and their local Better Business Bureau. (Johnson and Sedgwick Counties have Consumer Protection Divisions.) Clients must also be advised that

such agencies will not actually represent them in suits against contractors. They may attempt to mediate some of the more serious problems, but clients should be aware of the need not to prolong any settlement attempts and that ultimately they will have to pursue cases on their own.

I-2 ARE THERE SITUATIONS WHEN I CAN CANCEL A CONTRACT WHICH I HAVE ALREADY SIGNED?

In Kansas, consumers have three days to cancel a door to door sales contract. See K.S.A. 50-640.

The contract must be for sale, lease, or purchase of consumer goods and services of \$25 or more. Door to door could include telephone or any other salesperson-solicited sale. Consumers are entitled to a written notice of the right to cancel. It is a violation of the Kansas Consumers Protection Act not to give the required notice.

Three day cancellation does not apply to any consumer initiated transaction, transactions covered by federal consumer credit protection act, transactions done entirely over the phone or by mail, real estate sales, securities or commodities sales.

I-3 HOW DOES A PREPAID FUNERAL CONTRACT WORK, AND IS IT A GOOD IDEA TO HAVE ONE?

A person can enter into a written agreement with a funeral director to arrange for his or her own burial. This agreement spells out the particular goods and services being purchased and the corresponding costs. There is a total price which is agreed upon, and payment is made in accordance with the agreement. The funeral director is supposed to hold the money until death, at which time the money is to be applied to the services performed in accordance with the agreement. The funds should be held in an escrow account for the client's protection, and the terms of the escrow should be part of the written agreement.

Prepaid burial arrangements have some advantages. They give an individual the opportunity to control the details and costs of his or her own funeral. The funeral director is bound to deliver the goods and services at the price agreed upon in the contract. They also relieve

family members of the responsibility of making these arrangements at a time when it may be difficult for them to do so. In the event there are no family members or friends who will take care of funeral arrangements at the time of death, the pre-arranged funeral contract gives assurance that the individual's wishes will be carried out.

The main disadvantage of prepaid funeral plans is the potential for fraud. Before signing a prepaid burial agreement, the individual should understand it thoroughly. It is particularly important to know what provisions for cancellation the contract has in the event of a move to another place or the need to cancel for other similar reasons.

It is also possible to set up a burial trust account in a bank for the purpose of covering funeral costs. The account can be set up in a way which allows a particular funeral director to receive the proceeds in the account at the time of the client's death. It is not necessary to designate a particular funeral director. That decision may be left to the discretion of an executor or other representative. In the event there is a surplus in the account after expenses are paid, the surplus is payable to the estate. The burial trust account eliminates the potential for fraud; however, the individual does not "lock in" the costs (as in a prepaid funeral contract).

I-4 I PAID FOR AUTO REPAIRS, AND MY CAR STILL ISN'T WORKING. WHAT RIGHTS DO I HAVE?

Consumers have the right to have the repairs for which they have paid performed in a proper, workmanlike manner. If the car does not function properly after repairs are made, it must be determined whether this is the result of poor work or whether it is a result of some other malfunction, unrelated to the repairs in question. The first step should be to bring the problem to the attention of the garage where the work was done. In some cases, the garage will be able and willing to correct the problem at no extra charge. If the garage maintains that the problem is unrelated to the work the garage performed, and will charge for any additional work, it is necessary to get another opinion before authorizing the new work. If, in the opinion of another reputable garage, the problem is a result of defective repair work, there is a basis to demand that the problem be remedied by the original garage at no

extra charge. If the garage will not do so, a written estimate of the cost to correct the problem must be obtained.

Claims for up to \$1,800 may be pursued in small claims court. If the amount in controversy is greater, the client will need to contact a private attorney.

The client may also complain to the Better Business Bureau or the Attorney General's office for complaints involving Kansas Consumer Protection Act violations.

I-5 I BOUGHT A NEW CAR, AND IT HAS CONTINUOUSLY GIVEN ME TROUBLE. CAN I RETURN IT AND GET ANOTHER CAR?

There are both state and federal laws which provide remedies for consumers who have purchased new automobiles and have had problems with them. The following is a summary of these laws.

Uniform Commercial Code (UCC)

Relief is based upon warranty protection under the sale of goods section of the UCC. A purchaser who discovers defects in the car before acceptance may reject the car and recover the full purchase price, along with other damages. The problem with this remedy is that most defects will not become apparent until after acceptance and delivery of the car.

The purchaser is entitled to revoke an acceptance already made, but only under limited circumstances. The purchaser must first give the dealer an opportunity to remedy the defect. Only after there has been an unsuccessful attempt by the dealer to remedy the defect, can the purchaser revoke his or her acceptance.

The Magnuson-Moss Warranty Act (MMWA)

The MMWA is intended to help consumers better understand the warranties accompanying the purchase of goods by requiring manufacturers to identify the type of warranty as either "full" or "limited." If the manufacturer offers a full warranty, the manufacturer

must permit the customer to elect either a refund or replacement, without charge if the product contains a defect after the manufacturer makes a “reasonable” number of attempts to repair the defect. If the manufacturer offers only a limited warranty, such remedies are not available to the purchaser. Most automobile manufacturers offer only a limited warranty.

Kansas Lemon Law K.S.A 50-645

The Kansas Lemon Law extends to consumers who have purchased a motor vehicle of 12,000 pounds or less that has not been modified by certain converters. It provides that:

- If a manufacturer or dealer receives a report of a defect during the warranty term or first year of operation, that manufacturer or dealer is obligated to make repairs even if the repairs occur outside of the warranty term or first year.
- If the manufacturer or dealer are unable to conform the car to all applicable warranties (after reasonable attempts to repair) **and** the defect substantially impairs the use and value of the car, the manufacturer shall replace with comparable car or refund the price less any use by the consumer. Abuse, neglect, alterations by the consumer are defenses.
- Reasonable attempts to repair are:
Four or more times in the first year or warranty term
The vehicle is out of service a cumulative total of 30 days of the first year or warranty term OR there have been 10 or more attempts to correct the nonconformity.

Clients should also check to see if the manufacturer has established an informal dispute settlement procedure. The Kansas Attorney General has authority to enforce the lemon law.

I ORDERED SOMETHING BY MAIL TWO MONTHS AGO, AND I STILL HAVE NOT RECEIVED IT. WHAT CAN I DO?

When merchandise is ordered by mail, the seller must ship the goods no later than 30 days after receipt of a properly completed order (unless the

advertisement specifies otherwise). Delivery may take three or more weeks from the date of the shipping. A consumer can cancel the order and get a refund if this time limit is exceeded. If the seller is unable to meet the required shipping date, the seller must send the consumer a notice giving the consumer the option to consent to a delay in shipping or cancel his or her order and receive a full refund.

These rules do not apply to all orders. Toll-free telephone credit card purchases, magazine subscriptions after the first issue, photo finishing services, C.O.D. orders, and seed and plant orders are exempt.

If the client paid by credit card and the card has been billed for the item already, the client can contact the credit card company to dispute the charge. The credit card company will conduct an investigation and can find out if the item has been shipped.

I RECEIVED SOMETHING IN THE MAIL WHICH I DID NOT ORDER. DO I HAVE TO SEND IT BACK?

It is illegal to send unsolicited goods through the mail and then bill for them. Anyone receiving unsolicited goods may keep them without any obligation to pay. Any attempt by a mailer of unsolicited goods to demand payment or return of the goods should be reported to the postal authorities. Charitable organizations are exempt from the rule to the extent that they are permitted to request donations. However, there is no obligation to return goods even if no donation is made.

I HAD DENTURES MADE BY A DENTIST, AND THEY DO NOT FIT PROPERLY. I HAVE GONE BACK SEVERAL TIMES AND HAVE HAD TO PAY FOR ADDITIONAL WORK AND I AM STILL NOT SATISFIED. WHAT CAN I DO?

If the client has not talked to the dentist about the problem or a refund, they should do so. If the dispute cannot be solved, then they may have to consider a lawsuit for damages.

The client will need to establish that the dentist's work was below the standard of care and quantify the amount of damage. The client will need to find another dentist who will support his claim and quantify the damage.

If the amount in controversy is up to \$1800, a case may be brought in small claims court. Otherwise, the client will need to seek an attorney to assist him/her.

HOW LONG MUST I KEEP CANCELED CHECKS AND RECEIPTS?

Generally, advise clients to keep most records for six years, although certain records should be maintained for longer periods.

The statute of limitations on written contract actions is five years. Receipts for tax payments (where there may not be any limitations on actions), and records of capital expenditures, both on investments or improvements to real property (which may be needed to calculate gains or losses at time of sale), should be kept indefinitely.

I HAVE THE BASIC CABLE SERVICE IN MY AREA. THE CABLE COMPANY HAS NOTIFIED ME THAT THE COMPANY IS ADDING A NUMBER OF NEW STATIONS TO THE BASIC SERVICE AND CHARGING AN INCREASED FEE. DO I HAVE TO PAY THE CABLE COMPANY FOR THE EXTRA STATION IF I DON'T WANT THEM?

Cable companies do business under contracts with local government units which grant the companies exclusive rights to do business in their communities. A customer would have to check with the local authorities to see if the conduct complained of violated that contract. There is no regulation at all of cable rates on a national level. Nor do local laws generally control cable rates. The customer's rights and responsibilities are controlled by the contract signed with the cable company. These contracts usually offer cable services on a subscription basis, with payments due in advance of services. When full payment is not received by the company, the services may be discontinued. Often, the contracts allow the cable company to increase services by adding channels and charging additional fees. In such circumstances, the customer's only options might be paying the extra charge or canceling the contract by notifying the company and surrendering all equipment belonging to the company. A contract which is silent on the issue of increases and which does not contain specific provisions giving protective rights to the customer when changes are made by the company will leave the customer in no better position.

Standard form contracts which do not allow the customer to bargain for particular terms are written to favor the business and not the customer. Such contracts of "adhesion" have occasionally been ruled unenforceable, but in the context of cable TV, licensed by local governments, this is unlikely. The

regulation of cable TV has been discussed at the federal as well as state levels, but is not yet law.

I RECEIVED A BILL FROM A CREDITOR WHICH I BELIEVE HAS A MISTAKE IN IT. HOW DO I GET IT STRAIGHTENED OUT?

Individual debtors have rights under federal law (the Fair Credit Billing Act, also known as the billing errors provision of the Truth in Lending Act) to have disputed bills from creditors on open-end credit transactions verified. The law establishes procedures for complaining about alleged errors, and it requires creditors to respond by either correcting the error or by explaining its position and rejecting the debtor's complaint.

A billing error is any mistake made in billing, including misstated charges, failure to credit payment, unauthorized charges, or inadequate identification of a transaction. In order to benefit from the provisions of the law, the debtor must assert his or her rights in the following way:

- Notify the creditor in writing of the error within 60 days of receipt of the billing statement;
- Provide the written notice on a separate piece of paper and not on the billing statement itself;
- Provide his or her name and account number (if any) on the written notice;
- Describe the type, date and amount of the billing error in the notice; and
- Explain the reasons for believing there is an error

Once the debtor's rights have been asserted in the manner described, the creditor is obliged to act. Within 30 days of receiving the written notice, the creditor must either (1) acknowledge receipt of the notice or (2) "resolve the dispute." If the creditor chooses just to acknowledge the dispute rather than take an immediate position, the creditor must resolve the dispute within two billing cycles or 90 days at the most.

To "resolve the dispute" only means that the creditor must follow the procedures set out in the law. It does not mean resolving the dispute to the debtor's satisfaction.

To “resolve the dispute” the creditor may:

- Fully agree with the explanation and make appropriate corrections; or
- Reject the claim completely (in this case, the creditor must send a written explanation or clarification); or
- Agree in part and disagree in part (in this case, the creditor must make appropriate corrections and send a written explanation or clarification).

Until the dispute resolution procedures have been completed, the creditor must stop attempting to collect the disputed amount. The creditor is forbidden from charging interest or late fees for the period during the resolution or from making an adverse credit report or taking retaliatory action during the period. Once the procedures have been completed, the creditor must promptly notify the debtor of when payment is due.

A debtor disagreeing with the creditor’s position should promptly submit any supporting documents (e.g., copies of monthly statements, invoices, receipts and canceled checks).

Clients must always be advised to keep copies of any correspondence pertaining to the dispute. This correspondence will help in proving any violation of state or federal law by a creditor or collection agency.

I AM BEING BILLED BY A DOCTOR FOR MORE THAN MY MEDICARE (AND SUPPLEMENTAL MEDICARE INSURANCE) WILL PAY. I CANNOT AFFORD TO PAY WHAT SHOULD I DO?

If a client receives a bill from a doctor which the client does not pay, in time, the doctor may turn over the claim to a collection agency. If the client is judgment proof (only social security, pension, etc. – no savings or real estate), it is good to write a letter to the doctor’s office explaining the financial problems. The client may want to try to talk to the doctor directly about the financial limitation. Ask if the doctor will accept the Medicare assignment as payment in full. If not, the client may want to try to look for a new doctor who will accept assignment. It may be necessary to advise the client of his or her rights under the collection practices laws as well as other debtor’s rights.

In accordance with OBRA – 1989, and effective as of January 1, 1992, a national fee schedule replaced customary charges for individual physicians and prevailing charges for physicians within specific geographic regions under

Medicare. The fee schedule is based upon relative value units (RVU) which are associated with three components: 1) time, intensity of effort and skill, 2) practice expenses, and 3) malpractice premiums. The RVU for each medical procedure is adjusted by a geographic adjustment factor which reflects differences in costs in different areas. The new fee schedule is being phased in between 1992 and 1996. Under the new system, physicians who are not Medicare participating are subject to a limiting charge (LC), whereby the physician can only charge a specified amount above the Medicare approved amount. As of January 1, 1993, a non-participating physician may not charge more than 115% of the approved amount. Any physician who violates the law will be subject to sanctions from Medicare, and Medicare patients are not required to pay a physician any amount in excess of the LC.

Initially, if the client feels the bill is legitimate, some effort should be made to pay, even if in very small increments. However, if the income is too low for this, there is really little to advise other than to forget the matter and hope the doctor does likewise.

MY SPOUSE DIED RECENTLY. ALL OF OUR PROPERTY WAS JOINTLY OWNED, AND THERE WAS NO FORMAL ESTATE PROCEEDING. I AM RECEIVING MEDICAL BILLS. I DID NOT AUTHORIZE THESE CHARGES. AM I RESPONSIBLE TO PAY THESE MEDICAL BILLS?

Spouses can be held responsible for the medical bills of a deceased spouse if the bills were for necessary treatment under the Doctrine of Necessities. What may or may not have been necessary can be arguable. Medical treatment has almost always been found to fall under the doctrine.

Any treatment required by the deceased spouse which was for the purpose of curing the illness, or for making the spouse comfortable in the event of incurable illness, would be considered necessary. It might be possible to successfully defend a suit for medical care if the care was to prolong life without the consent of the surviving spouse, in situations where the care exceeded basic comfort care. This defense would be more effective if it could be shown that the “unnecessary” care was also contrary to the wishes of the deceased spouse, and that this had been communicated to the doctor or hospital involved.

ARE MY SOCIAL SECURITY OR PRIVATE PENSION BENEFITS SUBJECT TO ATTACHMENT AND/OR GARNISHMENT BY MY CREDITORS?

Social Security – Answer updated 2/4/13

A recipient may not assign Social Security benefits. Social Security benefits are also not subject to levy, **garnishment** or attachment except in special circumstances. The most common exception is where there is enforcement of a recipient's obligation to make **support or alimony payments**. In this case, up to 60% of the benefit may be garnished (50% if the beneficiary is supporting a family). An additional 5% can be garnished if child support or alimony payments are more than 12 weeks in arrears. Social Security benefits can also be garnished for **federal tax indebtedness**.

Once in a bank account, Social Security funds are often mixed with other money that the account holder may have. Department of Treasury rules since May, 2011, require the bank to review the account and protect the amount of all Social Security funds received in the two months prior to garnishment from attachment or "freezing". Funds exceeding two months of the Social Security deposit are subject to attachment by a creditor. More information here: <http://www.nslc.org/wp-content/uploads/2011/08/Treasury-Rules1.pdf>

Private Pensions

Under federal law, an employee generally is not permitted to assign or alienate benefits in a private pension plan. One exception is that a voluntary and revocable assignment of no more than 10% of a benefit payment is allowed. Another exception is that payment of all or part of the pension benefit in accordance with a qualified domestic relations order (QDRO) is allowed. A QDRO is a judgment, order or decree of court which creates or recognizes the existence of the right of an alternative payee (spouse, former spouse, child, other dependent) and assigns to that party the right to receive all, or part of , the benefits payable to a pension plan participant.

The anti-assignment provision has been generally held to preclude a judgment creditor from garnishing a debtor's pension benefits. Further, Kansas law specifically exempts pension and profit sharing plans from attachment or execution by creditors. See K.S.A. 60-2308.

Courts are divided as to whether a participant's interest in a pension fund is exempt from creditors under the Bankruptcy Code. However, the overwhelming majority of cases have held that where a plan participant of an Employee Retirement Income Security Act (ERISA) Qualified Plan has provided

the funding for a plan, or where the employee retains control over the corpus of the trust, or where the employee can demand an early withdrawal, the debtor cannot exclude the plan from the bankruptcy estate under the federal law exemptions in bankruptcy are less generous than the federal exemptions and the majority of debtors will opt for the more generous federal exemptions if available.

There is no restriction against garnishment of pension benefits for federal tax indebtedness.

I AM BEING HARASSED BY A COLLECTION AGENCY. WHAT CAN I DO?

The federal law called the Fair Debt Collection Practices Act gives debtors many rights. A collection agency is a third party to the debt (meaning the client does not owe the money to the collection agency). As a third party, the Act gives the debtor the right to demand that the collection agency stop all contact. This request is best done in writing. If the client is judgment proof, the client may want to include that information in the letter. Tell the client to keep a copy of the letter.

The client then can expect to be contacted by the creditor directly. The client should be prepared to negotiate with them or have a good explanation as to why he/she cannot pay.

The Fair Debt Collection Practices Act gives debtors other protections such as the time in which calls can be made, what parties can be contacted, the content of any letters, and limits on actions that can be threatened. A client who feels particularly harassed may want to contact his/her Legal Services office for further advice.

I HAVE BEEN SUMMONED FOR A DEBTORS EXAM. DO I HAVE TO GO?

Kansas Law give creditors the opportunity to question debtors about their assets. This is called a Hearing in Aid of Execution or Debtors Exam. A judgment has already been entered in the case, so advise the client this will not be an opportunity to contest the debt. Generally, the client must appear. Failure to appear can result in contempt and ultimately a bench warrant being issued for the client's arrest.

If the client is being called into a distant county or cannot appear for health reasons, he/she should attempt to contact the attorney who set the hearing about

being excused from appearing. A letter to the judge is sometimes helpful. Ultimately, the client needs to be prepared to appear at sometime to be put under oath and examined by an attorney. A client may want to contact his/her Legal Services office about additional assistance.

I COSIGNED A LOAN FOR MY SON. MY SON HAS STOPPED MAKING PAYMENTS ON THE LOAN. WE DID NOT RECEIVE NOTICE THAT HIS LOAN WAS IN DEFAULT UNTIL THE COLLECTION AGENCY CALLED. NOW WE HAVE A BAD CREDIT RATING. WHAT CAN WE DO?

Pursuant to the federal Collections Practices Act (CPA), before a creditor can report adverse information about a cosigner to a consumer reporting agency or a collection agency, or take any collection action against the cosigner on the obligation (other than orally telling the cosigner that the primary obligor is delinquent), the creditor must: 1) send the cosigner a first class mail notice that the primary obligor has become delinquent or defaulted on the obligation and that the cosigner is responsible for payment of the obligation; and 2) allow the cosigner not less than 30 days from the date the notice was sent to respond by either paying the amount due, or making other arrangements “satisfactory to the creditor.”

If the creditor does not give the cosigner the written notice and wait 30 days for a response, and the cosigner then “suffers loss as a result of a violation,” the cosigner may sue for actual damages or \$250,000, whichever is greater, together with reasonable attorney fees. The CPA requires the cosigner to give the creditor 30 days notice of the intent to bring suit, including evidence of the loss. Then, if within 25 days of receiving the notice, the creditor gives the cosigner “an amount equal to the loss,” the cosigner is barred from other recovery, including receiving attorney fees.

As a practical matter, when the CPA is violated, it is usually by the creditor’s failure to wait 30 days after sending written notice to the cosigner that he or she is responsible for payments on the obligation. What usually occurs when the statute is not followed is that the cosigner receives notice that the debt has been turned over to a collection agency as the first written notice of the obligation to pay.

Although the CPA does not further define “making other arrangements satisfactory to the person to whom the obligation is owed,” this seems to be another area where violations commonly occur. Cosigning clients often make

arrangements within 30 days to pay something other than the full amount of the debt. Usually these arrangements are made verbally, with nothing in writing to confirm the deal. Then, months later, the debt is turned over to a collection agency because of an accumulating arrearage, and the client is told to pay the balance in full, or is, at minimum, required to pay a higher monthly payment to avoid a collection suit. It is arguable that if the client has acted within 30 days to make a payment arrangement (even if not in writing), that the creditor has violated the CPA if the notification process is not started over (giving the client 30 days to react before turning the account over to a credit reporting or collection agency).

CAN I FILE FOR AN INDIVIDUAL BANKRUPTCY, OR DO I NEED TO ADD MY SPOUSE?

Any “person” can file for bankruptcy as a “debtor.” This would mean that one spouse could file for individual bankruptcy, and his or her spouse need not join in the action (11 U.S.C. §109(a)). In most cases, an individual spouse could file under Chapter 7 or 11. He or she may also be able to file under Chapter 13 if he or she has a “regular income” and owes, on the date of filing, non-contingent, liquidated, unsecured debts of less than \$100,000 and non-contingent, liquidated, secured debts of less than \$350,000 (§109(e)). A husband and wife could file jointly under Chapter 13 if, together, they meet the above limitations.

The code provides for specific treatment to be taken when a “join” case is filed. A “joint” case is defined as a filing of a single petition under any Chapter by an individual that may be a debtor under such Chapter and such individual’s spouse (11 U.S.C. §302). In such a case, the court shall determine the extent if any, to which the debtors’ estate shall be consolidated. The legislative history accompanying §302 makes it clear that one spouse cannot take the other into bankruptcy without the other spouse’s knowledge and consent.

WHAT ASSETS WOULD BE IN THE BANKRUPTCY ESTATE WHEN ONLY ONE SPOUSE FILES FOR BANKRUPTCY?

The formation of the bankruptcy estate is governed by §541 of the Bankruptcy Code (11 U.S.C. §541). Basically, the bankruptcy estate includes all debtor’s legal or equitable interests in property at the time of commencing the action. Thus, entireties property is “part of the estate.” Tenant by entireties is exempt from process under applicable state non-bankruptcy law. However, it would appear that this exception is only available if the debtor chooses the state exemptions. (See, §541(a)(1) and (a)(2), §522(d)(1), and §522(b).) The estate is

formed at the time of filing, and only the property owned by the debtor at that time can become part of the estate. Generally, property acquired after filing the petition remains the debtor's. However, there are important exemptions to this rule. After acquired property can be made part of the bankruptcy estate if the debtor acquires or becomes entitled to acquire the property within 180 days of filing:

- By bequest, devise, or inheritance;
- As a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or
- As beneficiary of a life insurance policy or of a death benefit plan.

Also, specifically excluded by the Bankruptcy Code is any interest the debtor has in a "spend-thrift trust" which is enforceable under non-bankruptcy law.

WHAT CAN I EXEMPT FROM THE BANKRUPTCY ESTATE?

The debtor can choose either the state exemptions or the federal exemptions found at Bankruptcy Code §522(d). If the debtor chooses the state exemptions, he or she can also exclude property which is exempt under federal law, other than subsection (d) of §522. Some of the items that may be exempted under other federal laws include:

- Foreign service retirement and disability payments (22 U.S.C. §1104);
- Social Security payments (42 U.S.C. §407);
- Injury of fisherman, seaman and apprentices (46 U.S.C. §601);
- Civil service retirement benefits (5 U.S.C. §729, §2265);
- Longshoremen's and Harbor Worker's Compensation Act death and disability benefits (33 U.S.C. §916);
- Railroad Retirement Act annuities and pensions (45 U.S.C. §228); and
- Veteran's benefits (38 U.S.C. §770(6)).

Kansas exemptions are found at K.S.A. 60-2301 et. Seq. and include the following:

- I. A homestead to the extent of 160 acres of farming land or one acre within the limits of a town or city which is the residence of the owner, or the family of the owner, or both.
- II. Personal Property, K.S.A. 60-2303
 - a. Furnishings, equipment and supplies, including food, fuel and clothing, for the person which is in the person's possession and is necessary at the principal residence for the person for a period of one year.
 - b. Ornaments of the debtor's person, including jewelry, having a value of not to exceed \$1,000
 - c. Interest not to exceed \$20,000 in value in a vehicle used for transportation. If the vehicle is designed or equipped or both for a handicapped person, then the value limit does not apply.
 - d. Burial plot, crypt, or cemetery lot exempt from process under K.S.A. 17-1302.
 - e. Books, documents, furniture, instruments, tools, implements and equipment, breeding stock, seed grain or growing plants, trade tools, etc, not to exceed \$7,500.
 - f. Personal property exempt from process under K.S.A. 36-202 (inn keeper lien), 48-245 (uniforms, arms and equipment of Kansas National Guard) OR 84-2-326 (consignment sales).

WHAT IS THE AUTOMATIC STAY IN BANKRUPTCY?

Section 362 of the Bankruptcy Code (11 U.S.C. §362) stops virtually all debt collection efforts during the automatic stay period. The use of dunning letters or other informal collection methods is stayed (§362(a)(6)). Obtaining, perfecting or enforcing a lien is stayed. Post-petition setoffs are stayed. Commencing or continuing a collection action is stayed. Enforcing a pre-petition judgment against "property of the estate" or the debtor is stayed.

The language of §362(a)(1) provides a stay, against all entities, of the commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other proceeding against the debtor. The stay also prevents any act to obtain possession of property of the estate or of property from the estate. The enumerated exceptions to the automatic stay are limited. Of interest are those which provide that the stay shall not prevent the commencement or continuation of a criminal action, nor the collection of alimony, maintenance or support from property that is not property of the estate (§362(b)(1) and (b)(2)).

The effect of the stay is obvious. It gives the debtor a breathing spell from his creditors. The stay may also prevent actions against a co-debtor if the petition for relief is filed under Chapter 13. In a Chapter 13 proceeding, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt from any individual that is liable on such debt with the debtor, unless the co-debtor becomes liable on such debt in the ordinary course of his or her business (§1301).

The stay is not permanent, but is intended to give the trustee in bankruptcy an opportunity to inventory the debtor's position before proceeding with the administration of the case.

IS IT POSSIBLE TO GET RELIEF FROM THE AUTOMATIC STAY?

If the action desired to be taken does not fit under one of the eight exceptions to the stay, then the party desiring to take the action must request relief from the Bankruptcy Court. This would appear to include landlords, as eviction would affect possession of property of the debtor, even though he or she has only an equitable interest in the property. A requesting party is entitled to relief under two circumstances. The first is "for cause." This includes, but is not limited to, lack of adequate protection (§362(d)). From the notes accompanying, it appears that "other causes" would include the lack of any connection with or interference with the pending bankruptcy case. These notes also shed some light on just how broad the "stay" is intended to be. Examples of actions which should be granted relief include divorce or child custody proceedings, and a probate proceeding in which the debtor is the executor or administrator of another's estate. The second method is if the requesting party, with respect to an action against property, can show that the debtor does not have an equity interest in such property, and such property is not necessary to an effective reorganization. This method would appear to be the method available to landlords in eviction actions. However, the Court need not grant relief if it determines that the requesting party is adequately protected. The Bankruptcy Code now places a burden on the Court to act in a timely manner on requests for relief from the stay. The stay is automatically terminated thirty days after the request is made, unless the Court orders that it be continued within this time period (§362(e)).

II. Health Care

A. Medicare

The hospital told me that Medicare will no longer pay for my hospital stay. What should I do?

B. Medicaid/Nursing Homes

How can I pay for long term nursing home care?

Is it possible to set up a trust for a beneficiary who is receiving Medicaid benefits without jeopardizing his or her eligibility?

Is it true that a nursing home resident must sell his or her residence?

Is it legal for a nursing home to require that before I enter the facility, I must have a responsible party, sponsor or guarantor sign the admission contract?

Is it legal for a nursing home to require me and/or my family to sign a contract agreeing to pay private pay rates for a certain period of time before converting to Medicaid?

If I am a private pay nursing home resident, can the nursing home transfer or discharge me if I deplete my assets and become eligible for Medicaid?

I am worried about estate recovery? What is it?

The nursing home says they cannot care for my loved one and want me to move. I do not want to. What can I do?

THE HOSPITAL TOLD ME THAT MEDICARE WILL NO LONGER PAY FOR MY HOSPITAL STAY. WHAT SHOULD I DO?

If the notice that Medicare will not pay for the hospital care isn't in writing, the patient should request that a written notice be issued. The patient should be advised to record the date when the notice is received, as it determines the extent of Medicare coverage as described below. This notice will not say the patient must leave the hospital, but it will say he or she must pay for the bills when Medicare stops paying.

Next, the patient should check the letterhead to determine who is sending the notice, the hospital or a Peer Review Organization (PRO). The hospital must obtain the consent of the PRO or the patient's doctor before the hospital can send such a notice.

The patient must decide whether to leave the hospital or remain despite the notice. This decision is difficult because the patient must weigh the potential risk to health against the possibility of incurring a large hospital bill.

The patient's physician must be consulted. After the physician consultation, the following scenarios may arise:

- 1) If the patient and the physician agree that the patient is well enough to leave the hospital, timely arrangements for departure should be made.
- 2) If the patient disagrees with the doctor's opinion, that he or she is well enough to leave the hospital, the notice may be appealed as described in (4) below. However, without the doctor's support, chances for a favorable review are remote.
- 3) If the patient and doctor feel that only a few more days of hospitalization are required, it is normally possible to obtain Medicare coverage for these days. For example, if the hospital sent the original notice, Medicare will pay for up to two additional calendar days of hospital care beyond the day the notice was received. If the PRO sent the original notice, Medicare will pay for the number of additional days stated in the notice (which, at the discretion of the PRO, can be zero, one or two days beyond the day the notice was received). If these additional days will allow sufficient recuperative time, appeal is unnecessary.
- 4) If both doctor and patient agree that additional hospitalization is required, the PRO must be called immediately and an expedited review requested. The PRO's telephone numbers are available from the hospital or the local Social Security Administration office. If the RO sent the notice, it must review the case within three working days of the request. It is essential for the doctor to call the PRO and provide medical reasons for the need for additional hospital time.

It is best to make arrangements for leaving the hospital in case the decision is unfavorable. If an unfavorable review is made before the Medicare coverage expires, the patient can leave immediately, without incurring extra hospital bills. If the patient decides to "back out" of the patient must be made aware

that he or she is responsible for any bills Medicare refuses to pay during the “grace period” described above. If the appeal is successful, Medicare will pay for both the extended hospital stay and the time spent in the hospital awaiting the PRO’s decision.

There are several more levels of appeal that may be pursued. A favorable decision at any level of appeal will result in full Medicare coverage for the extended hospital stay. The client may want the assistance of an attorney for additional appeals.

There are several more levels of appeal that may be pursued. A favorable decision at any level of appeal will result in full Medicare coverage for the extended hospital stay. The client may want the assistance of an attorney for additional appeals.

The patient is entitled to an appeal even if Medicare coverage is provided by an HMO.

HOW CAN I PAY FOR LONG TERM NURSING HOME CARE?

It is essential that clients requiring information on long term nursing home care have a basic understanding of the overall system for financing such care.

MEDICARE

Medicare coverage for long term care is limited. The individual must first be a Medicare recipient. Coverage is restricted to **skilled care only**. (Lesser care levels, custodial and personal care provided in an institution or personal care boarding home, are not covered and must be paid for by the recipient.) In addition, the individual must have been hospitalized for at least 3 days and have entered the skilled nursing facility within 30 days of the hospital discharge. Medicare will pay the full charges for 20 days, after which the patient pays the first \$92 per day (1996 figure) and Medicare pays the rest. “Medigap” policies may pay all or part of the patient’s co-payment. Maximum coverage is 100 days per benefit period, which means one continuous period of illness. A gap of 30 days in institutional care can trigger a new benefit period.

PRIVATE INSURANCE

Some individuals carry private insurance which pays for nursing home care. The cost and benefits of such policies vary widely. Many are quite expensive, and provide very limited benefits. “Medigap” policies usually dovetail with Medicare and may help with co-payments, but do not actually extend coverage. In any event, it is important to assess the limits of coverage of any private policy. If a client is interested in various long-term care policies, the Kansas Department of Insurance has information on all policies sold in Kansas. The client’s Area Agency on Aging has counseling to help choose a policy available through the SHIC (SENIOR HEALTH INSURANCE COUNSELING FOR KANSANS) Program.

PRIVATE PAYMENT

Once any public and/or private insurance benefits are exhausted, the individual patient becomes liable for the expenses of care. Nursing care is normally considered to be a necessity, which means that married persons are liable for the care of a spouse.

MEDICAID

Medicaid, which is called Medical Assistance (MA), is the federal/state program which pays for skilled and intermediate nursing care when a patient can no longer do so. Medicaid is essentially a welfare program. As such, it is available based on financial need, as well as medical need Eligibility rules require that an applicant’s income must be less than the cost of care, and that his or her assets be spent down to levels established by law.

Initially, all admissions to a Kansas Nursing Home must be screened for medical need. The client’s Area Agency on Aging does the CARE (CLIENT ADMISSION AND REFERRAL EVALUATION) screenings.

The rules deal with basic issues related to financial eligibility. These are the treatment of income, treatment of assets, division of assets between spouses, and the permissibility of transfers for less than fair market value. Following is a brief summary:

Income: Income includes all monthly or regularly received money. This includes wages, social security, pensions, etc. The general rule for income eligibility is that the Medicaid applicant’s medical expenses must exceed their

income. For most nursing home clients this is not difficult. In the past, Kansas had an income cap. The cap will no longer apply after July 1, 1996.

Assets: Assets include all resources such as cash, investments, real estate and personal property.

Certain resources are exempt:

- Home and contiguous acreage regardless of value,
- One car regardless of value,
- Most funeral plans,
- An ongoing business in very limited circumstances.

Countable or available resources are all remaining money or property. This includes a second car or other vehicle, IRAs CD's, stock bonds, etc. to which the applicant and/or spouse have access to. For single people the assets must be spent down to \$2,000 to be eligible for Medicaid.

Division of Assets Between Spouses: Division of Assets is a program for married persons where one spouse is in the nursing home. It allows the couple to divide resources and/or income so that the spouse in the nursing home will be qualified for Medicaid and the community spouse will have assets to live on.

Division of Assets----Resources:

The same rules for countable and exempt resources found above apply to Division of Assets. Medicaid looks at the amount of assets owned by the couple (individually or jointly) at the time the spouse entered long-term care. The community spouse is entitled to keep a portion as set by law as follows:

| <u>Resources</u> | <u>Community Spouse Share</u> | <u>Institutionalized Spouse Share</u> |
|--------------------|-------------------------------|---------------------------------------|
| \$0 - \$20,880 | all | \$0 |
| \$20,881 – 41,762 | \$20,880 | Remaining Resources |
| \$41,763 – 208,800 | one-half | Remaining ½ |
| \$208,801 – up | \$104,400 | Remaining Resources |

(as of 5/08)

The institutionalized spouse's share needs to be spent down until there is only \$2,000. The institutionalized spouse's share may be spent on anything for the couple. This would include pay off all bills, credit cards, etc., or purchasing exempt property like burial plans, car, furniture, etc. Once the institutionalized spouse portion is down to \$2,000 then the couple is eligible for Medicaid.

Transfer for Fair Market Value

Medicaid will look at the 36 months prior to application for any transfers for less than fair market value of gifts. The applicant will be penalized a certain number of months for any such transfers. The penalty is based upon the amount of the gift and when it occurred.

If there has been a transfer to an irrevocable or Medicaid trust the look back time is five years prior to application. The penalty period is potentially unlimited. These rules are very complicated. Advise the client to seek individual consultation with an attorney before proceeding with transfers to qualify for Medicaid.

A client may go to SRS at the time of nursing home admission for an initial assessment of eligibility and may also contact his/her legal services office for additional advice.

IS IT POSSIBLE TO SET UP A TRUST FOR A BENEFICIARY WHO IS RECEIVING OR INTENDS TO APPLY FOR MEDICAID BENEFITS WITHOUT JEOPARDIZING HIS OR HER ELIGIBILITY?

Prior to the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), some individuals would establish trusts for their own benefit, and subsequently apply for Medicaid. Under these trust agreements, the trustee was granted discretion to spend both trust income and principal for the individual's benefit, but not if the payments would affect the individual's Medicaid or Supplemental Security Income (SSI) eligibility. Often, the trustee had authority to divert the payments to other beneficiaries if the principal beneficiary's eligibility was affected. This practice is still permitted under the SSI program. However, since COBRA, this is no longer possible under the Medicaid program.

Under COBRA, these types of trusts (Medicaid Qualifying Trusts) will not have the desired effect of sheltering income from consideration by the Medicaid program. If a Medicaid claimant (or the claimant's spouse) establishes a trust for his or her own benefit, the maximum amount of payments that may be permitted under the terms of the trust to be distributed to the grantor (claimant or spouse) assuming full exercise of discretion by the trustee will be deemed to be available to the grantor (or claimant). This amount will count as a resource or as income. COBRA provisions apply to Medicaid Qualifying Trusts whether or not they are revocable, whether or not they might have been established for other purposes than to qualify for Medicaid, or whether or not the trustee actually exercises his or her discretion under the terms of the trust. COBRA provides an option to waive these provisions in cases of "undue hardship." Congressional conferees interpreted this to apply when an individual would be forced to go without life-sustaining services altogether because the trust funds could not be made available to pay for the services. Grantor trusts will have a five year look back for transfer penalties.

Remember, these COBRA rules do not apply to other government programs, such as SSI. Also, remember that they apply only to disbursements from **grantor** trusts and not disbursements from non-grantor trusts such as those established by parents for mentally retarded children.

The rules for Grantor Medicaid Qualifying Trusts are very complicated and uncertain in this time of political change. Clients interested in the Medicaid Qualifying Trusts are very complicated and uncertain in this time of political change. Clients interested in the Medicaid Qualifying Trust should consult with a qualified private attorney who specializes in this type of estate planning.

Trusts set up by a third party (such as a parent for a disabled child or a child of an older person) are permitted. These are generally called supplemental needs trusts. The key to avoiding availability for Medicaid is whether the funds in the trust are "available" to the Medicaid applicant. Kansas Courts have found that a purely discretionary trust does make the corpus or income available to the beneficiary Myers v. Kan. Dept. of SRS 866 P.2d 1052 (Kan. 1994). These trusts maybe testamentary or inter vivos. Again, this is a specialized area of the law. The client should be advised to see an experienced estate planner.

IS IT TRUE THAT A NURSING HOME RESIDENT MUST SELL HIS OR HER RESIDENCE?

This question becomes an issue when a person must apply for Medicaid (MA) benefits in order to pay for long term care in a nursing home. This answer must be read in conjunction with all of the MA questions and answers.

A home is not a countable resource regardless of value. The Medicaid applicant needs only to sign an intent to return home form for the house to remain exempt when the resident enters a nursing home. The intent to return home form will be honored even if there is no way the Medicaid applicant could return home. If the spouse, minor child, or disabled child remains in the home, the house will also remain exempt.

If no spouse or child lives in the home, it does raise a practical problem of who will pay the taxes and upkeep. Medicaid does not provide single persons with any shelter allowance. Also, when the Medicaid applicant dies, the property will be subject to the Kansas Estate Recovery Program. This is where the State of Kansas will make a claim in probate for the amount of state aid spent on the decedent. Therefore, although it is not required that the house be sold for Medicaid eligibility, for many single persons it becomes practically necessary to sell the home.

The home may be conveyed to a disabled child or a child that has lived in the home and provided care to the nursing home resident for two years prior to admission to the nursing home without jeopardizing Medicaid eligibility.

IS IT LEGAL FOR A NURSING HOME TO REQUIRE THAT BEFORE I ENTER THE FACILITY, I MUST HAVE A RESPONSIBLE PARTY, SPONSOR OR GUARANTOR SIGN THE ADMISSION CONTRACT?

It is a very common practice for a nursing home to require the signature of a responsible party on the admissions contract before admitting a resident. This practice is illegal. The Omnibus Budget Reconciliation Act of 1987 (OBRA-87) strictly prohibits a nursing facility from requiring a third-party guarantee as a condition of admission or continued stay (Medicaid – 42 U.S.C. §139(c) (5)(A)(i); Medicare – 42 U.S.C. §1395i-3(c)(5)(A)(ii).

If this becomes a problem for the client, then he/she can contact Health and Environment to file a complaint, the Regional Long-term Care Ombudsman, or Legal Services office for additional assistance.

IS IT LEGAL FOR A NURSING HOME TO REQUIRE ME AND/OR MY FAMILY TO SIGN A CONTRACT AGREEING TO PAY PRIVATE PAY FOR A CERTAIN PERIOD OF TIME BEFORE CONVERTING TO MEDICAID?

It is a common practice for nursing homes to require applicants to agree to remain private-pay patients for specified periods of time (usually two or three years) before applying for Medicaid. Thus, the nursing home is able to receive the higher, private pay rate for that period. The effect is to increase the level of reimbursement available to the home. This can be a substantial benefit to the home and detriment to the patient. The Medicaid Fraud and Abuse Amendment (42 U.S.C. §1396h(d)) makes it a federal criminal offense to charge, solicit, accept or receive any gift, money, donation or other consideration as a precondition of admitting a patient, or as a requirement for the patient's continued stay, when a patient would otherwise be eligible to have services paid for by Medicaid. It is, therefore, illegal for a nursing home which participates in the Medicaid program to ask patients to sign such agreements.

Keep in mind that all nursing homes do not participate in the Medicaid program. However, those who do are bound by all the laws and regulations affecting Medicaid. Some nursing homes may not require a duration of stay agreement per se, but will say that a "Medicaid bed" will not be available for a certain period of time. If the nursing home participates in Medicaid, it cannot legally limit the number of "Medicaid beds" in the nursing home. Kansas approves an entire facility not a number of beds as Medicaid.

If a client needs additional assistance with this type of matter he/she may contact the Kansas Department of Health and Environment, the Regional Long-Term Care Ombudsman or Legal Services office for additional assistance.

IF I AM A PRIVATE-PAY NURSING HOME RESIDENT, CAN THE NURSING HOME TRANSFER OR DISCHARGE ME IF I DEplete MY ASSETS AND BECOME ELIGIBLE FOR MEDICAID?

If the nursing home participates in the Medicaid program, the nursing home cannot transfer or discharge a private-pay resident who becomes eligible for Medicaid.

Some nursing homes place a clause in their admissions contract which requires residents to pay for care from private funds for a certain period of time before conversion to Medicaid will be “accepted.” This type of clause is illegal and unenforceable.

A resident cannot be transferred or discharged for any reasons other than medical reasons or non-payment. Conversion to Medicaid is not “non-payment” within the meaning of the law. Therefore, a resident who has been paying the cost of care from his or her own funds and then exhausts those funds cannot be discharged based on a claim that there are no “Medicaid beds” available.

OBRA-87 also includes provisions prohibiting facilities from requiring individuals to waive their rights under Medicaid or Medicare (Medicaid – 42 U.S.C. §1396r(c)(5)(A)(i)(I), Medicare 42 U.S.C. §1395i-3(c)(5)(A)(i)(I)).

For any involuntary transfer or discharge, the facility must give a 30 day written notice (if the resident has been there 30 days) of intent to discharge and state the reasons. The reasons are limited by law. Medicaid is not one of those reasons.

If a client needs additional assistance with this type of matter he/she may contact the Kansas Department of Health and Environment, the Regional Long-Term Care Ombudsman or Legal Department of Health and Environment, the Regional Long-Term Care Ombudsman or Legal Services office for additional assistance.

MY SPOUSE IS IN A NURSING HOME AND I AM WORRIED ABOUT ESTATE RECOVERY. WHAT IS IT?

Kansas law provides that the estates of all persons age 55 or older are subject to Estate Recovery for the amount of state aid expended on their behalf. The Kansas Department of Social and Rehabilitation Services Estate Recovery Unit (ERU) administers the estate recovery program.

The state of Kansas has a claim in probate and bank accounts against the estate of the Medicaid recipient or the recipient’s spouse. The state has a first class claim in probate (even before attorneys). They, like other creditors, have six months from the death to file a claim. The claim is enforced on the death of the second spouse. There are not liens. Currently, Joint Tenancy property does defeat the Medicaid claim. The Joint Tenancy would need to be set up prior to Medicaid

eligibility. Clients should be advised that ERU has the authority to set aside transfers for less than fair market value.

If the Medicaid recipient received long-term care insurance, then there is a dollar for dollar credit against the debt for the amount of money paid by insurance.

THE NURSING HOME SAYS THAT THEY CANNOT CARE FOR MY LOVED ONE ANY MORE AND WANT US TO MOVE. I DO NOT WANT TO. WHAT ARE MY RIGHTS?

Any nursing home resident who has resided in the facility for 30 days is entitled to 30 days written notice of the intent to discharge or transfer the resident from the facility. (Immediate danger to self or others is an exception.) The notice must contain the reasons for discharge, advise the resident of the Ombudsman name and number, and the right to a hearing. These standards apply to all facilities who receive Medicare or Medicaid and all residents in those facilities (whether or not the specific resident receives payment from those sources.)

The reasons for involuntary transfer and discharge are limited and determined by federal law to (42USCS §1395i-3(c)(2)(A), 42 USCS§1396r(c)(2), 42 C.F.R. §483.12(a), K.A.R. 28-39-148(a).

- Non-payment, after reasonable notice and attempts to obtain payment,
- When discharge is necessary to meet the resident's welfare and resident's welfare cannot be met by the facility
 - As determined by the resident's physician AND
 - Documented in the resident's file,
- When the resident's health has improved sufficiently so that the resident no longer needs the services of the facility
 - As determined by the resident's physician AND
 - Documented in the resident's file,
- OR when health or safety of individuals in the facility is endangered
 - As determined by the resident's physician AND
 - Documented in the resident's file,

If the client wants to appeal the discharge, he/she should contact the KDOA for an appeal, the Regional Long-Term Care Ombudsman, and Kansas legal Services office or a private attorney.

III. INCOME MAINTENANCE

A. Social Security

[Am I liable for Social Security contributions for a person providing me with home health care services?](#)

[I am age 62, disabled and cannot work anymore. Should I take early retirement or apply for Social Security Disability?](#)

B. Unemployment Compensation

[How will my pension affect my ability to collect unemployment compensation?](#)

AM I LIABLE FOR SOCIAL SECURITY CONTRIBUTIONS FOR A PERSON PROVIDING ME WITH HOME HEALTH CARE SERVICES?

The answer to this question depends on whether or not the person is considered to be an independent contractor or an employee. Worker's Compensation makes an exception for domestic workers. Social Security tax need only be paid for household helpers who earn \$1,000 or more during the year. (In the past, employers and employees were required to report and pay Social Security taxes on all earnings of at least \$50 in a three-month calendar quarter.) The new law applies to 1994 earnings. Therefore, if an employer paid Social Security taxes for an employee whose earnings from the employer in 1994 were less than \$1,000, the employer and employee can ask for refunds.

The determination of the difference between independent contractors and employees can be a gray area. Generally, the worker agrees to be an independent contractor. In any situation, there should be a written statement, signed by the parties reflecting the terms of employment, and specifying that the worker understands that he or she is an independent contractor and will be responsible for his or her own Social Security payments, insurance, taxes, etc. The real legal definition hinges on the degree of independence versus supervision of the work to be performed. When the worker is more the one who decides when, what and how work is to be done, or is to carry through tasks agreed to with the employer on the worker's own, without direct supervision, the scales would tilt to independent

contractor. When the worker is relied upon to exercise his or her own skill and judgment, without constant direction, the scale moves further toward independent contractor. Payments being made at a per diem or hourly rate, rather than at a weekly or monthly rate, may also be evidence of an independent contractor relationship. All this information should be included in the written agreement.

It is a very common practice that people providing home care are considered to be independent contractors. There can never be a guarantee that, in event of some real problem, a court would not find that the independent contractor status was a sham. There is really no way to protect against this. At worst, the employer would be required to pay the Social Security tax. When the parties agree initially, it is generally better to hire the person as an independent contractor as opposed to an employee.

I AM AGE 62, DISABLED AND CANNOT WORK. SHOULD I TAKE SOCIAL SECURITY EARLY RETIREMENT OR APPLY FOR DISABILITY BENEFITS?

At age 62 a person who has paid into the Social Security system is eligible to take early retirement. A client who chooses this option will receive a reduction in benefits that is lifelong. This reduction is taken because the client has elected to receive benefits at 62, as opposed to waiting until age 65 when the client would receive full benefits. Early retirement does not mean early eligibility for Medicare.

It may be advisable for the client who can no longer work because of physical and/or mental problems to apply for Social Security Disability. Disability is determined by a number of factors including, severity of medical impairment, age, education, and work background. If the client is found disabled, then he/she will receive full Social Security benefits. A finding of disability also makes the client eligible for Medicaid (although the client will still have to meet the income and resource guidelines.) After two years of disability, the client will be eligible for Medicare.

If a client has been denied disability, the decision can be appealed. A denial does not necessarily mean that the client has a bad case. The client should contact Social Security immediately to request the next level of appeal. If the client wished to be represented on appeal or has other questions about Social Security Retirement, Social Security Disability, or Medicaid, he/she should contact their area Legal Services office.

HOW WILL MY PENSION AFFECT MY ABILITY TO COLLECT UNEMPLOYMENT COMPENSATION BENEFITS?

A federal statute enacted in 1976 has required states to reduce unemployment compensation by 100% of all pension income. A 1980 amendment to that law required that two conditions be met before the offset is required. It also permitted states to limit the offset where the worker made contributions for payments.

The first condition is that the “plan” (i.e., the pension plan) is one which was maintained by the base period employer or chargeable employer under the unemployment compensation law. The condition is apparently met if the base period employer ever contributed to the plan. The plan referred to in the statute can include Social Security. If the base period employer has paid FICA taxes, the condition appears to have been met. Some cases have challenged that interpretation. The individual worker’s Social Security benefits. Also, the challenge has been made that suggests Social Security benefits are not to be offset unless the base period employer has also employed the worker at the time he became “fully insured” under the Social Security act.

The most common example of the offset question is illustrated in the following example:

An individual at Company A retires and begins to collect Social Security. For whatever reason, this person then goes to work for Company B and, after 6 months at Company B is terminated. The argument goes that, assuming the individual is eligible for unemployment insurance because of the work done at Company B, the level of unemployment insurance will not be reduced at all. This is because the base period employer is not the same as the Social Security employer. The offset would apply, however, if the individual had returned to work for Company A instead of working for Company B. Under those circumstances, the base period employer and the Social Security employer would be the same.

The argument that there should be no offset if the base period employer is different has been made in federal courts in the 6th, 7th and 9th Circuits and the offset has been upheld. The District Court in Colorado held that the offset should not be permitted; however, that case was reversed on appeal.

In summary, it appears that the courts are upholding the offset of unemployment compensation benefits from Social Security payments whenever the base period employer contributed to Social Security.

IV. HOUSING/REAL ESTATE

A. Landlord/Tenant

[Can I break a written lease before the term of the lease has expired?](#)

[Can I get all or part of my security deposit returned before my lease ends?](#)

[How do I get my security deposit returned to me?](#)

[What is the amount of the security deposit to rent owed as well as to damages to the property?](#)

[May a landlord apply a security deposit to rent owed as well as to damages to the property?](#)

[I want to evict a tenant. How do I go about doing so?](#)

B. Public Housing

[I am a tenant in subsidized housing. Can I be charged more than 30% of my monthly adjusted income for rent?](#)

[I am a tenant in subsidized housing. My landlord wants to evict me because he says I am disruptive. What can I do?](#)

C. Real Estate Sales

[I am selling my house. Is it necessary for me to be represented by an attorney at the closing?](#)

[I entered into a written agreement of sale for my home, and now the buyers are not going through with the purchase. May I keep the earnest money they gave me?](#)

D. Real Estate Taxes

I own property in a bad neighborhood. I have been unable to sell said property. It is vacant and dilapidated, and I have not paid taxes for several years. I have received a letter from the county threatening to sue for the taxes. Can they sue me personally? IV-12

I received my property tax assessment statement, and my property is valued too high. Can I appeal?

E. Mortgage Satisfactions

I paid off my mortgage six months ago. I have not received a satisfaction of mortgage notice, and the register of deeds tells me one has not been filed there either. Do I have a legal remedy?

CAN I BREAK A WRITTEN LEASE BEFORE THE TERM OF THE LEASE HAS EXPIRED?

When a written lease is present, the tenant's rights are governed by the terms of the lease. The lease may provide that the tenant can give required notice and terminate the lease.

If the lease is silent on this issue, then the client needs to look to the Kansas Residential Landlord Tenant Act (RLTA) K.S.A. 58-2540 et seq. The RLTA does not cover geriatric, medical, educational, or counseling service; fraternal or social organizations; transient hotel or motel; occupancy of an employee; condominium units; or primarily agricultural leases.

The RLTA does give a tenant the right to terminate the lease if the landlord has failed to comply with his duties under K.S.A. 58-2553. These duties generally include compliance with building and housing codes materially affecting health and safety; maintenance of common areas; maintenance of electrical, plumbing, sanitary, heating, ventilation, etc.; maintenance of garbage areas; supplying running water and hot water. If the client believes that the landlord has failed to fulfill his duties, the tenant must give proper notice as found in K.S.A. 58-2558.

The notice must provide the landlord with 14 days in which to make repairs. If the repairs are not made or the same or similar problem occurs after the 14 days, then the rental agreement shall terminate 30 days from the receipt of the notice. Then the tenant may terminate the rental agreement.

If the landlord is not in breach of his duties, then RLTA provides no means for tenant to terminate the lease before it expires. The tenant will be responsible for the remaining rent through the end of the term unless the landlord releases the tenant from this responsibility. To stop payment or break the lease would be a breach of the contract. Like any contract, the landlord has an obligation to mitigate or reduce his or her damages. Therefore, a tenant can reduce his/her liability by finding a responsible replacement tenant. The tenant should also give a written notice as soon as practical to give the landlord opportunity to find a new tenant. The landlord is obliged to accept a responsible replacement tenant and, by doing so, the landlord relieves the tenant of the tenant's obligation to pay rent under the lease. In other words, the landlord cannot collect rent twice for the same premises. If no replacement tenant is found, and if the landlord does not agree to let the tenant out of the lease, the tenant is responsible for the rent until the end of the lease term.

CAN I GET ALL OR A PART OF MY SECURITY DEPOSIT RETURNED BEFORE MY LEASE ENDS?

Security deposits are covered at K.S.A. 58-2250(b). At the termination of the tenancy (for whatever reason), the landlord may apply the security deposit to accrued rent and damages. Damages are those suffered by the landlord by tenants non-compliance with K.S.A. 58-2555 and the rental agreement. (This does not include ordinary use or routine maintenance.) If the landlord wants to keep any or all of the rent, the landlord has to provide the tenant within 14 days and no more than 30 days.

Kansas makes no provision for return of deposits before the termination, of the tenancy. The client should not try to apply the deposit to the last month's rent. To do this would mean that the deposit is forfeited. The client would then be liable for the last month's rent, late fees, and any damages. K.S.A. 58-2550(d).

HOW DO I GET MY SECURITY DEPOSIT RETURNED TO ME?

Upon the termination of the tenancy a client should be advised to complete a check-out of the rental unit with the landlord. If possible, get a copy of the check sheet. The client should leave an address where the security deposit can be sent.

If the deposit has not been returned within the 30 days or only a portion of the deposit with no itemized list of damages, then the tenant may need to consider legal action to recover the deposit. If the landlord has not sent the deposit or an itemized list of damages as required by K.S.A. 58-2550(b), then the tenant may not only recover the deposit but 1 and ½ times the amount of the deposit wrongfully withheld.

If the tenant's claim is for \$1,800 or less, this may be pursued in small claims court without the assistance of an attorney.

WHAT IS THE AMOUNT OF THE SECURITY DEPOSIT MY LANDLORD CAN REQUIRE?

For an unfurnished dwelling, the landlord may demand only one month's rent as security.

For a furnished dwelling, the security may be one and one-half month's rent.

If the rental agreement permits pets, then an additional on-half month's rent may be held as security K.S.A. 58-2550(a).

MAY A LANDLORD APPLY A SECURITY DEPOSIT TO RENT OWED AS WELL AS TO DAMAGES TO THE PROPERTY?

Yes, at the termination of the tenancy the landlord may apply the deposit to accrued rent. A tenant, however, may not apply the deposit to the last month's rent. This would mean the deposit is forfeited. The tenant would then be liable for the last month's rent and any damages.

I WANT TO EVICT A TENANT. HOW DO I GO ABOUT IT?

Kansas Landlord Tenant Law may seem a bit complicated for a lay person to attempt an eviction. Suggest that the client may want to seek representation by an attorney.

Notice

The notice necessary to evict depends upon the lease and the reasons for eviction. If there is no written lease, the landlord does not need a reason to terminate the tenancy and may give notice prior to the rent paying period that the tenancy will end at the end of the rent paying period. For example: If rent is paid monthly, the landlord must give a 30-day written notice of intent to terminate the tenancy. The notice must be given prior to the rent paying period. Assume rent is due March 1, and you want to terminate the rental agreement. Notice must be given before March 1 to terminate the tenancy on March 30. If notice was given March 15, the tenancy could not end until April 30. If rent is weekly, then a week's notice needs to be given etc. See K.S.A. 58-2570.

If there is a lease for a term greater than 30 days, it is not considered a month to month tenancy and the client must use a different type of notice to evict K.S.A. 58-2570(b).

If the landlord wished to evict for a breach of the lease, there must be material non-compliance by the tenant of the tenant's duties at 58-2555 affecting health and safety. The landlord must give 30-day written notice and provide the tenant 14 days to cure the breach. If the breach is not cured or the breach occurs again after the 14 days, then the rental agreement will terminate K.S.A. 58-2564.

If the landlord seeks to evict for non-payment of rent, the landlord needs to give a three-day written notice to pay. The three days are three 24 hour periods. The notice must state the amount due and that if not paid the rental agreement will terminate in three days. Notice may be served on the tenant or by posting 58-2564(b). If the tenant pays in three days, the landlord cannot evict.

Action for Possession

If after giving good notice the tenant does not leave, then the landlord must file an action for Forcible Detained in Chapter 61 of the District Court. This action is to give the landlord a judgment for possession and money. The landlord should take no action to evict the tenant themselves, by locking out or diminishing services (like utilities). Such self-help eviction is punishable by 1 ½ months rent or actual damages. (Punitives are possible. See Geiger v. Wallace, 233 Kan. 656-61, 664 P.2d 846 (1983)).

The Forcible Detained Act does require an additional three-day notice to quit before the action is filed. This requirement is jurisdictional. In a non-payment case, a separate three-day notice is not required.

The Forcible Detained Action is an expedited proceeding. A client may need the assistance of an attorney to prepare the necessary papers.

I AM A TENANT IN SUSIDIZED HOUSING. CAN I BE CHARGED MORE THAN 30% OF MY MONTHLY ADJUSTED INCOME FOR RENT?

It is possible for landlord of subsidized housing to charge more than 30% of monthly adjusted income for rent. However, the landlord's ability to charge more than 30% depends on the type of subsidized housing involved. There are three major types of subsidized housing available (excluding housing owned and operated by the government (public housing programs)).

1. **Section 8** This is the most common type of subsidized housing available. It is based on a typical landlord-tenant situation. However, the landlord has agreed with the Department of Housing and Urban Development (HUD) to participate in the Section 8 program, the purpose of which is to make housing available for the poor. HUD inspects and certifies the property as eligible for Section 8. Under this program, the rent paid by the tenant is limited to

- 10% of the family's monthly income
- 30% of the family's monthly adjusted income
- For a family receiving welfare payments, the part of the payment specifically designated to meet housing needs.

To determine a family's income, anticipated annual income is used. Income includes income from non-excludable assets, wages, and all other types of compensation, Social Security and other benefit payments, annuities, pensions, disability benefits, welfare, alimony and child support, lottery winnings, and regular gifts. Income does not include foster care payments, inheritances and insurance payments, medical expense reimbursements, educational scholarships, and veteran's benefits used for tuition, fees, books, equipment, materials, supplies, and transportation, special armed forces pay, certain Supplemental Security Income, HUD and other

public assistance payments, sporadic or temporary income, gifts, and amounts excluded by federal statute. Amounts specifically excluded under other federal statutes include, inter alia: food stamps, Low-Income Home Energy Assistance Program payments, and payments received under Title V of the Older Americans Act of 1965.

Income is further reduced by subtracting the following deductions:

- \$480 for each family member under 18, handicapped, disabled, or a full-time student
- Expenses of child care for children under 13 years of age that enable a family member to go to school, work, or look for work after losing a job
- A handicap assistance expense equal to the lesser of the excess of handicap assistance expenses over 3% of annual income, or the amount an adult family member will earn because handicap assistance is available
- \$400 per household for any elderly, handicapped, or disabled family member
- Unreimbursed medical expenses that exceed 3% of the annual family income for an elderly, handicapped, or disabled family member.

The landlord collects the difference between what the tenant pays and the fair market rental from HUD.

2. **Section 236** This is a mortgage insurance and subsidy program open to profit and non-profit sponsors of multifamily housing. The subsidy acts to reduce the interest paid by a builder of a qualified project. It is then hoped that renters will benefit by lower rates caused by the reduced cost to the builder. Under this section, the monthly rental charge is the greater of:

- The basic rental charge (based on operating expenses, mortgage, interest and utilities); or
- 30% of adjusted monthly income.

Accordingly, a renter under the Section 236 program could be required to pay more in rent than a similar Section 8 tenant. However, he/she may qualify to participate in a special Rental Assistance Program (RAP). Under the RAP, the landlord and HUD specify how many units are available for the supplement. To qualify for the RAP, a renter must:

- Be a Section 236 renter; AND
- Have an adjusted monthly income less than four times the rent.

If the renter qualifies, then he/she only pays 30% of his/her adjusted monthly income in rent, and HUD pays the balance.

3. **Section 202** This is a direct program to private non-profit organizations to build or rehabilitate housing for the elderly or handicapped. Under the Section 202 program, rent is based on costs.

I AM A TENANT IN SUBSIDIZED HOUSING. MY LANDLORD WANTS TO EVICT ME BECAUSE HE SAYS I AM DISRUPTIVE. WHAT CAN I DO?

Tenants of subsidized housing have all the notice rights of the Kansas Residential Landlord Tenant Act and most have additional notice and hearing rights given to them by federal law. These rights vary widely depending on the nature of subsidy received. If the clients want to fight the eviction, they should contact their area Legal Services Office right away.

Sometimes clients who are seen as disruptive may have a handicap. This handicap perhaps can be accommodated. If the landlord refuses to offer an accommodation, this can be a violation of Fair Housing Law and the Americans with Disabilities Act, as well as a defense to the eviction. These clients should contact their Legal Service Office an/or make a complaint to Housing and Urban Development or HUD.

I AM SELLING MY HOUSE. IS IT NECESSARY FOR ME TO BE REPRESENTED BY AN ATTORNEY AT THE CLOSING?

Real estate “closing” or “settlement” are terms which refer to the process of completing a real estate transaction during which deeds, mortgages, leases and other instruments affecting real property are signed and/or delivered, an accounting is made, the money is disbursed, the papers are recorded, and all other

details such as the payment of outstanding encumbrances and the transfer of hazard insurance policies are attended to. The transfer of legal or record title is a small portion of the overall closing.

All sellers should attend the closing and, if they cannot, it is advisable that the deed be executed and acknowledged ahead of time. There is no legal requirement that a seller be represented by an attorney at the closing, but it is always a good idea. Attorneys for both the buyer and seller should review the settlement sheet to make sure that all matters affecting the sale of the property are in order.

The closing is the final transaction in a sale. More important than having an attorney present at the closing is to have an attorney review the agreement of sale to be certain that no problems exist in advance of the closing.

I ENTERED INTO A WRITTEN AGREEMENT OF SALE FOR MY HOME AND NOW THE BUYERS ARE NOT GOING THROUGH WITH THE PURCHASE. MAY I KEEP THE EARNEST MONEY THEY GAVE ME?

It is common practice for a buyer to give to a seller a deposit at the time the agreement of sale is signed. This is supposed to give the seller some insurance against the buyers defaulting on the agreement. Standard terms in agreements of sale allow the seller, at his or her option, but not as his/her exclusive remedy, to retain the deposit money as liquidated damages if the buyer defaults on the terms of the agreement of sale. The buyer's inability to secure financing will constitute a default, unless the securing of financing has been made a condition of buyer's obligations under the agreement. If there is a broker involved in the sale, the broker may have rights concerning the deposit money as well. It is important to understand that the rights of the parties are controlled by the terms of the written agreement, and it is not possible to give advice without a careful review of the agreement.

I OWN PROPERTY IN A BAD NEIGHBORHOOD. I HAVE BEEN UNABLE TO SELL SAID PROPERTY. IT IS VACANT AND DILAPIDATED. I HAVE NOT PAID TAXES FOR SEVERAL YEARS. I HAVE RECEIVED A LETTER FROM THE COUNTY THREATENING TO SUE FOR THE TAXES. CAN THEY SUE ME PERSONALLY?

The client will be a named party in the action to foreclose on a real estate tax lien. The action, however, is an in rem proceeding. The judgment extends to the real estate only. If, however, the owner in any way colludes with the subsequent purchaser to buy back the property, he/she may face personal liability for any deficiency.

I RECEIVED MY PROPERTY TAX ASSESSMENT STATEMENT, AND MY PROPERTY IS VALUED TOO HIGH. CAN I APPEAL?

Counties in Kansas regularly send out assessments of valuation. If the client believes that his/her property has been assessed too high, he/she may appeal. The form to request an appeal is on the back of the valuation statement. The initial appeal is informal. The client should be prepared with evidence regarding the property. The best evidence is a formal appraisal. To have one of these done, be prepared to pay around \$300.

The amount of valuation is not the amount of tax the client will owe. The city, school district, and/or county then determine the tax by assessing a mill levy on the valuation. If the client thinks the taxes are too high, he/she needs to contact his/her city, county, and/or state representatives.

Kansas does provide some property tax relief for seniors, low income persons, and the disabled. The client can get forms to apply for a Homestead Tax Refund at most libraries and senior centers. If the client needs assistance in finding or completing a homestead application, he/she may contact the Area Agency on Aging or Legal Services.

I PAID OFF MY MORTGAGE SIX MONTHS AGO. I HAVE NOT RECEIVED A SATISFACTION OF MORTGAGE NOTICE, AND THE REGISTER OF DEEDS TELLS ME ONE HAS NOT BEEN FILED THERE EITHER. DO I HAVE A LEGAL REMEDY?

This issue is covered at K.S.A. 58-2309a. Kansas Law requires the mortgagor to file a satisfaction of mortgage within 20 days of when the mortgage has been paid. If the mortgagor may be sued for \$500 AND attorney's fees. If the client has sustained actual damages as well, he/she may recover those damages.

V. DOMESTIC

A. Support
Is there a legal responsibility for adult children to support their parents?

B. Debts of a Spouse
Am I responsible for the debts of my spouse even if I did not benefit from the goods and services for which the debt was incurred?

C. Divorce
How will my divorce affect my pension benefits?

My spouse and I are getting a divorce and cannot agree on how to divide our property. How will the court divide our property?

My spouse and I are getting a divorce. Is it true that I must be totally unable to support myself in order to receive maintenance (or alimony)?

D. Grandparent Visitation/Custody Rights
Our son and his wife are getting a divorce. Our daughter-in-law has threatened to prevent my husband and I from seeing our minor grandchildren. Do we have a legal right to see our grandchildren?

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IS THERE A LEGAL RESPONSIBILITY FOR ADULT CHILDREN TO SUPPORT THEIR PARENTS?

Generally no. a child may offer to guarantee payment for their parent. This happens often on admission to a nursing home. Many nursing homes will ask for a guarantor at the time of admission. If a child does sign as a guarantor, they may be liable for the parent's bill. It is illegal for a nursing home that receives Medicare or Medicaid funds to require a guarantor as a condition of admission.

AM I RESPONSIBLE FOR THE DEBTS OF MY SPOUSE EVEN IF I DID NOT BENEFIT FROM THE GOODS AND SERVICES FOR WHICH THE DEBT WAS INCURRED?

Generally, under ordinary principles of contract law, a person is not responsible for debts he/she did not consent to or derive any benefit from. A spouse is liable on a joint credit account, since that is considered consent even though he or she did not specifically authorize the specific charges. Separated spouses should always notify credit card companies to cancel joint accounts.

Kansas, however, does recognize the doctrine of necessities. In the case of “necessities,” the general rule changes and a spouse will be responsible for the debts of his/her spouse, even if he/she didn’t consent to or derive any benefit from them (this is founded in the support law as well as on common law quasi-contract theory). “Necessities” are anything required for the basic maintenance of health and safety, including food, shelter, clothing and medical treatment.

HOW WILL MY DIVORCE AFFECT MY PENSION BENEFITS?

Social Security

A divorced spouse may receive Social Security retirement or survivor’s benefits on the record of a former spouse if he/she was married to the worker for at least ten years before a final divorce. However, the law requires that the divorced spouse who applies for retirement benefits be at least 62 years old, currently unmarried and not entitled to higher retirement or disability benefits on hi/her own record. If the divorced spouse remarries, entitlement to these benefits is lost. A divorced widow or widower is entitled to survivor’s benefits if he/she is at least 60 years old and has not remarried before age 60.

Railroad Retirement

A divorced wife is entitled to Tier I benefits under the Railroad Retirement Act under the same circumstances that divorced wives of Social Security covered employees would be eligible for Social Security.

Private Pensions

The Employee Retirement Income Security Act of 1974 (ERISA) gives spouses and divorced spouses some rights in a worker’s pension plan. This law requires that pension benefits divorced spouses some rights in a worker’s pension plan. This law requires that pension benefits paid at normal retirement age take the form of a joint and survivor annuity. A joint and survivor annuity is a benefit paid during the lifetime of the worker, with a survivor benefit to one other person,

usually the spouse. In order for a divorced spouse to qualify for survivor benefits, the marriage must have lasted at least one year.

The Retirement Equity Act of 1984 provides further protections to spouses and former spouses by making it clear that pension benefits are subject to state family law, including divorce law. Practically speaking, this means that a pension is “property” subject to distribution upon divorce according to the guidelines of state law. While federal law generally prohibits assignment or giving away of one’s rights in a pension, it does permit assignment of pension benefits to a former spouse under a Qualified Domestic Relations Order, which is an order or judgment of a court relating to alimony or marital property rights.

The impact of divorce on an individual’s economic status will depend upon a number of factors unique to the individual. If an individual is contemplating divorce, it is very important for the individual to consult with an attorney licensed to practice law in the individual’s state who can advise the individual specifically about his/her rights.

MY SPOUSE AND I ARE GETTING A DIVORCE AND CANNOT AGREE ON HOW TO DIVIDE OUR PROPERTY. HOW WILL THE COURT DIVIDE OUR PROPERTY?

Kansas is a common law state, as opposed to a community property state. The Kansas courts are empowered to make an equitable distribution of the assets. The court can divide all of the property owned whether individually or jointly without regard to how the property was acquired. As a practical matter, the courts will look at how the assets were acquired in deciding an equitable distribution.

The courts are to consider the following factors when dividing the property: age of the parties, duration of the marriage, present and future earnings capacity, time, source, and manner of acquisition of the property, family obligations, allowance of maintenance, dissipation of the assets and any other factors necessary to make a reasonable division. The courts have broad discretion in these matters. Fault is not a statutory factor, but could be a factor depending on the facts of the case. This makes it very difficult to try to guess how a court would divide property. Many couples will enter into a settlement agreement. This is a contractual agreement where the couple decides how the property will be divided. This will avoid the uncertainty of a judge’s decision.

Some judicial districts (like Johnson County) have guidelines for division of property. This is not law, but a guideline.

(It may not be possible to give clients a firm answer to this question. If they do not have an attorney, advise them to get one to represent their interests.)

MY SPOUSE AND I ARE GETTING A DIVORCE. IS IT TRUE THAT I MUST BE TOTALLY UNABLE TO SUPPORT MYSELF TO RECEIVE MAINTENANCE (ALIMONY)?

Maintenance, alimony, or spousal support is available in Kansas. It is within the discretion of the court to award maintenance. An award of maintenance is closely tied to the property division. Maintenance is usually considered when the property division is not enough to provide support for the spouse.

The trial court is given broad discretion to award maintenance. The statutory language is found at K.S.A. 60-1610 (b)(2). The Kansas courts have also enumerated factors to be considered: age of the parties, earning capacity, length of marriage, property owned by the parties, parties' needs, manner of acquisition of property, family obligations, overall financial situation, and fault.

Amount

Some judicial districts may have guidelines for the award of maintenance. The Johnson County guidelines for couples with no children award 25% of the difference between the incomes up to \$50,000 and 22% of the excess as maintenance. For example:

H earns \$90,000. W earns \$10,000. Difference is \$80,000.

25% of the first \$50,000=\$12,500 per year/12 months= \$1041.67 per month

22% of the next \$30,000=\$6,600 per year/ 12 months = \$550.00 per month

$1042 + 550 = \$2,592$ per month.

For persons with children maintenance is figured before child support. Maintenance is 20% of the differences in income.

Duration

Kansas law limits the length of court awarded maintenance to 121 months. Couples may agree to longer support in a Settlement Agreement.

The Johnson County guidelines have a formula for determining the length of maintenance. Maintenance will terminate on death of either party, remarriage or cohabitation or the passage of years as determined by the following:

- For marriages of five years or less; the number of years of marriage divided by 2.5 (for example a five year marriage would mean two years of maintenance).
- For marriages of more than five years: two plus one-third of the number of years of marriage in excess of five years (for example, for a 30 year marriage):
 - Subtract 5 years ($30-5=25$)
 - Divide the result by 3 ($25/3=8.33$)
 - Add 2 ($8.33+2 = 10.33$ or 124 months) (Remember that the court cannot order maintenance of this length. This would need to be by agreement.)

OUR SON AND HIS WIFE ARE GETTING A DIVORCE. OUR DAUGHTER-IN-LAW HAS THREATENED TO PREVENT MY HUSBAND AND I FROM SEEING OUR MINOR GRANDCHILDREN. DO WE HAVE A LEGAL RIGHT TO SEE OUR GRANDCHILDREN?

Kansas courts have the discretion to award grandparent visitation in a divorce action. K.S.A. 60-1616. This statute set out no particular standard.

Even if there is no divorce, K.S.A 38-129 allows the court to order grandparent visitation if it is in the best interests of the child and there is a substantial relationship with the child. This statute is available to grandparents whose child is not deceased and wish to visit the surviving grandchildren, even if those children have been adopted.

VI. Estate Planning/probate

A. Wills

[Do I have to leave something in my will to my children?](#)

[Can a beneficiary of a will also be a witness to the will?](#)

[Can a beneficiary of a will also be an executor \(personal representative\) of the will?](#)

What are the duties of an executor of a will and who should be selected?

Can I write a codicil to my will?

Are wills required to be registered?

Where is the best place to keep a will?

If the witnesses to my will are dead, is my will invalid?

What is a self-proving will, and is it necessary to have one?

When is someone mentally incapacitated to make a will?

Is a will which was executed in another state valid in Kansas?

What are the requirements for execution of a valid will in Kansas?

Are holographic wills valid in Kansas?

Are oral wills valid in Kansas?

Can I make a will in Kansas if I own property in another state?

B. Joint Ownership

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How do I revoke a power of attorney?

Can an appointed attorney-in-fact under a durable power of attorney be forced to act, even if he or she does not want to do so?

Can a bank or other institution refuse to honor a valid power of attorney?

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F. Living Wills

Is a living will valid in Kansas?

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Does Kansas have an inheritance tax?

H. Transfer on Death Deeds

What is a Transfer on Death Deed?

DO I HAVE TO LEAVE SOMETHING IN MY WILL TO MY CHILDREN?

No, a person is not required to leave anything in his or her will to his or her children. The client should specify in the will that he or she is leaving his or her children out and should specifically name which children are to be left out, in order to avoid a will contest.

CAN A BENEFICIARY OF A WILL ALSO BE A WITNESS TO THE WILL?

This issue is covered at K.S.A. 59-604. If a witness is left a devise or bequest, then that devise or bequest is void. The rest of the will would still be valid. It is not recommended, however, to do this.

CAN A BENEFICIARY OF A WILL ALSO BE AN EXECUTOR (PERSONAL REPRESENTATIVE OR ADMINISTRATOR) OF THE WILL?

Kansas law does not prohibit a beneficiary from being an executor, and, in fact, it is quite common. However, if a dispute arises which poses a conflict of interest between the fiduciary obligation of the executor and the personal interest as a beneficiary, the executor may be forced to resign. Individual liability can be incurred by an executor who favors his or her personal interests over those of the estate and/or other heirs. Clients should be advised to check the law of any state to which they might move or in which they may own property, as there may be some states which require an independent executor.

WHAT ARE THE DUTIES OF AN EXECUTOR OR A WILL AND WHO SHOULD BE SELECTED?

Generally, the executor must take charge of all assets, pay debts, and account for and make distribution of assets. Unless an executor is also a lawyer, the executor generally hires a lawyer to handle all of the details. It is not wise to try to settle an estate without an attorney.

Any competent adult who is trusted by the testator can be an appropriate choice to be the executor of a will. A spouse or child is often chosen. If the spouse or a child is not appropriate, a lawyer could be nominated. If the estate is very large, a bank may be nominated (only a full service bank with a trust department can handle these estates). Be sure to check with the bank about their requirements and fees for such a service.

CAN I WRITE A CODICIL TO MY WILL?

Yes, an individual can write a codicil to his or her will as long as the codicil meets certain requirements. The codicil must refer to the original will by date. The codicil must be signed and witnessed just as the original will was signed and witnessed. The codicil should be attached to the original will. It is not recommended that an individual attempt to draft a codicil. A codicil should only be drafted by an attorney to insure that it will have its intended effect.

ARE WILLS REQUIRED TO BE REGISTERED?

In Kansas, wills are not required to be registered. Wills are filed for probate at the times of the testator's (the person who made the will) death. Wills are kept by the testator and sometimes by the attorney who drew up the will, in a safe place.

WHERE IS THE BEST PLACE TO KEEP A WILL?

It is really up to the individual where he or she keeps the will. It is important that the individual trusts (like the executor) should know that the will exists and where it is located. Some people keep their wills in safety deposit boxes. This can be a very safe place to keep a will. Kansas law permits bank officers to open a safe deposit box to retrieve a will and deposit it with the district court. See K.S.A. 9-1504.

IF THE WITNESSES TO MY WILL ARE DEAD, IS MY WILL INVALID?

Generally, no. As long as the witnesses were alive at the time the will was signed that is usually sufficient. Most wills in Kansas are self-proving wills pursuant to K.S.A. 59-606. Self-proving wills have the signatures of the testator and witnesses notarized. If your will is a self-proving will, then the witnesses do not have to testify when the will is probated. If your will is not a self-proving will, this does not mean that your will is invalid. It does probably mean that your will is old, and it may be time to meet with an attorney to review your estate plan.

WHAT IS A SELF-PROVING WILL, AND IS IT NECESSARY TO HAVE ONE?

A self-proving will, now accepted in most states, is one where, in addition to the signatures of the testator and witnesses, an affidavit is executed, attesting to the signatures. An affidavit is a sworn statement before a notary public. This affidavit makes the will "self-proving" and eliminates the need to verify again the signatures at the time of probate. The statutory form for the affidavit is found at K.S.A. 59-606.

It is not necessary to have a self-proving will in order for a will to be legally effective; however, it is certainly advisable.

WHEN IS SOMEONE MENTALLY INCAPACITATED TO MAKE A WILL?

Any adult (at least 18 years of age) who is of sound mind is able to make a will. See K.S.A. 59-601. Sound mind usually means the person is able to understand what property she has and how she wants the property to go on her death. See *In re Estate of Hall*, 165 Kan. 465, 470 (1948). This does not mean that a person has to have been adjudged incompetent (under guardianship or conservatorship) by a court of law. Wills can be challenged on the basis of a lack of testamentary capacity, even in the absence of an adjudication of incompetency. Also, even though a person may be under a guardianship or conservatorship, they may still retain testamentary capacity.

IS A WILL WHICH WAS EXECUTED IN ANOTHER STATE VALID IN KANSAS?

Kansas does recognize wills executed in other states if they are executed according to the Kansas requirements or that state's requirements and are in writing and subscribed (signed) by the testator. See K.S.A. 59-609.

WHAT ARE THE REQUIREMENTS FOR AN EXECUTION OF A VALID WILL IN KANSAS?

In order to be valid in Kansas, a will

- Must be in writing;
- Must be signed at the end (permissible substitute is testator's mark or someone else signing for the testator);
- Must be attested and subscribed in the presence of two witnesses who saw the testator subscribe or heard the testator acknowledge the will as his own. See K.S.A. 59-606.

ARE HOLOGRAPHIC WILLS VALID IN KANSAS?

A holographic will (one that is completely in the handwriting of the testator) is not recognized by Kansas law. It is not wise to rely on handwritten will. The client should be advised to consult an attorney for assistance in properly drafting a will.

ARE ORAL WILLS VALID IN KANSAS?

Oral (nuncupative) wills are recognized in Kansas under the following limited circumstances.

- The will must be made during the decedent's last sickness.
- The will is valid with regard to personal property only.
- The will must be reduced to writing and subscribed by two witnesses within 30 days after speaking the testamentary words when the testator called upon someone to hear the testamentary words as her will. See K.S.A. 59-608.
- An oral will cannot revoke a written will. See K.S.A. 59-611.

CAN I MAKE A WILL IN KANSAS IF I OWN PROPERTY IN ANOTHER STATE?

Yes, but if an individual owns real estate in another state it is necessary to have the will checked there to make sure the disposition of the real estate will be carried out. The will usually must be probated in the state where the real property is located. Since state laws governing wills and estates differ, a will must be checked by an attorney qualified to practice law in any state where the will might be probated to make sure it will be honored.

Note that this only applies to real property located in another state. Distribution of personal property in another state at the time of death will probably be governed by Kansas law. The personal representative might have to file an inheritance tax return and pay tax in the state where the property is located. A person with property in another state should consult an attorney in that state for estate planning advice before writing a will.

WHAT IS THE DIFFERENCE BETWEEN “AND” AND “OR” BANK ACCOUNTS?

Generally, the terms “and” and “or” on a joint account refer to the rights of access to the funds on deposit rather than to ownership or survivorship rights. A bank account which is set up as Mary Smith OR Jane Jones gives each party named unrestricted access to the fund regardless of amounts contributed by them. In other words, if either Mary Smith or Jane Jones chose to make withdrawals from the account, either could do so on her own authority. The same is true for accounts set up as Mary Smith AND/OR Jane Jones. However, this is not true for accounts set up as Mary Smith AND Jane Jones. In the “and” account, both Mary

Smith and Jane Jones must consent in writing, by completing written withdrawal slips or by co-signing a check, before funds can be withdrawn.

Federal government bonds can only be registered in the or form. This eliminates the bond from being subject to probate since the asset will pass automatically to the other named party.

If an individual has already established a joint account, and he has questions about it, he should contact a bank officer for a complete explanation of the bank's policies.

WHAT'S THE DIFFERENCE BETWEEN TENANTS IN COMMON AND JOINT TENANTS WITH RIGHTS OF SURVIVORSHIP?

Joint tenants with rights of survivorship each own the whole, subject to the equal rights of the other. On the death of one joint tenant, the surviving joint tenant(s) automatically get the interest of the deceased joint tenant. This is the feature which appeals to many clients who want to avoid probate. However, although title passes by operation of law and probate is avoided, there may still be inheritance tax due.

Tenants in common are owners of an undivided interest in property, but there is no survivorship right between them. Accordingly, this type of property ownership would result in the property interest being subject to probate. The law presumes the creation of a tenancy in common absent a clear intent to create survivorship rights.

IS IT A GOOD IDEA TO ADD A CHILD'S NAME TO THE DEED TO A FAMILY HOME?

As a basic policy, with the client's interest paramount as opposed to the child's interest, it is better not to add names to the deed to a home. However, clients are often concerned about saving their children the inconvenience and cost of estate administration. In cases where the parent is intending to have the family home pass to a child or children on his death, he will sometimes want to add the name of the child to the deed while he or she is alive, thus hoping to save probate costs and inheritance taxes. Clients must reach a decision on their own. However, it is very important for them to understand the benefits and detriments of adding a name to a deed or transferring property outright to a child. Following are some considerations for inquiring clients:

1. **Control.** This is probably the most important consideration. Once another person's name is on the deed, that person's consent must be obtained before disposing of the property. Therefore, if the client thinks he or she may want to sell the house for whatever reason, he will need to have the child's consent before the house can be sold. If the child is married, it will also be necessary to get the signature of the child's spouse on the deed before selling.

2. **Tax Consequences.** Federal estate tax is not avoided between non-spouses. The federal estate tax exemption for people dying in 1987 and beyond is \$600,000. So, if the property is valuable enough to be taxed, the tax is not avoided by adding a child to the deed and if it is not of such a high value, there is no federal estate tax anyway.

The addition of a child's name to a deed has potential gift tax consequences, depending on the value of the property. Even if there is no actual gift tax due because of the combined gift/state tax exclusions, it may still be necessary to file a gift tax return.

If the child dies first, the client may have to pay inheritance taxes.

There are potentially adverse income tax problems for the child. When received as a gift, there is no stepped up basis as there is in inheritance. As a result, if the property value when sold is substantially higher than the basis of the parent donor, the child will pay tax on the gain which might well exceed the inheritance tax and probate cost. If the child will pay tax on the gain which might well exceed the inheritance tax and probate cost. If the child waits to receive the property as a death transfer, then he will get a step-up in basis to the value of the home at the time of transfer and in most cases avoid or greatly reduce the tax to be paid.

2. **Medicaid (Kansas Medical Assistance (MA)) Eligibility.** Medicaid will look at the 36 months prior to Medicaid eligibility to see if there have been any transfers for less than fair market value. Placing the house in joint tenancy is a potential disqualifying transfer.

However, if the client is concerned about preserving the house for the family and Medicaid is a possibility in the more distant future, he may want to consider joint tenancy. Currently the Kansas Estate

Recovery Unit does not pursue joint tenancy property for recovery purposes. Joint tenancy would defeat estate recovery at the present time.

IS IT BETTER TO HAVE THE FAMILY AUTOMOBILE TITLED TO ONE SPOUSE OR TO BOTH?

Traditionally, automobiles were titled in the name of the husband alone in order to avoid the possibility of a judgment for tort liability, arising out of the operation of the auto, from being executed against jointly-owned marital assets. This was at a time when the male spouse generally did all of the driving, and liability insurance was not mandatory.

A co-owner of an automobile does not incur liability merely as a result of co-ownership. Nor does a spouse incur liability merely as a result of marriage. For any non-driver to be held liable for damages, direct negligence has to be shown, or an agency relationship or joint venture. This, plus the fact that women drive as much as, sometimes more than, their husbands, renders the issue moot, at least as to tort liability. Only the driver of the automobile will have liability for negligence. In any event, the best protection is the maximum amount of insurance reasonably affordable.

It is also to be noted that if the auto is in the name of the spouse who dies first, inheritance tax is due. This may not be important, especially if the car is the only taxable asset, and its value is less than the debts of the estate. In the final analysis, there is little difference in having a car titled in the name of one spouse or in the names of both.

I HAD MY SON'S NAME ON A JOINT BANK ACCOUNT ALTHOUGH ALL OF THE MONEY IN THE ACCOUNT WAS MINE. MY SON DIED. MUST I PAY INHERITANCE TAX ON MY OWN MONEY?

No. The client will need to show, however, that this money was his and was not obtained as a gift from him. See K.S.A. 79-1554.

MY HUSBAND DIED A FEW MONTHS AGO, AND HIS NAME IS STILL ON THE DEED TO OUR HOME. DO I HAVE TO CHANGE THE DEED?

Generally no. If the deed states that the wife and husband owned the property as joint tenants with rights of survivorship, the client does not have to do

anything. The client owns all the property. If the wife wants to remove his name from the deed or the tax rolls, she will need to file a certified copy of the death certificate with the register of deeds where the deed is recorded.

Also, she will need to file certification that all inheritance taxes are paid or none are owed. She will need to contact the Kansas Dept of Revenue, Inheritance Tax Division, for a Form 100. After she fills it out, they will send her a statement regarding the taxes. She should file this with the death certificate with the Register of Deeds to establish her clear title.

If she and her husband did not own the property as Joint Tenants With Rights of Survivorship (JTWROS), then she owned the property as Tenants in Common. She will need a probate action to get the other half of the house in her name and will need to consult an attorney about this.

WHAT IS MY SHARE OF MY SPOUSE'S ESTATE IF MY SPOUSE DIES WITHOUT A WILL?

As to jointly owned property, the surviving spouse takes all. If there is non-jointly owned property, then the estate must be submitted to probate and is subject to division following the general rules as follows:

- If survived by a spouse but not issue or issue of a previously deceased child, all to spouse K.S.A. 59-504;
- If survived by parents, but no spouse, or children or issues of deceased child, all to parents. K.S.A. 59-507;
- If survived by child(ren) and spouse, one half to child(ren) and ½ to spouse. K.S.A. 59-506;
- If survived by child(ren), but not spouse, then to child or children in equal shares K.S.A. 59-506.

WHAT IS MY SHARE OF MY SPOUSE'S ESTATE IF I ELECT TO TAKE AGAINST THE WILL OF MY DECEASED SPOUSE?

Kansas has recently changed its rules on elective share. The statute may be found at K.S.A. 59-6a201, et seq. The new law is complicated. This **brief and general** discussion of the main provisions of the law. The client should be encouraged to talk to an experienced estate planner about the spousal elective share and their overall estate plan.

Kansas law allows a surviving spouse to choose to take what is given to them in the will or a statutory portion of the estate known as the spousal elective share. Prior law allowed the spouse to take one-half of the decedent's probate estate.

Under the new law a surviving spouse may take an elective share amount that is equal to the "elective share percentage" of the augmented estate. The elective share percentage is determined by the length of the marriage. After one year, the percentage is 3% of the augmented estate. The percentage increases each year until after 15 years of marriage the surviving spouse is entitled to 50% of the augmented estate.

The augmented estate includes the total of the following:

- The decedent's net probate estate,
- The decedent's non-probate transfers to others,
- The decedent's non-probate transfers to the surviving spouse,
- The surviving spouse's own property, and
- The surviving spouse's non-probate transfers to others.

See K.S.A. 59-6a203.

The new law ensures the surviving spouse a minimum of \$50,000 from the augmented estate. If the surviving spouses own property, non-probate transfers to the surviving spouse do not equal \$50,000, then the surviving spouse can get more to get up to the \$50,000 amount. See K.S.A. 59-6a202.

The surviving spouse also may receive a homestead allowance in addition to the will or elective share. Id.

IS THERE A SIMPLE WAY TO ADMINISTER AN ESTATE WHICH HAS A MINIMAL AMOUNT OF ASSETS?

The client may consider simplified probate, informal probate or refusal to grant letter testamentary for smaller uncontested estates. The type of probate would depend upon several factors. The client should consult with an attorney who does probate work in their area.

Bank Deposits

Banks, trust company, savings and loan associations, credit unions or other savings institutions located in this state may pay the amount on deposit in decedent's account up to \$1,000 to decedent's heirs in the same order, without incurring liability. However, payment is conditioned upon the total estate not exceeding \$10,000 and signature on the affidavit found in K.S.A. 59-1507b(a).

Stock

If a resident of this state dies testate or intestate with a total estate of \$10,000 or less, money, stock, evidence of indebtedness, interest, or right transferable shall be transferred to the successor by will or intestate succession by the furnishing the corporation with the affidavit found at K.S.A. 59-1507b(b).

Motor Vehicles

The next of kin would make an "Application for a Decedent's Title." This allows the spouse, or if no spouse, other heirs to apply for the title to the car. The client will need a death certificate and the title to the vehicle.

DO YOU NEED TO HAVE AN ATTORNEY TO SETTLE A SMALL ESTATE?

Yes. Settling a small estate requires that a petition be filed with the court. Even if the layperson wanted to attempt it, there are very specific rules which must be followed and probate clerks, while most are very nice people, cannot provide legal advice or draft pleadings.

I HAVE HEARD THAT AN INTER-VIVOS (LIVING) TRUST IS A GOOD WAY TO AVOID THE COSTS OF PROBATE AND INHERITANCE TAXES. IS IT A GOOD IDEA FOR ME?

The term "inter-vivos" means that the trust is created during the lifetime of the settler (the individual who creates the trust). This type of trust is distinguished from a "testamentary" trust, which is a trust created by a testator's will.

There are many reasons why an individual may want to set up an inter-vivos trust. Saving probate and estate tax costs are among them. Because of a lack of expertise, capacity or desire, someone may wish to create a trust for the purpose of having property managed by someone other than himself or herself, thus relieving himself of the responsibility of managing the trust property. Another

reason to create an inter-vivos trust is that the management of the property by a trustee, who is someone other than the settler, ensures continuity even if the settler should become incapacitated. An inter-vivos trust can be drafted in such a way that the settler can choose the governing law of the trust. This can be advantageous when someone moves to another jurisdiction with less favorable laws. However, this right of choice is limited and depends on other laws in force in the state of residence and would not be permitted if its effect was to evade some public policy. Sometimes, the cost of administering a trust may be less expensive than probate costs.

Whether these purposes can be achieved depends on the individual's circumstances and upon whether the trust is revocable or irrevocable. In a revocable trust, the settler retains the right to revoke or destroy the trust, to amend it or to take back possession of the trust property. An irrevocable trust is one in which the settler gives up all his or her rights to revoke or amend the trust. In this sense, an irrevocable trust is something like a gift.

While revocable trusts may help an individual achieve some advantages, they do not provide tax advantages. For federal income tax purposes, the settler is treated as the owner and all of the trust income is taxable to him. All of the trust property is included in the estate for federal estate tax purposes if the settler retains the right to revoke up to the time of his death. There may also be state income tax consequences in some states. The revocable trust will not be subject to gift tax so long as the settler retains a right to revoke. However, if this right is relinquished, the trust will be considered a gift at the time of relinquishment and, therefore, subject to gift tax.

In the case of an irrevocable trust, all income earned by the trust and distributed to a beneficiary is taxed to the beneficiary under the federal income tax law. Income earned by the trust and not distributed is taxed to the trust itself. The irrevocable trust can be used to divert income from a settler in a high tax bracket to a beneficiary in a lower tax bracket. All trust property not included in the settlor's estate for federal estate tax purposes is considered a gift for gift tax purposes. There may also be income tax consequences in some states.

For some elderly persons who fear becoming incapacitated and unable to manage their affairs, a trust is one way of allowing them to retain control over their affairs while competent, but providing management of their assets if they become incapacitated. This type of trust is similar to a "springing" power of attorney in which the powers of the attorney-in-fact "spring" into effect upon the incapacity

of the principal, as defined in the power of attorney document. However, unlike the power of attorney, which terminates on the death of the principal, the trust can be made to continue in existence after the death of the settlor.

Whether a trust is a good idea for an individual will depend upon his particular needs and circumstances. Clients interested in setting up an inter-vivos trust should be advised to consult with an attorney.

I WANT MY DAUGHTER TO TAKE CARE OF MY AFFAIRS WHEN I AM NO LONGER ABLE TO DO SO. HOW CAN I MAKE SURE SHE WILL BE LEGALLY PERMITTED TO ACT FOR ME?

Many people deal with this matter by creating joint accounts with children. This certainly allows access and can possibly save on estate administration costs after a client's death. However, creation of joint accounts may cause problems. The joint tenant will have unlimited access to the client's money and will be under no obligation to use the money for the client's benefit. If the child should become divorced or have creditors, the accounts may be tied up in legal proceedings. Finally, joint tenancy does not give the child authority to handle other business and medical decisions that may need to be made. Clients should be made aware of these issues before adding names to accounts.

Clients should be advised that a durable power of attorney is a very good way to permit a child (or any other trusted adult person) to have access to any accounts, and, in general, to provide for legal authority to manage the client's affairs in the event of the client's disability.

WHAT ARE THE BENEFITS OF A DURABLE POWER OF ATTORNEY?

The following are benefits of a durable power of attorney:

- A durable power of attorney enables the individual to clearly define ahead of time how the individual wants his financial and/or health care treatment handled in the event the individual becomes disabled or incapacitated.
- A durable power of attorney gives the individual the peace of mind that comes from knowing that the person he has chosen is the one who will be carrying out his affairs when he is no longer able to do so.
- The person to whom the individual delegates power (the attorney-in-fact) is required to use the individual's money only for the individual's benefit.

- The fact that the individual has executed a power of attorney does not interfere with the individual's right to handle matters for him as long as he is able to do so.
- A durable power of attorney can be helpful if the individual is temporarily hospitalized, or if the individual is traveling and will be away from home for some period of time, or if for any other reason the individual is unable to do his banking or pay his bills.
- A durable power of attorney may be a better alternative than adding someone's name to the individual's bank account, because with a power of attorney, another person can handle the individual's money without having an interest in it.

The individual is able to delegate health care decision-making authority in a power of attorney.

- An attorney-in-fact can help the individual to get all the benefits he is entitled to by making claims and applications on his behalf.
- A power of attorney can be revoked quickly.
- It is not expensive to have a power of attorney prepared by an attorney

DISADVANTAGES OF A POWER OF ATTORNEY

- A court does not supervise the actions of the attorney-in-fact. The attorney-in-fact has a great deal of power. The client must trust the attorney-in-fact.
- A power of attorney may not be accepted outside of the immediate area. States vary greatly on power of attorney laws.
- The attorney-in-fact cannot supersede the wished of the principal. This can set up family conflict, particularly if the principal should suffer a cognitive impairment. Guardianship and/or conservatorship may not be avoided in this type of situation.

IF I HAVE GIVEN SOMEONE A DURABLE POWER OF ATTORNEY WILL IT STILL BE NECESSARY TO HAVE A GUARDIANSHIP PROCEEDING IN THE EVENT OF MY INCAPACITY?

Hopefully not. Most general powers of attorney give the attorney-in-fact very broad powers to handle the affairs of the principal. These powers may even be more broad than the guardianship statutes. In most cases, the attorney-in-fact should be able to conduct all business for the principal. On rare occasions an

outside party may refuse to accept the power of attorney document. Then a guardianship or conservatorship may be necessary. Also, if the principal and attorney-in-fact disagree over some matter (for example admission to a nursing home), it may be necessary for the attorney-in-fact to pursue a guardianship in order to have clear authority. A guardianship and conservatorship are only granted if the principal is disabled to the extent he cannot conduct his own affairs.

HOW DO I REVOKE A POWER OF ATTORNEY?

A power of attorney is revoked by written notice from the principal to the attorney-in-fact. If a power of attorney is durable, and the principal is now incompetent, the power of attorney can only be revoked by the court appointed guardian. In cases of revocation, it is also a good idea to give notice to any banks, brokerages or other places where the attorney-in-fact conducted normal business on behalf of the principal and to file the revocation with the Register of Deeds in the county where the principal lives.

CAN AN APPOINTED ATTORNEY-IN-FACT UNDER A DURABLE POWER OF ATTORNEY BE FORCED TO ACT, EVEN IF HE DOESN NOT WANT TO DO SO?

No one can be required to assume the obligation of attorney-in-fact without his consent. There is no specific method of consent by a designated attorney-in-fact. However, if remuneration for services has been accepted, (or if a designated attorney-in-fact has actually tacitly accepted by performing fiduciary functions without remuneration), it may be possible to force an attorney-in-fact to act. Of course, there are very limited circumstances where this would be important. In most situations, if the attorney-in-fact does not want to act, the principal simply revokes his or her authority and designates a new attorney-in-fact.

Problems arise when the principal becomes incompetent. It is hardly in the best interests of the principal to have a reluctant attorney-in-fact. In such a case, the only way to avoid guardianship is to have the reluctant attorney-in-fact appoint a successor. It is necessary for this to be authorized in the power of attorney document itself.

An attorney-in-fact who has previously acknowledged acceptance of the power and who subsequently refuses to act under circumstances which cause damage to the interests or person of the principal, can be held liable for breach of fiduciary duty.

CAN A BANK OR OTHER INSTITUTION REFUSE TO HONOR A VALID POWER OF ATTORNEY?

Kansas' durable power of attorney law does not contain any provision which penalizes a third party for refusing to honor a power of attorney document which appears to be valid on its face. On the other hand, it would be necessary to prove that a third party honoring the document either knew or should have known that the document was a fraud or had been revoked in order to hold the party liable for any loss to the principal. Whether a principal could sue for damage resulting from a failure of a third party to honor a power of attorney is uncertain.

The best answer to the question is to avoid the problem by being prepared. Principals should be certain to contact any financial institution where they have accounts, safe deposit boxes, securities and the like, as soon as the power of attorney is executed. Copies should be provided, and any form that any of the institutions require of the principal or attorney-in-fact, such as authorizations or signature cards, should be executed. This generally avoids any difficulty.

It is also wise to have a power of attorney notarized even if it is unlikely that it will ever require recording. The notary seal will provide extra authentication for any wary third parties.

IF I GIVE A POWER OF ATTORNEY TO ANOTHER, DO I GIVE UP THE RIGHT TO MANAGE MY OWN AFFAIRS?

No. As long as a principal remains legally competent, he retains full control over his affairs. The principal may allow the attorney-in-fact to act or not at the sole discretion of the principal. A principal may cancel the power of attorney at any time without requirement of a reason.

IS A LIVING WILL VALID IN KANSAS?

Yes. Kansas adopted the Natural Death Act in 1979. K.S.A 65-28, 101 et. Seq. The statute recognizes the fundamental right of adult persons to control decisions relating to medical care including life-sustaining procedures and withdrawal of care in terminal conditions. A form is offered at K.S.A. 65-28, 103(1995 Supp.) Clients should substantially comply with the form. The Kansas statutes do not rule out other more detailed declarations. Many different forms are available

throughout the state. The client may contact his legal service office for a living will form.

IS THERE KANSAS INHERITANCE TAX TO THE REMAINDERMAN ON THE DEATH OF A LIFE TENANT IN REAL ESTATE?

Warning: This may not be accurate information in 2008.

Kansas inheritance tax will only be owed if you have an estate that is taxable for purposes of federal estate tax.

The Kansas inheritance tax, however, did change in 1998. Persons who died on or prior to June 30, 1998, would be covered by the old system of Kansas Inheritance Tax. (See previous questions.) The old system assessed tax on the recipient of property.

The old system of inheritance tax was repealed July 1, 1998. The new Kansas inheritance tax parallels federal estate tax. If the client owes federal estate tax, (estates over \$675,000 in 2000), then he will owe Kansas inheritance tax. The client in this situation should consult a tax professional about paying or avoiding federal estate tax.

MUST I PAY INHERITANCE TAX WHEN MY SPOUSE DIES?

Generally no. the client should be advised to file a non-taxable inheritance tax claim form or Form 100. These are available from the Kansas Department of Revenue, Inheritance Tax Division. The client should fill out the form, send it back to the Dept. of Revenue, and they will send a letter confirming that no tax was owed at the time of the spouse's death.

The Kansas inheritance tax, however, did change in 1998. Persons who died on or prior to June 30, 1998, would be covered by the old system of Kansas inheritance tax. (See previous questions.) The old system assessed tax on the recipient of property.

The old system of inheritance tax was repealed July 1, 1998. The new Kansas inheritance tax parallels the federal estate tax. If the client owes federal estate tax, (estates over \$675,000 in 2000), then he will owe Kansas inheritance tax. The client in this situation should consult a tax professional about paying or avoiding federal estate tax.

DOES KANSAS HAVE AN INHERITANCE TAX?

Warning: This may not be accurate information in 2008.

Yes. The Kansas inheritance tax, however, did change in 1998. Persons who died on or prior to June 30, 1998, would be covered by the old system of Kansas inheritance tax. (See previous questions.) The old system assessed tax on the recipient of property.

The old system of inheritance tax was repealed July 1, 1998. The new Kansas inheritance tax parallels federal estate tax. If the client owes federal estate tax, (estates over \$675,000 in 20000), then he will owe Kansas inheritance tax. The client in this situation should consult a tax professional about paying or avoiding federal estate tax.

WHAT IS A TRANSFER ON DEATH DEED?

The Transfer on Death Deed is a legal document on which individuals indicate who they want to receive their real estate upon their death. The Deed must be executed with the proper legal description. The Deed must be signed by all current property owners. The signatures of the owners must be notarized. The Deed is then filed at the Register of Deed's Office in the county in which your real estate is located. There is a small charge for the recording of the Deed.

- The grantors of a TOD may revoke or amend the TOD at anytime prior to death.
- The grantors of the TOD may sell the property or borrow against it without the permission of the TOD beneficiary.
- Any mortgages, liens, taxes, Medicaid claims, etc. to the property will follow the property after the death of the grantor.
- After the death of the grantor(s), the TOD beneficiary need only file the death certificate with the Register of Deeds office to transfer title.
- TOD beneficiaries may also be designated on automobiles. This is done at the title office in the grantor's county or may be done at the time property taxes are paid.
- TOD should be prepared by an attorney, as part of a comprehensive estate plan.

VII. TORTS

A. Negligence

I was injured as a result of the negligence of a government employee. Can I sue the government?

Am I liable to an individual providing home health care to me, in my own home, if that worker is injured while performing his duties?

I have been injured in an auto accident, and the other driver's insurance company will not pay my bills.

B. Neighborhood Disputes

Can I force a neighbor to cut down the branches of a tree which hang over my property?

Can I force a neighbor to pay for cleaning out my gutters which are clogged with leaves from his tree?

Can I go onto my neighbor's property in order to perform needed repairs to my own property even without his consent?

My neighbor has put up a fence which encroaches on my property what are my remedies?

I WAS INJURED AS A RESULT OF THE NEGLIGENCE OF A GOVERNMENT EMPLOYEE. CAN I SUE THE GOVERNMENT?

This issue is covered by the Kansas Tort Claims Act at K.S.A. 75-6101 et. Seq. A governmental entity and/or its employees acting in the scope of their employment may be sued for negligent or wrongful acts. The Act excludes certain acts which entity or employee may not be sued for. These included: legislative functions, judicial functions, enforcement or failure to enforce any law or regulation, enforcement of any personnel policy, failure to exercise any discretionary government function, tort action covered by worker's compensation, malfunction of road signs, any action barred by any other law, inadequate or negligent inspection of property, ice or snow conditions, improvement of any public property, providing police or fire protection, injuries at play ground, natural condition of unimproved property, injuries in an abandoned cemetery, road

maintenance, community service work vending machines, distributing geographical information (see K.S.A. 75-6104 1995 supp).

Claims under the Tort Claims Act are limited to \$500,000. A governmental entity is not liable for punitive or exemplary damages or interest prior to judgment. An employee may only incur liability for punitive damages if there is fraud or actual malice.

If a client believes he has a claim that is permitted by the Tort Claims Act, he should consult with a private attorney who handles personal injury cases.

AM I LIABLE TO AN INDIVIDUAL PROVIDING HOME HEALTH CARE TO ME, IN MY OWN HOME, IF THAT WORKER IS INJURED WHILE PERFORMING HIS OR HER DUTIES?

Several issues are presented by this frequently asked question. First of all, it must be decided whether this is a worker's compensation issue. The Kansas Worker Compensation law exempts any employer whose gross annual pay roll is less than \$20,000. Most clients will not come anywhere close. Many clients will hire workers from an agency. In this case the worker is the employee of the agency, and the agency is responsible for worker's compensation, etc. It is a good idea to ask the agency if they provide worker's compensation as well as liability coverage if the worker should injure the client. If the worker is not from an agency, it may help matters to have a clear agreement that the worker is an independent contractor who is responsible for his own worker's compensation, unemployment compensation, and Social Security liability.

Of course, being excepted from worker's compensation coverage means that a worker could sue the homeowner, or apartment lessor, for injuries resulting from negligence. The usual rules of liability for injuries on the premises apply. These rules are covered under normal homeowner's or renter's insurance policies under the liability provisions.

In any event, the bottom line seems to be that clients need not worry about regular worker's compensation issues, but must always be aware that they could be held liable for their own negligence in maintaining a dangerous condition on their homeowner's or renter's insurance.

I HAVE BEEN INJURED IN AN AUTO ACCIDENT, AND THE OTHER DRIVER'S INSURANCE COMPANY WILL NOT PAY MY BILLS. WHAT ARE MY RIGHTS?

These cases involve many issues. In Kansas, the personal injury protection (PIP) coverage of the car in which the injured person was a passenger or driver is the primary insurer. See K.S.A. 40-3109. If the client's insurance coverage is not sufficient to cover the costs of the injury, the client may want to consult with a personal injury attorney about the claim.

Often insurance companies will under value an older person's injuries. (Older people don't work, they are sick anyway, etc.) If the clients are not getting a settlement they feel is fair, they should contact a personal injury attorney. Many personal injury attorneys will give an initial consultation for free. If the clients retain an attorney, they should make sure they understand all the terms of any contingency fee agreement. They may also contact the Kansas Department of Insurance. The Department has a consumer division which may be able to assist the clients.

Also, clients should keep in mind that if Medicare has paid any of the clients' medical bills, then Medicare will expect to be reimbursed. Medicare has a statutory lien on any recovery or settlement. See 42 C.F.R. §§405.316(b); 405.322(c), (d); 405.323(c); 405.324(a).

CAN I FORCE MY NEIGHBOR TO CUT DOWN THE BRANCHES OF A TREE WHICH HANG OVER MY PROPERTY?

It seems clear that the tree branches which extend onto the client's property are trespassing. The client may cut them down himself. If the client wants to try to force the neighbor to cut them down, advise the client to try to work out an agreement before going to court. Mediation services are available in some communities. If the client cuts so much of the tree that the tree cannot survive, the case may be more difficult. It is best to try and work out these matters without going to court. Strictly speaking, a trespass here should not require a showing of nuisance or inconvenience. However, it may be a bit sticky to actually bring into court without some showing by the plaintiff of a good reason.

These types of cases can be expensive to pursue in proportion to the harm done. The client should evaluate the expense weighed against the benefit.

CAN I FORCE MY NEIGHBOR TO PAY FOR CLEANING OUT MY GUTTERS WHICH ARE CLOGGED WITH LEAVES FROM HIS TREE?

A client could try a suit for damages. There are no cases in Kansas on this issue. The client should remember that the burden of proof is on the client. They will need to prove whose tree these leaves came from. GOOD LUCK. A better solution may be to refer the client to the Area Agency on Aging for assistance or referral to a chore service to help clean up.

CAN I GO ONTO MY NEIGHBOR'S PROPERTY IN ORDER TO PERFORM NEEDED REPAIRS TO MY OWN PROPERTY, EVEN WITHOUT HIS CONSENT?

It would not be advisable to enter the property without the property owner's consent. The law probably does provide, as an equitable remedy, that if an adjoining owner must trespass in order to effect necessary repairs on his own premises, he may have reasonable access. If access means damaging the neighbor's property, this could be sticky, and if court action is required, the client could be forced to post a security bond. If self-help is used and damage is cause, the client would be liable for those damages. The client may want to try a mediation, which is available in some communities, as a way to avoid court action.

MY NEIGHBOR HAS PUT UP A FENCE WHICH ENCROACHES ON MY PROPERTY. WHAT ARE MY REMEDIES?

In this situation, it is essential that the client be absolutely positive about the property line. This can require a survey, which could be expensive. It is better to try to work this out with the neighbor, if at all possible. Self-help can be, and often is used in these situations, and is permissible, as long as the user is correct about the boundary. If a mistake is made, there is full liability for damages. If the neighbors cannot reach an agreement, then the client may need to consider a lawsuit for trespass and ejectment. The client will need to retain an attorney and will need to have a survey done. This all can get expensive. If the client takes no action, he should be advised regarding adverse possession.

