

**Testimony on:**

Senate Bill 32 – Medical Assistance and Discretionary Trusts

**presented to:**

Senate Committee on Judiciary

**by:**

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**Senate Committee on Judiciary**  
**March 13, 2007**

**Senate Bill 32 – Medical Assistance and Discretionary Trusts**

Thank you, Chairman Vratil, for the opportunity to present written testimony on SB 32. Since the last hearing of the bill by the Senate Committee on Judiciary, the Kansas Health Policy Authority has met with Mr. Eric Anderson of the Clark, Mize & Linville firm in Salina who suggested amendments to SB 32. Although the KHPA has taken a neutral position on the legislation, the KHPA would like to provide explanation as to the possible impact of changes that would be made by this legislation and the suggested amendments.

**History of the Law**

Current law for discretionary trusts came out of recommendations of the 2003 President’s Task Force on Medicaid Reform, appointed by Senate President Dave Kerr with the late Senator Stan Clark as chair. The Task Force proposed changes to eligibility and recovery statutes. The Kansas Judicial Council, Kansas Bar Association, Kansas Title Examiners, Kansas Register of Deeds Association and other various proponents and opponents offered testimony. The Task Force’s recommendations were embodied in SB 272, which was introduced in the 2003 Session, was passed in 2004, and has been effective for two and a half years. These changes included three eligibility amendments found now in K.S.A. 39-709(e)(2 - 4) and two estate recovery amendments found in K.S.A. 39-709(g)(3 – 7).

**Suggested Amendments**

The suggested amendments are designed to deal with three main issues related to Medicaid eligibility and discretionary trusts:

- i. The law, as amended in 2004, does not grandfather older trusts;
- ii. The law requires a specific reference to Medicaid for a trust to be considered a Medicaid-sheltering trust;
- iii. The overly restrictive phrase, “funded exclusively,” in K.S.A. 39-709(e)(3).

**I. Impact of amending the law to “Grandfather old trusts” by deleting the word “contemporaneous”**

Current law provides a way that caring parents of adult disabled children can provide for them after death without undermining Medicaid eligibility. Congress, in 1993, in response to the testimony of parents who did not want to have to “disinherit” their disabled adult children, created a special exemption for trust established by parents or grandparents of disabled individuals under 65. This is in 42 U.S.C. Sec. 1396p(d)(4)(A). Kansas specifically allows for guardians and conservators to establish these trusts, under K.S.A. 59-3080. K.S.A. 39-701 lays out the state’s intent in establishing a safe haven for these trusts: “. . . It is not the policy of the state to discourage or interfere with the universally recognized moral obligations of kindred to provide, when possible, for the support of dependent relatives, but rather it is the policy of the state to assist the needy and where necessary, the relatives in providing the necessary assistance for dependents.” Under the federal law, these trusts must be irrevocable, must be used for the sole benefit of the disabled individual, and must repay the state Medicaid agency for any Medicaid benefits paid to the individual if there are any funds remaining at the disabled individual’s death.

SB 272 (2004) required those who set up trusts for their children to be specific about whether they intended to create a Medicaid shelter. The intent of this law was to override the Myers case, Myers v. Kansas Dept. of

SRS, 254 Kan. 467, 866 P.2d 1052 (1994). The Myers court presumed that the mother intended to shelter her son's inheritance from Medicaid even though she did not express that in her will when she wrote it.

The suggested amendment grandfathered trusts created prior to the 2004 amendments to K.S.A. 39-709(e) that do not meet the new and specific requirements for special needs trusts. To the extent that it allows trusts that did not explicitly create a Medicaid shelter at the time they were created to now be considered to meet the shelter requirements, removal of the word "contemporaneous" would appear to overturn the intent of SB 272 (2004).

KHPA estimates that taking the word "contemporaneous" out of the current law will increase Medicaid expenditures by about \$450,400, as reflected in the fiscal note prepared in response to the bill. It is common for the Medicaid-planning bar to presume that people must have intended to create a Medicaid shelter when they wrote a trust, and it has been shown that lawyers can convince local courts to presume that is what must have been intended. Without the word "contemporaneous," lawyers may go to courts and get existing trusts "reformed" to add language that will create a Medicaid shelter. In these cases, the courts will effectively determine trust-related qualification for Medicaid<sup>1</sup>.

## **II. Impact of deleting language requiring a “Specific reference to Medicaid”**

One reason that old trusts may not meet the 2004 requirements is that they lack a specific reference to Medicaid rules, i.e., they may not, as non-required, require that the special needs trust specify its intent to comply with Medicaid eligibility rules. Essentially, the terms “specific contemporaneous language” and “specific reference to Medicaid” were both intended to prevent an assumption that a trust settler intended to create a Medicaid-sheltering trust. Removing either phrase would likely make it easier for trusts to qualify, or be changed to qualify, individuals for Medicaid.

## **III. Amending “funded exclusively” to read “funded more than nominally”**

KHPA does not see harm to the state’s position in ensuring appropriate trusts from allowing the creation of Medicaid-sheltering trusts with funding at nominal levels. That is, the words “funded more than nominally” could be substituted for the words “funded exclusively.”

## **IV. “Expanded Definition”**

Through discussion with Mr. Anderson, KHPA ascertained that the request for repealing the “expanded definition” for estate recovery purposes in K.S.A. 39-709(g)(3)(B) was a technical question that might not have any practical effect, and that the expanded definition had not caused him any specific problems.

As a result, KHPA would urge the Committee to forego any amendments to K.S.A. 39-709(g)(3).

## **Conclusion**

Thank you for the opportunity to outline the various aspects of SB 32, amendments to SB 32, and their possible impact. For any state, the Legislature is the body that determines who is eligible for Medicaid and weighs various public policy issues when determining that eligibility. Thus, the KHPA position on this legislation is neutral. The 2003 President’s Task Force on Medicaid Reform dealt with many issues, one being proper construction of a Medicaid sheltering discretionary trust. Based on KHPA’s interpretation of the 2004 amendments that followed, grandfathering trusts written prior to 2004 would allow some trusts not originally intended to be Medicaid sheltering trusts to be altered to become Medicaid sheltering trusts. This may have the effect of diluting eligibility requirements where trusts are involved.

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<sup>1</sup> This following case is a actual example of what can happen if the word "contemporaneous" is removed from K.S.A. 2006 Supp. 39-709(e)(3). The case is from a public record in Douglas County District Court. We have not used the woman's name, her daughter's name, specific dates, and other identifying information to avoid unnecessarily drawing attention to a living individual resident of Kansas.

In February 2004, a woman created a revocable trust. The woman died in May 2005, and so the trust became irrevocable.

Under the terms of the trust, upon the woman's death the trust funds would be divided between a son and a daughter, who both reside in Kansas. The accounting on the trust shows an estimate of over \$455,000 in the trust, consisting of a money market account, certificates of deposit, bonds, unit trusts, and mutual funds. The trust paperwork also refers to a "cooperative ownership contract" in an apartment complex in Washington, D.C. that, if sold, would be used to maintain the daughter's "standard of living." It provides that a two pieces of valuable art would go to the son. When the daughter dies, anything left in the trust would go to the son.

In April, 2006, a lawyer filed a petition in Douglas County District Court asking that the court modify the trust under K.S.A. 58a-410 of the Uniform Trust Code. The lawyer asked the judge to modify the trust to insert language in the trust that stated:

"The assets hereinabove set forth are not intended for the primary support of [the daughter]. They are to supplement said beneficiary's needs . . . the trustee shall take into consideration the amounts which [the daughter] shall be entitled to from any government agency, including, but not limited to, Title XIX of the Social Security Act . . . Medicaid, medical assistance."

The court granted the petition and modified the trust in April 2006.

If the daughter applied for Medicaid under current Kansas law, Medicaid would deny the application because the language added by the court was not "contemporaneous." If the law did not have that word, Medicaid would likely have to grant her application and be responsible from dollar one for her medical care.

Without that word, lawyers could turn trust beneficiaries in Kansas into needy persons and qualify them for Medicaid. It is also possible that Kansas could become a destination for residents of other states who are beneficiaries of trusts. There is no "durational residency" requirement in Medicaid. That is, Kansas Medicaid cannot require a person to have lived in the state of Kansas for any specific period of time. See 42 U.S.C. Sec. 1396a(b)(2) and 42 C.F.R. Sec. 435.403(j)(1). Thus, it is possible that a Missouri or Colorado resident who is the beneficiary of a large trust can move to Kansas, ask a court to modify the trust, and immediately qualify for Medicaid, if they meet other eligibility requirements (such as age or disability).