SPOTLIGHT ON ELDER LAW

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Elder Law Update: Medicaid Estate Recovery and Nursing Home Admission Contracts

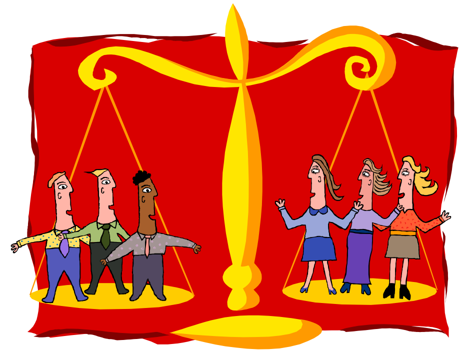
November was a busy month in Tennessee Courts for Elder Law issues. The Tennessee Court of Appeals for the *middle section* held that **all creditors, including TennCare Medicaid, must file a claim against an estate within 12 months from decedent's death or the claim is barred forever.** *In re: Henkel, No. M2006-02641-COA-R3-CV* (November 16, 2007); *In re: Estate of Margi Mary Anderson,* No. M2006-02303-COA-R3-CV (November 16, 2007). Now we know that all sections of our court of appeals agree as to the interpretation of this Tennessee law. The *western section* decided *In re Luck,* 2005 WL 1356448 (Tenn. Ct. App. June 7, 2005), and the *eastern section* decided *In Re Bennett*, No. E2004-02007-COA-R3-CV. The *Luck and Bennett* courts likewise held that creditors' claims must be filed within one year from the date of death. (The only exception is for taxes.)

The *Henkel* appellate court opined: *[T]he Bureau, like any other creditor, may make an application to appoint an administrator, which is exactly what the Bureau did in this case, albeit, nearly two and one-half years after Ms. Henkel's death. In short, if TennCare services is on notice that it may have a claim against an estate, either by virtue of the fact that TennCare has paid benefits on behalf of an individual prior to death, or has ceased payment at the beneficiary's death, then it is incumbent upon the Bureau to protect its interest by seeking to open an estate on its own motion. That being said, this Court does not conclude that the Bureau, although acting in its official capacity, has unlimited time to seek reimbursement.*

The Tennessee Supreme Court was also busy reading nursing home admission contracts this November. In two recent cases, families filed lawsuits because they felt that their nursing home patient-relative had been injured while in a nursing home. The nursing home responded in the lawsuit that the patient's family was not entitled to a jury trial because the healthcare power of attorney had signed the nursing home admission contract and agreed to waive a jury trial and go to binding arbitration. (Binding arbitration means that one person hears the case and makes a decision instead of a jury of 12 peers. Most folks prefer a jury for personal injury cases.)

The court of appeals held that an agent under a healthcare power of attorney may sign an admission contract on behalf of a nursing home patient, unless the

In this issue:



healthcare power of attorney does not authorize the agent to enter into the agreement. In other words, the court felt that signing a nursing home admission contract falls under the "healthcare" powers granted in a healthcare power of attorney. The court remanded to the trial court for a determination as to whether or not the admission contract was a contract of "adhesion." (That's legalese for a "sign here or we won't admit your relative as a patient".) If the trial court finds that it was a "take it or leave our nursing home" kind of contract, then the patients' lawsuits will proceed to a jury trial. As you can see, there is a lot of legal wrangling over the issue of a jury trial!

As a practical matter, what do these cases mean to us? **It means that you do not have to sign a nursing home contract just the way it is. You may strike out the portion that requires binding arbitration and waiver of a jury trial.** Often nursing homes will also ask that a relative sign a "financial responsibility" form. **If the nursing home accepts Medicaid or Medicare, they may not require a family member to personally guarantee payment of the nursing home bill**. The way to handle this is to write on the contract that you, as agent under a power of attorney, agree to pay for the patient's care *from the patient's funds.*

Read on for more information about being agent under a power of attorney—healthcare and financial.

What does it mean to be "power of attorney?"

Being an agent under a power of attorney is a big responsibility. What does it mean exactly? Is the agent liable for her parents' bills? Susie Stiles Wilson, L.C.S.W. addressed these questions for her column "Ask Susie" which is published in the Covenant Health ***Passport News***.

Dear Susie,

A friend of mine who doesn't have family in the area called me up and announced that she had seen her attorney and designated me as her Power of Attorney. I said "OK", but now I'm wondering: "What have I gotten myself into?!" What are my responsibilities and liabilities?

I've seen plenty about why seniors should have a POA, but little about being a POA. Help.

Dear Reader,

Becoming the POA for a friend or family member is indeed a big responsibility and not to be taken lightly. I consulted with Monica Franklin, Certified Elder Law Attorney here in Knoxville to learn more about POAs.

You can read about the "basics" of the Power of Attorney at her website www.hillfranklin.com. She advises that the first step is to obtain your copy of the document and review it thoroughly.

It should clearly state exactly what your authority and "powers" are and **when** those powers go into effect. These can vary. In the interest of fully representing the needs and wishes of your friend, I encourage you to sit down with her and review the entire document, point by point, and keep notes about specific issues and wishes that she has. It is a good idea to continue to review the POA on a regular basis-such as annually –make this part of a birthday lunch, and more frequently when there is a pending medical procedure. You will always need to present a copy of the POA document when you are representing your friend for healthcare and /or financial decisions, so keep it somewhere easy to access.

Regarding your "liabilities" Monica noted that one of the biggest errors POAs make is incorrectly signing documents (including medical facility admission contracts!).

You will not be financially liable for a hospital bill or other payment when you sign the principal (your friend's) name FIRST, and then write "By [your name], POA". The agent under a Power of Attorney has a "fiduciary duty to act in the best interest of the person he or she is representing". The potential "liability" here is upsetting the beneficiaries of your friend's estate by spending money in some manner that they could take issue with. You also are not allowed to take money for yourself, or to make risky investments. Obtain the counsel of a good financial advisor to assist you in making the best financial decisions. You are accountable for the financial decisions that you do make, so maintain good records of all transactions made on behalf of your friend.

Regarding the healthcare and financial POA, it is best to have the *Durable Power of Attorney.* The "durable" aspect enables you to continue to be the POA even when your friend is disabled or lacks the ability to make appropriate decisions for herself. There are some "gray areas" regarding this. Should your friend suffer from dementia or a mental illness that renders her unable to make good judgments and she decides to fire you, or she refuses necessary care, you may need to pursue Conservatorship. This is because you can be fired as the healthcare POA any time! (She must "revoke" the financial POA in writing and provide you with actual notice to fire you as financial POA). This mostly comes up when recommendations are made for certain treatments, hospitalization, or placement. The Conservatorship has more complete authority for decision-making and would assure that she is protected from making bad decisions that could pose a threat to her health and/ or finances. Whenever possible, it is a good idea to involve family members in discussions and enlist their assistance and support in making decisions.

End of life issues associated with the POA's authority should be fully discussed with your friend. You should have a very good understanding of what her wishes are, so ask all the hard questions – and then I encourage you to ask them again when medical crises arise!

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"One Call Club For Seniors"

There's good news for Knox County seniors trying to remain independent in their own homes. The Knoxville-Knox County Community Action Committee Office on Aging has been awarded a $450,000 matching grant from the Robert Wood Johnson Foundation (RWJF) to start a new program called the One Call Club for Seniors. The grant will be distributed over a four-year period.

Seniors who want to maintain their health and independence in their own homes need access to reliable, affordable services (ranging from help with getting to medical appointments and the grocery store to arranging for home repairs, housekeeping, yard work, and more). The staff of One Call Club for Seniors will screen service providers for quality and dependability, negotiate discounted prices, arrange for these services, and follow up to determine whether service was satisfactory. Seniors will pay a membership fee based on a sliding scale, making this "one-stop shopping" program open to people of all income levels.

"We are very grateful to our local funding partners; Covenant Senior Health, St. Mary's Health System, Sequoyah Hills Presbyterian Church, Cedar Springs Presbyterian Church, and a local family foundation," said Barbara Monty, director of the Office on Aging. "Without their support and commitment it would not have been possible for us to offer this one-of-a-kind service to seniors in our community."

The Office on Aging received the Robert Wood Johnson Foundation (RWJF) grant through the Local Initiative Funding Partners (LIFP), one of RWJF's most competitive annual grant-making programs. Using rigorous criteria, the LIFP program selects community-based projects that develop new, collaborative, creative solutions to improve health and health care for society's most vulnerable people. The LIFP office received 145 very strong applications for the 2007 awards. Knox County's One Call Club for Seniors was one of only 12 projects selected for funding.

Persons who are interested in more information about the program may call the Knoxville-Knox County Office on Aging at (865) 524-2786. Member enrollment opened in November 2007 with full services slated to begin in January 2008.

The 2008 Life Care Education Series

Hill & Franklin continues its monthly educational series for Life Care clients. Presented by our Elder Care Coordinators, Judy Wyrick and Susie Stiles Wilson, LCSW, program content is designed to support and empower our clients by addressing issues relevant to care and quality of life. Our group is intimate and our format includes both structured presentations and informal discussion. We will provide handouts and some surprises. We hope our Life Care clients will make plans to attend. Reserve your space by contacting our office at 865-588-3700. If you are not a Life Care client, we may still have space for you to join in. Call us!

Understanding Memory Loss - January 19, 2008 (9 a.m. – 11 a.m.)

This program will focus on understanding the normal aging process and memory loss, a discussion of the different types of memory loss/ dementia including known causes, and treatments, and tips for maintaining your memory. The presentation will include information from the latest research and informal discussion and responses to your individual questions and concerns. We will have information about community resources, self help, and strategies for supporting loved ones experiencing memory loss.

What My Family Should Know: Communicating Your End of Life Wishes – February 9, 2008 (9 a.m. – 11 a.m.)

We have all given at least some thought to how our lives might end and what our legacies will be. Most have even imagined a glorious funeral or two, and fantasized about what we will -or won't! - leave to loved –or not so loved – ones. However, for some mysterious reason we don't tend to share much of this information with those who may need to know it. Making plans about your death seems morbid, and to the more superstitious, like "asking for trouble". At the very least it's hard to get around to. Join us for a discussion about end of life planning that will help you to explore your "last wishes" and your legacy and develop insights and tools to share this important message. We promise a morning that you will find thoughtful and uplifting.

Getting the Most from Your Doctor Visit – March 8, 2008 (9 a.m. – 11 a.m.)

Good Healthcare for older adults is an essential and often a complex matter. We are all familiar with the frustrations of long waits and short visits at the doctor's office. Physicians face similar frustrations with the demands and constraints of medical practice at times in conflict with the needs of patients. In an environment where the patient may feel pretty helpless, there are indeed available great strategies to help you to improve the quality and the substance of your doctor visits. Join us to learn practical tools and techniques to take charge in improving your own healthcare and your satisfaction as a healthcare consumer.

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A December Ditty

What's a Donut Hole? or Adventures in Medicare Part D

T'was the start of Open Enrollment and all through the firm,
We were scratching our heads. We had so much to learn.
An Elder Law practice must grasp this giant,
Otherwise we could not help our dear clients
To access a benefit your tax dollars fund
To cover costs of your medicines - no pittance, that sum!

To our delight we discovered our teacher:
Knox's Office on Aging had this grant funded feature!
The Official Guru of all things Part D
David Holden himself answered our plea!
His eyes how they twinkled, his dimples how merry!
With his knowledge and patience this wasn't so scary.

He sprang to his computer, keyed in "Medicare.gov"
And took us right to a website we could learn to love.
With a complete list of meds and a Medicare card
We can help you to do this (even though it is hard).
Now Monica! Now Judy! Susie! Melissa and Trish!
We are all ready to grant your Medicare wish.

By December seven your enrollment should be done.
But the dropdead deadline is December thirty-one.
Call our office to schedule a time to come in.
We will get right to work and you'll leave with a grin.
Don't pass up this benefit, no matter how tedious it seems.
Even tho Part D "donut holes" don't taste like Krispy Kreme's!

--by Susie Stiles Wilson, L.C.S.W.
(Assistance with Part D enrollment is a complimentary service for our Life Care clients.)