

Litigating Filial Responsibility Claims

By Sharon Rivenson Mark, CELA, CAP

Filial responsibility statutes establish a duty for adult children to care for their indigent elderly parents. With the worsening financial crisis nationwide, more such claims by nursing homes and county boards of social services can be expected and must be vigorously defended.

The *Philadelphia Inquirer* on July 12, 2009, published its article, "If Mom Can't Pay, Adult Child Must," by Monica Yant Kinne. *ABC News* published its article, "Pay Your Parents' Bills or Else - Little-Known State Laws Force Some to Pay Their Parents' Nursing Home Bills," by Alice Gomstyn, on July 15, 2009. Both articles reviewed the "filial support" concept and noted how the precarious financial situations of care facilities and the funding problems of the federal systems now lead providers to invoke these laws.

Shoring Up Medicaid

An article published on the National Center for Policy Analysis (NCPA) website suggests that states begin to more systematically enforce filial responsibility laws to help reduce the explosive growth of Medicaid's long-term care benefit (*see* Matthew Pakula, "The Legal Responsibility of Adult Children to Care for Indigent Parents," National Center for Policy Analysis, July 12, 2005: <http://www.ncpa.org/pub/ba/ba521/> or <http://www.ncpa.org/pub/ba/ba521/ba521.pdf>). This article noted that 30 states then had filial responsibility statutes that were historically rarely enforced. When enforced, the statutes can require the adult child to reimburse state programs or institutions that have cared for the indigent parent with either a one-time contribution or installment payments. Today, there is no uniform federal filial responsibility statute.

Nursing home administrators are blogging on the issue of filial responsibility. A blog posting on February 25, 2009, noted increased interest in filial responsibility laws "as a way of shoring up faltering Medicaid dollars."

Filial Responsibility Laws

These filial responsibility laws reflect civil responsibility in some statutes and criminal responsibility in other statutes. Filial responsibility claims differ from claims against one spouse for "necessities" furnished to the other spouse. *In Jersey Shore Medical Center Fitkin Hosp v. Baum Estate* (84 NJ 137; 417 A2d 1003 (1980)),

the New Jersey Supreme Court held both spouses liable for each other's necessities.

In *Manatee Convalescent Center, Inc v. McDonald* (392 So 2d 1356, 1357 (Fla App, 1980)), the Court held that a wife is liable for the medical necessities of her husband.

In *North Ottawa Community Hospital v. Kieft* (214 Mich App 518; 543 NW2d 37 (1995)), the Court found that the provisions of the Michigan Married Women's Property Act (MCL 557.21 (1); MSA 26.165(1)) and Michigan Constitution precluded a recovery from a surviving wife for health care expenses incurred by the deceased husband. The Court found that, as traditionally formulated, the common law necessities doctrine violated equal protection principles, and held that neither a husband nor a wife is liable, absent express agreement, for necessities supplied to the other.

In **Pennsylvania**, the filial responsibility act was reenacted in 2005 following a Superior Court decision in *Presbyterian Medical Center v. Budd* (832 A.2d 1066 (Pa. Super. 2003)). Act 43 was reenacted in 2005 into Pennsylvania's Domestic Relations Code, 23 Pa.C.S.A. § 4603 regarding "Relatives' liability" (unofficial form) and its supporting Regulations (Actions for Support).

In *Presbyterian Medical Center v. Budd*, the child did not take the actions needed for her mother to qualify for Medicaid. Although the child transferred some of her mother's funds, that only made the mother ineligible for Medicaid for a limited period of time. The mother could have become eligible after the disqualification period expired. Once the mother qualified for Medicaid, the Medicaid program would have become responsible for the mother's cost of care. Federal law provides that once a resident qualifies for Medicaid, a nursing home has to accept the Medicaid payments as payment in full for all covered services. They cannot go after the child. Unfortunately, the child never followed up with the County Assistance office, and her mother never became eligible for Medicaid.

Over the years, the Pennsylvania courts have upheld the filial support law. (*See e.g., Verna v. Verna*, 288 Pa. Super. 511(1981); *Albert Einstein Medical Center*, 212 Pa. Super 450 (1968); *Commonwealth Home for the Aged v. Kotzker*, 179 Pa. Super 521 (1955); *Mattis*, 148 Pa. Super 462 (1942).) In Pennsylvania, a child with sufficient financial ability to support a parent can be held liable for the support of their parents, even where there has not been a transfer of assets. In *Savoy v. Savoy* (641 A.2d 596 (Pa. Super. 1994)), the Court held an adult son liable despite proof his reasonable expenses already exceeded his income.

In *Americana Healthcare Center v. Randall* (513 N.W. 2d 566 (S.D. 1994)), the **South Dakota** Supreme Court, held that: 1) statute [SDCL §25-7-271 providing that adult child, having financial ability to do so, shall provide support for parent who

is unable to provide for himself, as applied to son, did not violate equal protection or due process principles, and 2) son was liable under the statute for his parent's unpaid bills.

New Jersey still has a filial responsibility act on the books that, on its face, applied to county welfare board relief. The relatives chargeable for such support are identified in N.J.S.A. 44:4-101, and included the father and mother of a person under 18 years of age who applies for and is eligible to receive public assistance, and the children, and husband or wife, of a person who applies for and is eligible to receive public assistance. The support has to be court ordered, after a showing of financial ability, and with due notice and an opportunity to be heard. These provisions do not apply to any person 55 years of age or over except with regard to his or her spouse, or his or her natural or adopted child under the age of 18 years. N.J.S.A. 44:4-102 provides the basis and procedure for compelling support by relatives.

In Morris County Welfare Bd. v. Gilligan (130 N.J.L. 83, 31 A.2d 805 (1943)), the Court held that a daughter was not obligated to contribute to support of her mother without notice and opportunity to be heard. In the absence of such notice, there was no "process of law." Upon the daughter's death, her estate was not liable for old age assistance furnished to her mother.

Tennessee has a filial responsibility statute (T.C.A. §71-5-115) which only requires filial responsibility if such support is permitted by federal law.

Virginia statute (VA Code Ann. § 20-8 8) provides for the joint and several duty of all persons age 18 or over, of sufficient earning capacity/income, after reasonably providing for his or her own immediate family, to assist in providing for the support and maintenance of his or her mother or father, he or she being then and there in necessitous circumstances. Any person violating the provisions of an order entered pursuant to this section is guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$500 or imprisonment in jail for a period not exceeding 12 months, or both.

The Need for Monitoring

This discussion of a few of some 30 state filial responsibility laws highlights the need for vigilant monitoring of filial responsibility laws and their application. AARP's website has a current map of state filial responsibility laws (http://assets.aarp.org/www.aarp.org/_articles/bulletin/interactive/filialpiety/index.html).

While these filial responsibility laws exist, it must be emphasized that since

the 1960s, federal law (United States Code Title 42, §1396a(a)(17)(D)) has prevented the states from considering the financial responsibility of any individual (except a spouse) in determining the eligibility of an applicant or recipient of Medicaid or other poverty programs.

This discussion cannot end without noting the collateral issue of so-called "responsible parties" with respect to nursing home contracts. For example, New Jersey law (N.J.S.A. 30:13-3.1(a)) provides a blanket prohibition against even voluntary third party guarantees. A nursing home cannot, with respect to an applicant for admission or a resident of the facility: 1) require that the applicant or resident waive any rights to benefits to which he may be entitled under the Medicare program established pursuant to Title XVIII of the federal Social Security Act, 42 U.S.C. § 1395 *et seq.* or the Medicaid program established pursuant to N.J.S.A. 30:4D-1 *et seq.* (the New Jersey Medical Assistance and Health Services Act); or 2) require a third party guarantee of payment to the facility as a condition of admission or expedited admission to, or continued residence in, that facility; except that when an individual has legal access to a resident's income or resources available to pay for facility care pursuant to a durable power of attorney, order of guardianship, or other valid document, the facility may require the individual to sign a contract to provide payment to the facility from the resident's income or resources without incurring personal financial liability.

Proper legal advice from an experienced Elder Law attorney is indispensable to protecting children from improper and overreaching filial responsibility claims as well as from "responsible party" claims.

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