



## Elder Law: Case affirms kin liability in care costs

May 27, 2012 12:00 am

By Julian Gray and Frank Petrich /

After last month's column on "filial responsibility," we were preparing this month's column on an entirely different topic. However, because of the volume of emails and questions we received and, more importantly, a Pennsylvania Superior Court case that was decided after our last column appeared on just this topic, we felt compelled to do a Part 2.

Let us restate some of the language from last month's article as a refresher, as follows:

In July 2005, the Pennsylvania General Assembly passed an unpublicized Filial Support Law, commonly known as Act 43. The law dated back to the good old days of Colonial "Poor Laws."

As we approach the seven-year anniversary of the recodification of this law (it previously existed in the Welfare Code from the 1930s and was recodified in the Domestic Relations Code for modern usage), there have been increasing instances of facilities pursuing family members to pay for care, usually for parents' care in a long-term care facility.

The key language is found in Section 4603 of the Act, which states:

"All of the following individuals have the responsibility to care for and maintain or financially assist an indigent person, *regardless of whether the indigent person is a public charge*" (emphasis added):

- "1. Spouse of indigent person;
2. Child of indigent person;
3. Parent of indigent person."

One of the defenses Act 43 does provide under Section 4603(a) (2) states the obligation to support does not apply if an individual does not have "sufficient financial ability to support the indigent person." In addition, the statute provides for a somewhat complex way of determining the amount of liability that may be owed.

Let's now review the facts of the case, which was decided on May 7. A mother was injured in an automobile accident, completed rehab for those injuries and was then transferred to a nursing facility for skilled nursing care and treatment.

The mother stayed in that facility approximately six months, left and relocated out of the United States. A substantial unpaid amount of money was due and owing to the nursing facility. As a result, the facility instituted a filial support action against the mother's son in order to make him liable for his mother's treatment and care.

The mother also had a husband and two other grown children. The court also noted that a Medical Assistance application was pending during this proceeding with no determination having yet been made as to the mother's eligibility.

The case went to arbitration; the nursing facility lost. The facility then appealed the arbitration decision to a trial court. After a three-day, nonjury trial, the court entered a verdict in favor of the nursing facility in the amount of \$92,943.41. The son appealed this verdict to the Superior Court, which upheld the trial court's verdict in favor of the nursing facility.

The Superior Court held, among other things, that:

1. The nursing facility met its burden of proving that the son had the ability to support his mother.
2. If the son wanted to share his "support-burden," he could have joined his mother's husband and her other children in this case in the lawsuit, which he did not do.
3. The court agreed that the nursing facility adequately established the mother's indigent status by the trial court's consideration of her income and assets.

Scary. Whether this case is going to be appealed is unknown at this time.

What are some of the lessons to be learned and questions yet unresolved from this case?

1. Nursing facilities are under even more financial pressure this year due to an 11 percent Medicare payment reduction and also because Medicaid's payment rates from the state are only approximately 70 percent of the facility's private pay rates. Thus, these facilities are becoming more aggressive in seeking payment for services.
2. How did the nursing facility bill grow to \$93,000 without, apparently, being challenged by the son based on the limitation on liability formula in the statute?
3. What was the timing of the Medical Assistance application that, under federal law, stays the imposition of the full private pay rate except for the portion determined by the state as the resident's amount?
4. While the court seems to say that if the Medical Assistance application is granted, it will somehow relieve the child, the facility may have collected against the child at the private pay rate, while Medical Assistance will probably only be liable at the lower Medical Assistance rate.
5. Children, be concerned; be very concerned. You can't ignore attention to your parents' long-term care needs and their ability to pay for those needs. Whether or not you agree with this decision, you, the child, could be liable for your parents' care expenses. You should consult with an attorney knowledgeable in this area of the law to look at and implement options to help avoid and mitigate your potential exposure.

As stated in our last column, House Bill 321 was introduced on January 31, 2011, to repeal Act 43 and presently is in the House Judiciary Committee for consideration. You might want to think

about having a discussion with your state representative if you'd like to have this onerous statute repealed.

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First Published 2012-05-27 00:20:47