THE LAW OFFICES OF
SCOTT ALAN MORRISON, P.A.
Estate Planning & Strategic Asset Preservation
www.samlawoffice.com

Facility Bills – Liability of the Child

QUESTION:

Am I liable for my parent's nursing home/foster care/assisted living facility bill?

ANSWER:

Maybe. While the parent is able to cover the bill from the parent's own income and assets, then the facility will not sue the child for unpaid facility charges: there are no unpaid charges. But what if the parent runs out of money for the bill?

Voluntary Assuming Liability: By Simply Paying the Bill, are you Assuming Liability?

If the child simply begins to pay the bill, with his or her own funds, then he or she may be assuming legal responsibility for the ongoing charges. The facility might argue that the child orally promised to pay, and the child's history of payment will demonstrate that promise. The facility may try to hold the child who voluntarily pays the bill liable on some equitable or oral promise theory. If the child wants to assume the obligation, pay the parent's bill, and claim the parent as a dependent for income tax purposes, the complicated IRS rules for the dependency exemption (including the $3,100 gross income ceiling, but excluding Social Security income) should be discussed with the child's CPA. If the child wants to make a gift and claim an exclusion from gift tax for amounts paid on behalf of a donee parent directly to the facility, the IRS rules for such a gift should be discussed with the child's CPA.

Court-Imposed Liability

A court can hold a child liable for a parent's facility bill in several ways. It is possible, for example, that one child has responsibility by signing the contract, one escapes liability by signing a contract as an agent, but all have joint and several responsibility under relative responsibility statutes.

1. Contractual Liability. The facility with an unpaid bill can, if the patient lacks funds, look to anyone who guaranteed the bill contractually. Most care facility contracts do not have a payment guarantor explicitly identified, but contracts often use the phrase "responsible party" to identify the relative or friend who actually signs the contract when the patient is ill or incapacitated. This responsible party is liable, under many versions of the care agreement, to pay the bill when the patient does not. Please have your facility agreement reviewed by your lawyer to see if this exposure to contractual liability exists.

The facility might sue children who receive the parent's assets by gift prior to Medicaid application. In a recent Tennessee case, the State of Tennessee denied eligibility for sixteen months after Medicaid-motivated transfers to the resident's three daughters and the facility successfully sued the daughters personally for the nursing home bill and contractual attorney fees and costs, claiming the parent's transfers to the children were fraudulent. The children were found liable for both the unpaid care AND the facility's attorney fees and costs.

2. Agency or Guardian Relationship as a Defense. What if the responsible party who signs the care contract seeks to limit his or her liability to the funds of the patient under his or her control, and to thus AVOID personal liability for an unpaid care bill? The responsible party can avoid personal liability by having a "representative capacity", fully disclosed to the care facility. These representative capacity arrangements can be set up through a court (guardian, conservator) or by incapacity planning documents – a power of attorney, trust, or health care advance directive. The responsible party who is protected by a court or incapacity planning documents must be sure that the care agreement contract shows the representative capacity. For example, the contract should be signed as "John Jones, guardian for Mary Jones" or "John Jones, Power of Attorney for Mary Jones." However, even a disclosed agency or guardian capacity may not protect you from liability if creative facility lawyers add equitable theories of recovery. In a recent Montana case, the guardian daughter was subject to personal liability for "bad acts" – promising to pay for care but not using her mother's assets for the bill, and leaving her mother at Vencor even after she knew her mother had insufficient assets to pay for care.

3. Statutory Liability. Many states have "relative responsibility" statutes specifically making parents and children mutually responsible for each other's support. For example, in Oregon the statute provides:

> "Duty of Support--Parents are bound to maintain their children who are poor and unable to work to maintain themselves; and children are bound to maintain their parents in like circumstances." ORS 109.010

The above Oregon relative responsibility statute is not currently enforced often in Oregon, as most disabled adult children and parents unable to work have seen the state step forward and pay for care under the federal/state Medicaid program. As a condition of participation in federal funds for Medicaid, the states agreed to not enforce relative responsibility laws for those eligible for that program. The state will not bring the suit under the relative responsibility law, but will instead focus on transferee liability suit (see below).

As the states reduce enrollment in Medicaid by stricter eligibility requirements, this will increase the number of relatives who face potential statutory liability for care needs of a disabled child or elder. Where Medicaid is not available, the facilities will likely look to statutorily responsible children for payment.

Private claims for unpaid care costs could be made by facilities, as conservator or creditor of the ill family member. For example, in a recent Montana case, the Supreme Court of Montana relied on is 1895 version of relative responsibility law (using the terms "necessaries") to rule that the daughter who had promised to pay a nursing home could be liable. However, we also anticipate court cases between family members to determine each child's contribution to the cost of the ill parent's care. In an Oregon case, the mother of an adult disabled child successfully sued the father for the adult disabled child's support under the relative responsibility statute, and the children (or one of them as conservator on behalf of the ill parent) could sue each other for contributions to the cost of the ill parent's care.

4. Transferee Liability. Many states look with disfavor on gifts made by Medicaid applicants to nonexempt transferees. The federal government, in the Deficit Reduction Act of 2006, has imposed a five year look-back period on all transfers by Medicaid applicants, and starts the disqualification penalty period running as of the date the person applied as is "otherwise eligible" for benefits.

The states are looking at ways to sue the children, called "transferees", after the parent transfers assets to the child and then applies for Medicaid. In 2005 the State of Connecticut passed a law permitting the state to directly sue children as transferees if any gifts were made to them prior to the parents application for Medicaid. In Oregon, the state will have a conservator appointed for a Medicaid recipient to sue the children (or other transferees) to set aside transfers that are void or voidable under common law.

Please have all care contracts reviewed by your lawyer and discuss family responsibility with your relatives.