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The ElderLaw Report

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Continuing Care Retirement Communities: Issues for Elder Law Attorneys

By Michael Gilfix and Bernard A. Krooks

Continuing care retirement communities (CCRCs), sometimes called life care communities, are popping up across the country. Not limited to the traditional retirement states, such as Florida or Arizona, CCRCs are becoming more prevalent in the Northeast and Midwest as many seniors are choosing to retire in their home state to be near family. Just a few years ago, most CCRCs were owned by religious or non-profit organizations. Today, high-end real estate developers have gotten into the act and the trend is toward upscale, for-profit communities.

As the quality of CCRCs has gone up, so has the cost. Seniors are being asked to pay hundreds of thousands, and in some cases millions, of dollars as entrance fees for the right to live in these exclusive residences. Elder law attorneys must familiarize themselves with the complex legal issues that can arise when a client enters a CCRC. Admissions agreements must be reviewed and negotiated, the financial health of the CCRC (and possibly a parent company) must be examined, and tax implications must be analyzed. This article will discuss some of the issues that require the attorney's attention before a client makes a substantial financial commitment to a CCRC.

Why CCRCs?

CCRCs offer the entire residential continuum, from independent housing to assisted living to round-the-clock nursing services. For many seniors, there is nothing more important than living out their final years with the highest quality of life possible. A sense of community, a secure environment, and access to round-the-clock health care, if necessary, are paramount. Today's CCRCs go much further, however. Many feature championship golf courses, state-of-the-art fitness facilities, award-winning chefs, high-speed Internet access, full-time activities coordinators, and recitals by world-renowned musicians, among many other amenities.

CCRCs offer a sense of community for residents, but with added security. For many, this is particularly attractive when compared to living at home alone in relative isolation. Combine that with the fact that residents have access to on-site health and medical services along the entire continuum of care and it is easy to see why CCRCs have enjoyed explosive growth in recent years.

Of course, moving into a CCRC is fraught with emotional as well as financial and legal considerations. Many have long waiting lists and require certification of the potential resident's health prior to admission. Thus, there is a premium placed on early application.

Accreditation

The Continuing Care Accreditation Commission (CCAC) was formed in 1985, and it merged with the Commission on Accreditation of Rehabilitation Facilities (CARF) in 2003 to form CCAC-CARF. CCAC-CARF sets accreditation standards for CCRCs in the United States. Not all CCRCs are accredited, but that doesn't mean that their financial health is not sound. Although CCAC-CARF accreditation ensures that a facility has met certain minimum standards regarding governance, financial position, and quality of services, it is not a guarantee of the entity's financial solvency. In fact, many states have stricter standards. Prospective residents and their counsel should still perform their own due diligence, especially if the CCRC has a substantial amount of debt. Financially sound CCRCs have sufficient liquid resources to meet ongoing

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obligations. You may check the credit rating of certain CCRCs online at *www.standardandpoors.com*.

Levels of Care

Most CCRCs offer three levels of care. Residents can begin living in a CCRC at one level of care and, as medical needs increase, move to another level along the continuum.

The lowest level of care offered by CCRCs is generally referred to as an independent living unit (ILU). These units can range from fully equipped apartments in high-rise buildings to quaint cottages around a lake to expansive duplexes. ILU residents can have meals in their homes or enjoy the company of other ILU residents, sometimes in elegant dining halls with meals prepared by five-star chefs. Most high-end CCRCs require medical certification that the resident is in good health upon entrance and able to live independently. These seniors are able to benefit from taking part in indoor and outdoor sports, discussion groups, tours, shopping sprees, and cultural activities. Although even the healthiest residents who move into ILUs get sick, CCRCs have health services on campus for their residents.

For seniors who need help with activities of daily living, such as bathing and dressing, assisted living units (ALUs) offer the next level of care. The same upscale amenities are still available as in the ILU, but the residences are suitable for seniors who rely on walkers, wheelchairs, or other ambulatory devices.

The highest level of care offered by CCRCs is skilled nursing care. For many seniors, this is a critical consideration, and it is important to choose a CCRC that offers skilled nursing care as an option. This can be especially important for married couples, where the well spouse desires to be in close proximity to the ill spouse.

CCRC policies differ regarding transfers between levels of care (see below). Ideally, residents like to get into a facility while they are still able to enjoy a high quality of life. In fact, that is one of the primary selling points of a CCRC. The requirement of many CCRCs that residents be healthy upon admission can present a thorny issue, since many facilities have long waiting lists and the potential resident may be healthy at time of application but not as healthy when the facility has room.

Rent or Buy?

Residents rent their units at some CCRCs and buy them at others. For clients who no longer want the responsibility of home ownership, rental CCRCs are the perfect solution. Typically, a lease is signed that may or may not provide for annual, or more frequent, increases in monthly rents or fees. Check to make sure what services or amenities are included in the monthly fee.

Traditionally, CCRCs have charged not only monthly fees but also a substantial upfront investment. Residents enter into a life-long contract that covers their housing, health care, and most of their other needs. These entrance fees, which range from tens of thousands of dollars to $2 million or more at a few of the high-end facilities, typically serve as security in the event that a resident does not make a monthly payment to the CCRC.

The disposition of the entrance fee money when the resident dies or moves is a major issue to be addressed when reviewing the residency agreement. Depending on the CCRC, all or a portion of the fee may be refundable. Sometimes the refundable amount is a function of how long the person resided in the CCRC.

Entrance fees are treated as loans to the retirement facility. Since the CCRC does not pay interest on these loans, the foregone interest is considered imputed interest pursuant to Internal Revenue Code (IRC) § 7872. The IRS treats the foregone interest (calculated at market rates) as income to the CCRC resident, the lender of the loan. However, § 7872(g) of the IRC pro-

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vides an exemption up to a loan amount that is updatd annually for inflation. Pursuant to Rev. Rul. 2005-75, 2005-49 I.R.B., issued on December 5, 2005, this figure is now $163,300.This exemption applies to any below-market loan made by a lender to a qualified CCRC if the lender (or the lender's spouse) attains age 65 before the close of the year.

Four residents of a CCRC recently tried to claim that they had a landlord-tenant relationship with the CCRC and that the refundable portion of their entrance fee was a security deposit, entitling them to receive interest on that portion of the fee. The Court of Appeals of Illinois found that no landlord-tenant relationship existed. According to the court, the CCRC's duties are very different in scope from those of a landlord. In addition, the court found that the life care agreement that the residents had signed did not convey the right to exclusive possession of specific premises. (*Jackim v. CC-Lake, Inc.*, 1-04-3883 (Ill.App. 2005).)

A major benefit of owning versus renting is that many CCRCs are appreciating substantially in value. Thus, residents or their estates can make a nice profit when the time comes. However, this is another instance in which the residency agreement must be reviewed carefully because agreements differ on how they handle appreciation in value. In some cases, the facility itself handles the resale and deducts a fee similar to a brokerage commission. In other cases, a percentage of the appreciation goes to the facility. Moreover, in many facilities the entrance fees are not returned to the previous owner until the new owner has closed on the unit and paid the entrance fee. Even when the resident owns the CCRC, there are monthly maintenance fees to pay.

The Tax Deductibility of Monthly Fees

While more an issue for the CPA than the elder law attorney, income tax deductions for medical expenses can make a major difference as elders struggle to pay the typically high monthly cost of living in a CCRC and for other necessities and joys of life. The US Tax Court reasonably ruled that the percentage method may be used in determining the portion of monthly service fees that may be allocated to medical care. [*Baker v. Commissioner of Internal Revenue*, 122 T.C. 143 (2004).]

Delbert and Margaret Baker entered a CCRC in 1984 and resided in an ILU. For their monthly service fee, they were guaranteed access to an emergency pull-cord system, nursing services, and access to the skilled nursing facility, if needed. The Bakers evaluated the facility's costs in providing its spectrum of services and determined the portion (approximately 41 percent) that could be allocated to its medical services. They were allowed to deduct this percentage of their monthly fee as a medical expense, notwithstanding the IRS position that a different, more onerous, approach was to be used.

Critical Contractual Provisions

It is easy for an older couple to misunderstand what they are getting and not getting when they sign a CCRC lifetime contract. Brochures can be misleading, such as unreserved promises of a "lifetime together" at a multi-level CCRC. In their zeal to meet marketing objectives, the sales staff may de-emphasize areas of logical concern. For example, what happens if a resident's marital status changes or the resident wishes to have someone else move into the unit? Is there a right to automatic renewal of the contract?

Transfers Between Care Levels: Who Decides?

Virtually everyone wants to continue living in their own apartment, perhaps obtaining assistance, before moving to a higher level of care that will involve less independence. CCRC contracts typically provide that the management and health care staff of the facility will decide when a resident must move to a higher level of care. These provisions may allow for input from the elder's family and physician, but power will typically and exclusively reside with management.

Efforts on the part of individual attorneys and advocates to modify such language to permit greater control by the residents or their physicians, in particular, are typically fruitless. To an extent, facilities cite regulatory restrictions and requirements. While it is acknowledged that liability can be a concern, criteria are largely objective and in fact can be analyzed by a personal physician.

When a facility decides that an elder must leave the independent living unit and move to assisted care, disputes are not rare. Successful advocates have found that the determinations of the facility's health care team can be challenged by a physician report that is thorough and based on an extensive, multi-visit evaluation. It may be necessary to hire private aides to be with the elder—always on a private-pay basis—to address facility concerns about safety and security.

Because CCRCs are marketing lifetime peace of mind, anything that publicly disrupts the perception of a peaceful existence is avoided by CCRC management. In appropriate circumstances, therefore, a properly-drafted press release about such problems can be equally or perhaps more effective.

The last resort is to terminate the relationship and leave the CCRC for a new environment, perhaps returning to one's home if it was retained. While theoretically viable, this approach is rarely available because the family home has typically been sold. In addition, if there is any significant degree of failing health, moving to a new environment can cause setbacks, a phenomenon known for years as "transfer trauma."

Will the Nursing Home Bed Be Available?

CCRCs are businesses. Particularly when they are new, they are economically motivated to make their

nursing home beds available to anyone, regardless of whether they are members of the CCRC community. If 10 skilled nursing facility beds are filled by individuals from outside the CCRC community, the facility could collect an additional $100,000 in monthly income. It is for this reason that CCRC contracts do not guarantee an individual entry into the skilled nursing facility that is a part of the CCRC. This comes as a great shock to most elders who believe precisely the opposite.

A married couple moves into a CCRC largely because they want to be together for life. They believe that, if one spouse needs to be in the nursing home on the grounds, the other will be able to visit as often as he or she likes. The discovery that the facility can place a resident in another nursing home in the community can be nothing less than shattering. Yet, virtually every CCRC contract allows for such placement. There may be guarantees about moving back to the CCRC facility when the next vacancy occurs, but this provides little consolation.

As always, it is a matter of having one's eyes open so that there are no traumatizing surprises at critical points in a person's life.

Responsibility for Facility Operating Costs

CCRC contracts usually allow for virtually limitless increases in the monthly fee because community members are responsible for paying the operating costs of the CCRC. Definitions of "operating costs" can be remarkably expansive, including marketing staff, advertising to fill vacant units, and capital construction. An elder entering into a life-care arrangement must be aware of the level of exposure that results from potentially unlimited increases. While some contracts put a cap on monthly increases, both in terms of percentages and how often increases can be imposed, most do not.

There are many other contractual provisions that require careful review with a client. Two examples are possible restrictions on visitors and interior decoration. A retired interior decorator with a large family may find such restrictions unacceptable, while a long-retired octogenarian with no family may view them as unimportant.

Standards for Eviction

CCRC agreements typically delineate the grounds for a resident's eviction. They include disruptive behavior, behavior that presents a danger to staff or other residents, and the CCRC's inability to provide appropriate care to the individual. A facility may not evict a resident without reason, a New Jersey appellate court has ruled. [*Seabrook Village v. Murphy*, 371 N.J. Super. 319 (2004).] The court held that "just cause" must first exist and that the resident has a right to a hearing before eviction may take place.

Resident John Murphy was involved in a fee dispute with the CCRC, which further determined that Mr. Murphy refused to release a living unit he had previously inhabited. As a result, he was given 60 days' notice of termination of his residence. Relying substantially on state law (New Jersey's Continuing Care Retirement Community Regulation and Financial Disclosure Act), the court held that the state's Department of Community Affairs must hold a hearing under the referenced Continuing Care Act to ensure that the CCRC had just cause for its eviction. [*See* "Keeping Current," *The ElderLaw Report*, Oct. 2004, page 8.] While the ruling is substantially based on New Jersey law, most states have conceptually comparable law to support a similar outcome.

CCRCs and Medicaid Asset Transfers

While most CCRCs are not Medicaid-certified, CCRC contracts typically include an anti-alienation provision designed to prevent a resident from transferring assets. Some provide exceptions if prior approval of the facility is obtained. Anti-alienation provisions may be included to ensure a resident's ability to pay monthly fees or to effectively prohibit eligibility for Medicaid when the resident enters the skilled nursing level of care.

Although Maryland's high court held that such provisions are unenforceable (*Oak Crest Village, Inc. v. Murphy*, 379 Md. 229 (2004); *see* "Keeping Current, *The ElderLaw Report*, June 2004, p.6), the Deficit Reduction Act of 2005 (DRA) permits CCRCs to require residents to spend down the resources declared on their admission applications before applying for Medicaid.

In addition, under pre-DRA law, the CCRC entrance fee was treated like a home and considered unavailable for Medicaid purposes. Under the new law, the entrance fee is an available resource for Medicaid "to the extent that—

(A) the individual has the ability to use the entrance fee, or the contract provides that the entrance fee may be used, to pay for care should other resources or income of the individual be insufficient to pay for such care;

(B) the individual is eligible for a refund of any remaining entrance fee when the individual dies or terminates the continuing care retirement community or life care community contract and leaves the community; and

(C) the entrance fee does not confer an ownership interest in the continuing care retirement community or life care community."

[Section 6015(b)(2)]

CCRCs and the Nursing Home Reform Act

A skilled nursing facility is covered by the Nursing Home Reform Act (NHRA) even if it is part of a CCRC. Acceptance of Medicare or Medicaid coverage brings application of the NHRA, according to both Maryland's highest court (in *Oak Crest Village, Inc. v. Murphy*) and the Centers for Medicare and Medicaid Services (CMS). Jeane Nitsch of the CMS

Division of Nursing Homes stated in a May 31, 2005, letter that "(a)ll nursing homes receiving payment from the Medicare or Medicaid programs, regardless of where the nursing home is located (i.e., hospital based, in a continuing care retirement community, etc.) are bound by" the NHRA. [CMS letter to attorney John Callinan; *see http://www.nsclc.org/news/05/06/CMSletter_ccrcnhra.pdf.*]

Conclusion

CCRCs can be the solution to many older persons' life care needs, but elder law attorneys owe it to their clients to advise them of their options and of the possible pitfalls in CCRC contracts and finances before the client makes this substantial financial commitment. CCRCs should be places where seniors can forget about their cares and enjoy their remaining years to the fullest extent possible, not places where they will encounter distressing surprises that may involve them in unwanted disputes or simply create anguish.

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KEEPING CURRENT

Detailed Questions About Loan Allowed in Determining Eligibility

Roach v. Morse (U.S. App. Ct., 2d Cir., No. 05-2277-cv, Mar. 3, 2006). A US Court of Appeals holds that a state may ask detailed questions about a legal, informal loan when determining Medicaid eligibility.

After Vermont resident Anne Roach moved to a nursing home, her husband, William, loaned the couple's daughter $287,000. The loan requires the daughter to repay the loan at 3 percent interest a year, in monthly installments of $717.50, until December 1, 2007, when she must repay the balance of the loan with interest. The loan is not assignable.

Shortly after making the loan, Mr. Roach applied for Medicaid to cover his wife's expenses. The state sent him a form, which asked how the length of the loan was determined, the purpose of the loan, and why it was not negotiable. Mr. Roach refused to answer the questions and sued the state under 42 U.S.C. § 1983, claiming that the state was employing a Medicaid eligibility methodology that is more restrictive than the Supplemental Security Income (SSI) program allows.

The district court (*Roach v. Morse*, 1:05-cv-6, slip. op. at 14 (D. Vt. Apr. 13, 2005)) (*see* "Keeping Current," *The ElderLaw Report*, June 2005, p.6) held that the loan was legal under state law and that, under federal law, the state could not ask detailed questions about a transaction that was not a gift. The state appealed, arguing that the Roaches should have exhausted their administrative remedies and that the state was permitted to inquire about an informal cash loan.

The Second Circuit reverses, holding that, while the Roaches weren't required to exhaust their administrative remedies, the questions were permissible under federal law. According to the court, federal law permits detailed questions in some circumstances, and there was no evidence that the Roaches would have been denied Medicaid if they had answered the questions.

Study Finds Wide Variation in Projected Need for Long-Term Care

How likely is it that a client will need long-term care, and how much will she have to put aside to pay for it? An analysis of the projected long-term care needs of those currently turning age 65 predicts that about one-half will not have to pay anything for long-term care. But more than one-third of retirees will spend some time in a nursing home, and 1 percent will need to have at least $250,000 set aside and invested at age 65 to pay for their care.

"Long-Term Care Over an Uncertain Future: What Can Current Retirees Expect?," published in the winter issue of the health care journal *Inquiry*, predicts that those turning 65 will need long-term care for an average of three years before they die. One in 20 retirees will spend more than five years in a nursing home. Meanwhile, 65 percent will need some form of long-term care at home, and 11 percent will receive home care for more than five years.

While the study finds that on average people would have to invest $21,000 at age 65 to pay their future long-term care bills, individuals will experience very different futures: One-half of 65-year-olds will incur no out-of-pocket costs, yet an investment of $100,000 at age 65 will not be enough to cover all out-of-pocket long-term care (LTC) costs for 6 percent of retirees. One percent will need more than $250,000.

High Court Lets Stand Ruling That SNT Can't Protect Disability Income

Reames v. Oklahoma, 05-807 (U.S. 2006). The US Supreme Court has declined to review a decision holding that a Medicaid recipient must pay to a nursing home Social Security disability income that had been placed in a special needs trust. For details on the case. *see* "Keeping Current," *The ElderLaw Report*, Sept. 2005, p.5.

Estate Holds Privilege in Talks Between Guardian and Attorney

Tripp v. Salkovitz (Fla. App. Ct., 2d Dist., No. 2D05-1458, Feb. 8, 2006). A Florida appeals court finds that the estate holds the attorney-client privilege in communications between the deceased's guardian and the guardian's attorney that were related to the attorney's representation of the deceased.

Adult Comprehensive Protection Services (ACPS) was appointed guardian of Mark Salkovitz. ACPS hired Thomas Tripp to serve as its attorney in the provision of services to Mr. Salkovitz. After Mr. Salkovitz died, his daughter, Alison Carpenter, was appointed personal representative of his estate. She sued ACPS for negligence and breach of fiduciary duty.

Ms. Carpenter sought to compel ACPS to turn over confidential communications between ACPS and Mr. Tripp regarding the guardianship. Ms. Carpenter claimed that the estate held the attorney-client privilege with regard to all communications between Mr. Tripp and ACPS. The trial court agreed, and ACPS appealed.

The Florida Court of Appeals affirms in part, holding that the estate holds the attorney-client privilege with regard to communications related to Mr. Tripp's representation of Mr. Salkovitz but not with regard to communications related to Mr. Tripp's representation of ACPS.

To download the full text of this decision in PDF format, go to *http://www.2dca.org/opinion/February%2008,%202006/2D05-1458.pdf.*

Court May Substitute Judgment to Create SNT for Disabled Adult

Conservatorship of the Estate of Kane (Cal. Ct. App., 1st, No. A110631, Mar. 6, 2006). A California appeals court rules that a probate court had the legal authority to create a special needs trust for a developmentally disabled adult through the vehicle of substituted judgment.

Kevin Kane is a developmentally disabled adult who lived with his mother until her death in March 1999. The court appointed a conservator for Mr. Kane, who now resides in a group home and receives Supplemental Security Income and Medi-Cal (Medicaid) benefits. Mr. Kane inherited about $65,000 from his mother, but unfortunately her estate planning did not include any special provisions for her son. Because the direct receipt of his inheritance would render Mr. Kane ineligible for government benefits, the conservator petitioned the court for a substituted judgment to establish a special needs trust for him. The probate court denied the petition, reasoning that it would essentially be only a substitute for Mr. Kane himself and questioning whether Mr. Kane could be the grantor of such a trust.

The Court of Appeal of California reverses, concluding that statutory provisions authorizing a probate court to substitute its judgment for that of a conservatee gave the probate court jurisdiction to establish a special needs trust in such circumstances. The court cites supporting authority from other states, such as *In re Gillette*, (Sur. 2003) 756 N.Y.S.2d 835, 838, in which a trial court granted a similar petition even though the disabled person was essentially the grantor of his own trust. However, in an aside the court notes that its decision would have been different had Mr. Kane's assets come by way of litigation rather than by inheritance.

To download the full text of this decision in PDF format, go to *http://www.courtinfo.ca.gov/opinions/documents/A110631.PDF.*

Attorney Fees Can Be Based On Assets Not Subject to Tax

In the Matter of the Estate of Martin (Iowa, No. 10 / 04-0305, Mar. 3, 2006). The Iowa Supreme Court finds that attorney fees should be based on all assets in the estate, including assets that are not subject to inheritance tax.

Doyle Sanders was the attorney for the executor of the estate of Melba Martin. Based on the gross estate value shown in the inventory, which included a number of 401(k) retirement annuities, the court set the attorney fees at $15,072.

When the Iowa Department of Revenue and Finance reviewed the inheritance tax paid by the executor, it concluded that the retirement annuities were not subject to inheritance tax. Under state law, maximum attorney fees are calculated based on the gross assets of the estate. The probate court concluded that attorney fees could be calculated only on the portion of the estate subject to inheritance tax and reduced the attorney fees by two-thirds. Mr. Sanders appealed the court's decision.

The Supreme Court of Iowa reverses, holding that the calculation of maximum attorney fees should include the retirement annuities. According to the court, the definition of gross estate includes portions of the estate not subject to inheritance tax.

To download the full text of this decision, go to *http://www.judicial.state.ia.us/supreme/opinions/20060303/04-0305.asp.*

New Reports Suggest Transfer Changes Won't Ease Medicaid Squeeze

Supporters of the Deficit Reduction Act of 2005 (DRA) contended that it would prompt many more seniors to purchase long-term care insurance, thus alleviating reliance on Medicaid. But two new reports by the Kaiser Family Foundation cast doubt on this assumption.

One report, "Private Long-Term Care Insurance: A Viable Option for Low and Middle-Income Seniors?," finds that the price of a long-term care policy is not affordable for most elderly people and that, even when they can afford it, such insurance is not available to people who already have long-term care needs. Estimates indicate that nearly one-third of people age 65 to 69 would not pass an underwriting test.

The report notes that, although LTC Partnership Programs have been operating in four states since the early 1990s, enrollment in them has been limited. The programs appear to attract upper middle-class individuals, similar to the private long-term care insurance market, Kaiser found.

A second Kaiser report, "Frontline Perspectives on Long-Term Care Financing Decisions and Medicaid Assets Transfer Practices," echoes these findings and warns that efforts to tighten Medicaid transfer rules may impede access to needed long-term care services for low- and middle-income Americans. "The findings of this study," the report concludes, "suggest that the role of Medicaid as the primary payer of long-term care services will continue to grow, despite recent federal and state efforts to limit asset transfers."

"Private Long-Term Care Insurance: A Viable Option for Low and Middle-Income Seniors?" is available at *http://www.kff.org/uninsured/7459.cfm*. "Frontline Perspectives on Long-Term Care Financing Decisions and Medicaid Assets Transfer Practices" is available at *http://www.kff.org/medicaid/7458.cfm*

Property in Revocable Trust Still Has Homestead Protection

Engelke v. Engelke (Fla. App. Ct., 4th Dist., No. 4D04-2454, Feb. 8, 2006). A Florida court of appeals rules that property held in a revocable trust is entitled to homestead protection because the grantor retained an ownership interest in the property.

Paul and Judy Engelke had joint ownership of their house. They each transferred their one-half interest in the house into separate revocable trusts. Mr. Engelke's trust agreement provided that, after he died, Mrs. Engelke could remain in the house during her lifetime, and once she died, the house would go to Mr. Engelke's children. The trust agreement also provided that the trust would pay any claims the estate could not cover.

After Mr. Engelke died, his estate could not pay all the claims against it. Mrs. Engelke petitioned the court to compel the trustee to use trust funds to pay the expenses. Because the house was the main asset in the trust, the trust would have to sell the house to pay estate expenses. The trial court found that the trust was responsible for paying estate expenses, so the house should be sold. The trustee appealed, arguing that the house was protected by homestead rules.

The District Court of Appeals of Florida reverses, holding that the house was entitled to homestead protection and could not be sold to pay creditors. According to the court, because Mr. Engelke retained an ownership interest in the house through the revocable trust, he also retained homestead protection.

To download the full text of this decision, go to *http://www.elderlawanswers.com/resources/article.asp?id=5243§ion=9&state=*.

Late-Appointed Representative Can't Pursue Estate Claim

Winn v. Plaza Healthcare (Ariz. App. Ct., No. 1 CA-CV 05-0129, Feb. 14, 2006). An Arizona appeals court finds that a man who was appointed personal representative of his wife's estate five years after she died could not prosecute a claim that a health provider had negligently caused her death.

George Winn's wife died, and five years later Mr. Winn was appointed personal representative of her estate. He sued Plaza Healthcare, claiming that it had negligently caused his wife's death.

Plaza Healthcare filed a motion for summary judgment. The court granted its request, holding that Mr. Winn was not authorized to bind the estate to pay for any litigation costs. Under state law, if a personal representative is appointed more than two years after the death of a decedent, the personal representative does not have the right to "possess estate assets beyond necessary to confirm title . . . in the rightful successors of the estate."

The Court of Appeals of Arizona affirms, holding that Mr. Winn could not prosecute the claim. According to the court, the claim is an asset of the estate, and in order to prosecute the claim, Mr. Winn would need to possess the claim, which is prohibited by state law.

To download the full text of this decision in PDF format, go to *http://www.cofad1.state.az.us/opinionfiles/CV/CV050129.pdf*.

PRACTICE TIPS

Consider Using Medical Deductions In Post-DRA Planning

As we have reported in this column earlier, nursing home expenses paid by a child for a parent may be deductible as medical expenses. (*See* "Practice Tips," *The ElderLaw Report*, Dec. 2003, p.8.)

If a parent transfers assets to a child and the child pays more than one-half the support for the parent, the child could end up with an approximate 35 percent tax benefit if the child is in the maximum tax bracket, without considering state tax benefits (although the child might have to share this with the other siblings who are party to a multiple support agreement).

"It's not as good as the half loaf, but certainly something we have to watch for," observed David R. Okrent, a Long Island, New York, elder law attorney who raised the idea during a recent ElderLawAnswers conference call on medical expense deductions.

Help Clients Navigate the Medicare Drug Benefit

No doubt at least a few of your clients have asked about the Medicare drug benefit that went into effect January 1, 2006. Most beneficiaries have until May 15 to choose a drug plan from among the scores available in most areas without incurring a premium penalty.

Despite its ongoing problems, Medicare's Web site (*www.medicare.gov*) remains the best way for beneficiaries to compare prices and other features of the different plans available in their area. However, most elderly individuals do not have Internet access or are not comfortable with using a computer. At a session on the drug benefit at the National Academy of Elder Law Attorneys Institute in Tucson, Arizona, the suggestion was made that elder law attorneys make a computer or two available to clients who want to consult Medicare's site. While no attorney wants to be in the business of evaluating prescription drug plans, staffers might be able to offer assistance with pointing and clicking before turning a client loose on the Medicare site.

While surfing the site, clients may want to have a hard copy of a worksheet developed by ElderLawAnswers handy. Not only are there many plans, but there are many factors to consider in choosing a plan, including the monthly premium, deductibles, drugs covered, the cost of those drugs, limitations on drug purchases, and the convenience of the plan's pharmacy network. The "Drug Plan Comparison Worksheet" allows beneficiaries to note important information about each plan, compare the plans side by side, and identify the one that best meets their needs. The worksheet is available at *www.elderlawanswers.com/resources/DrugBenefitChecklist3.pdf*.

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