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Traps for the Unwary in Nursing Home Admission Agreements - Guarantor, Agent or Separate Promisor

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Elder Law Symposium—Practice Perspectives

Traps For The Unwary In Nursing Home Admission Agreements—Guarantor, Agent Or Separate Promisor?

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INTRODUCTION

Despite federal laws that attempt to prohibit nursing homes from soliciting third party "guarantee" agreements as a condition of care, there are potential financial traps for anyone who signs a nursing home agreement on behalf of a resident. This article highlights the importance of sound legal advice for residents and their families prior to admission.[1]

FEDERAL LAW SETS THRESHOLD STANDARDS FOR NURSING HOME AGREEMENTS

Following a comprehensive inquiry into nursing home practices throughout the nation, in 1986 the Institute of Medicine made strong recommendations for changes to address serious and chronic problems in nursing home care.[2] In 1987, Congress responded by adopting the Nursing Home Reform Act, that affects all nursing homes that participate in Medicare or Medicaid funding.[3] Congress sought to establish threshold standards for residents' safety, privacy, freedom from restraints and individual autonomy.[4] In addition to federal reg-

[1] This article will also demonstrate, without resolving, the potential for a classic, potential "Elder Law" conflict of interest for the lawyer who represents the prospective resident while advising the prospective "Responsible Party." *See*, e.g., David M. Rosenfeld, *Whose Decision Is It Anyway?: Identifying the Medicaid Planning Client*, 6 ELDER L.J. 383 (1998).

[2] *See*, e.g., *Estate of Smith* v. *Heckler*, 747 F.2d 583 (10th Cir. 1984) (granting mandamus relief and finding federal agency had duty to establish and enforce regulations regarding patient care in nursing homes receiving Medicaid money).

[3] *See* Senator Charles Grassley, *The Resurrection of Nursing Home Reform: A Historical Account of the Recent Revival of the Quality of Care Standards for Long-Term Care Facilities Established in the Omnibus Reconciliation Act of 1987*, 7 ELDER L.J. 267 (1999).

[4] 42 U.S.C. §1395i-3(c)(4) (2002) (regarding resident rights under Medicare). *See also* identical language governing resident rights for nursing homes participating in Medical Assistance, also known as Medicaid, at 42 U.S.C. §1396r(c)(4) (2002).

ulations,[5] nursing homes are subject to complementary Pennsylvania's regulations.[6] One overarching goal is to curb disparate treatment between public and private pay residents of nursing homes. Federal law provides that a nursing facility "must establish and maintain identical policies and practices regarding . . . covered services . . . for all individuals regardless of source of payment."[7]

Medicare and Medicaid set limits on the amounts that the government reimburses facilities for the cost of care. For obvious reasons, nursing homes prefer the higher income generated by private pay patients. In an attempt to protect potential Medicaid residents from being manipulated by nursing homes, the Nursing Home Reform Act prohibits facilities from requiring residents to "waive" rights to seek Medicare or Medicaid coverage, and bars them from seeking promises from residents not to apply for these lower limits of coverage. Indeed, nursing homes are required to advertise and educate residents about how to apply for Medicare and Medicaid coverage.[8]

For family members and others assisting a resident in the admission to nursing homes, an important provision of federal law expressly prohibits any nursing home certified as eligible for Medicare or Medicaid reimbursement from requiring guarantees as a condition of admission or extended care. The key statutory language specifies: "With respect to admissions practices, a skilled nursing facility must . . . not require a third party guarantee of payment to the facility as a condition of admission (or expedited admission) to, or continued stay in, the facility."[9]

This language, standing alone, seems to prohibit facilities from conditioning admission upon a third party's guarantee of the higher private pay costs.[10] Consumer publications and legal advocates frequently describe the federal law as imposing a bar on third party guarantees or as making "Responsible Party" provisions contained in nursing home agreements presumptively illegal and unenforceable.[11] The interpretation of the statutory restriction on guarantees is complicated, however, by additional language in the federal statute. The Act also provides that Medicare and Medicaid qualified facilities may "requir[e] an individual, who has legal access to a resident's income or resources available to pay for care in the facility, to sign a contract (without incurring personal financial liability) to provide payment from the resident's income or resources for such care."[12]

Thus, the Nursing Home Reform Act appears to prohibit mandatory, third party guarantees, while opening the door for nursing homes to ask "legal representatives" to sign admissions contracts pledging the use of the resident's funds for payments. In practice, the nursing homes walk a fine line in their preprinted form agreements, using language that may provide superficial reassurances to family members or others that they face no personal liability, while also using—and sometimes burying—clauses that may later be characterized as "voluntary" financial obligations assumed by anyone who signs as a "Responsible

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[5] *See* 42 C.F.R. §§483.1- 483.75 (2002).

[6] *See*, e.g., 28 PA. CODE §§201.1-201.31 (2000). Pennsylvania regulations use the term "responsible person" to refer to someone who is not an employee of the facility and who "is responsible for making decisions on behalf of the resident." *Id.* at §201.3 (Definitions). Pennsylvania regulations incorporate many of the federal resident rights. *See*, e.g., 28 PA. CODE §§201.2(4) (Requirements), 201.24 (Admission Policy), 201.29 (Resident Rights). Federal law permits states to impose more stringent admission rules aimed at curbing discriminatory treatment. *See* 42 U.S.C. §1395i-3(c)(5)(B)(i) (Medicare: specifying that there is no federal preemption of stricter state standards for admissions policies); 42 U.S.C. §1396r(c)(5)(B)(i) (Medicaid).

[7] 42 U.S.C. §1395i-3(c)(4) (regarding Equal Access to Quality Care for Medicare patients; 42 U.S.C. §1396r(c)(4)(A) (regarding Equal Access to Quality Care for Medicaid patients).

[8] 42 U.S.C. §1395i-3(c)(5)(A)(i)(I)-(III) (Medicare); 42 U.S.C. §1396r(c)(5)((A)(i)(I)-(III) (Medicaid).

[9] 42 U.S.C. §1395i-3(c)(5)(A)(ii); 42 U.S.C. §1396r (c)(5)(A)(ii).

[10] *See*, e.g., *Slovik* v. *Prime Healthcare Corp.*, 838 So. 2d 1054, 1057 n.2 (Ala. Civ. App. 2002) (noting nursing home's concession that it was not trying to collect stepfather's debt from representative as a guarantor because Medicaid regulations "prohibited it from requiring [the step-son] to guarantee his stepfather's obligation to them. . . .").

[11] AARP's consumer website provided the following guidance: "Using terms such as responsible party or guarantor, which impose personal liability for the cost of the resident's care, is illegal for residents receiving Medicaid and unenforceable for privately paying residents." *What You Should Know About Nursing Home Admission Contracts*, at http://www.aarp.org/ (last visited June 15, 2003). *See also*, ERIC M. CARLSON, LONG-TERM CARE ADVOCACY §3.06[2] at 3-40 (2002) (arguing that for "at least three reasons, these 'Responsible Party' provisions are illegal and/or unenforceable").

[12] 42 U.S.C. §1395i-3(c)(5)(B)(ii); 42 U.S.C. §1396r(c)(5)(B)(ii). *See also* 42 C.F.R. §483.12(d)(2) (2002).

Party." Frequently, such provisions are at best vague, and at worst misleading.

SAMPLE CLAUSES DEMONSTRATE VAGUE OBLIGATIONS OF "RESPONSIBLE PARTIES"

During admission, the prospective resident may be overwhelmed by the paperwork. Several complex documents seek the signature of the resident, but permit a third party to sign.[13] Commentators note the questionable practice of having third parties sign documents that affect vital interests of a patient, especially where the nonresident signer has no formal power of attorney or court-appointment giving lawful decision-making authority.[14] The third party is often acting with, at best, a layman's understanding of the agent's role, while the nursing home wants both an agent and a guarantor of payment.

The key document is the facility's Admissions Agreement, a separate, often lengthy document, that may cover health care issues, bed hold policies, resident rights—while also serving as the contractual obligation to pay for care. A review by the author of more than twenty Admissions Agreements from nursing homes in Pennsylvania revealed that all had signature lines for "Responsible Party" or "Sponsor" while using language that may confuse the signing party about the scope of his or her personal liability. Significantly, there is no uniformity in the contractual language used by nursing homes in Pennsylvania, and nursing homes may or may not permit family members to make changes to the agreement.[15] It is not unusual for the admissions agreement to be presented to the agent for signature with the payment terms left blank.[16]

As a practical matter, the documents are usually contracts of adhesion. Examination of the language of two different facilities' contracts, identified in this article as "samples," is helpful to illustrate the variation in language, as well as the potential for confusion, despite (or perhaps because) portions of the language used in the contracts are paraphrases of federal statutory language. Copies of these samples are on file with the author.

In Sample Admission Agreement #1, the Responsible Party is defined as "that person who looks after the interest and welfare, both personal and financial, or [sic] the Resident. The Responsible Party may or may not have a durable Power Of Attorney or legal guardianship." This provision appears to permit those who are merely interested friends or family members to sign. The same contract also provides, "A Power of Attorney, legal guardian, or Responsible Party assumes no financial responsibility beyond the resources of the Resident." Few laymen will catch the potential significance of the words "beyond the resources of the Resident," which, for reasons discussed later this article, may be interpreted as a separate contractual promise that *does* impose personal financial responsibility on the signer.

In Sample Agreement #2, from a different Pennsylvania facility, the contract uses odd syntax to provide that the "RESIDENT, or RESPONSIBLE PARTY *solely from RESIDENT's financial resources*, agrees to pay basic service charges in advance." The italicized language seems to exclude personal liability for the nonresident signer. In addition, prepayment may be waived by the facility, "if RESIDENT or RESPONSIBLE PARTY has reasonable expecta-

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[13] For example, "Admissions Notice Packet," PA Form MA 401, is currently twenty-plus pages, covering a host of care related topics. It describes the Commonwealth's "Admission Policy" on the liability of third party signers only in the negative, vaguely suggesting that as long as the resident is "entitled to medical assistance," (not, however, referring to "Medical Assistance" or "Medicaid," the capitalized words used elsewhere in the document to refer to public benefits programs), no one may be required to guarantee any payments.

[14] *See* e.g., Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical and Public Policy Implications*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 6 (Winter 1998) (critiquing nursing home admission policies and concluding that "[t]he informed consent status of nursing facility admissions . . . has been virtually ignored thus far by legal practitioners, lawmakers and scholars.").

[15] By comparison, the Maryland Department of Health and Mental Hygiene has two model contracts, including a separate "Resident's Agent Financial Agreement." Nursing homes in Maryland are not required to use the model contracts, but as one publication warns, "A nursing home admission contract that differs significantly may have illegal terms." *See* Maryland State Bar Association, *Nursing Home Admission Contracts in Maryland*, available under "publications" at http://www.msba.org (last visited July 7, 2003).

[16] *See*, e.g., *Holloway* v. *Riley's Oak Hill Manor, Inc.*, 2002 WL 31259803, at *1 (Ark. Ct. App. 2002) (analyzing contract that provided patient or responsible party "agrees to pay at a daily rate of [blank]"). *But see* 28 PA. CODE §201.29 (requiring information on charges to be given "verbally and in writing" to resident and responsible person "prior to, or at the time of admission . . .").

tion that services will be covered by Medicare or Medicaid." With this language, it seems reasonable for the family member or other signing party to assume that as long as the threshold review of assets appears to make the prospective resident eligible for Medicaid, the nursing home, and *not* the "Responsible Party," is accepting the risk of non-eligibility.

Nonetheless, the author has reviewed lawsuits filed in Courts of Common Pleas in Pennsylvania by facilities using both of the above contracts, and the facilities are suing the persons who signed as Responsible Parties. The complaints have a laundry list of legal theories for relief,[17] but among the theories alleged are breach of these same contracts, focusing on the Responsible Party's alleged promise to pay for care, and treating this promise either as the signer's primary assumption of an obligation to pay, or as a guarantee of payment in the event that the resident's private funds are exhausted or public funding is unavailable. Family members and others who are unable or unwilling to pay for another's nursing home care are probably unprepared to pay the costs of defending unexpected claims for contractual liability.

The ambiguity of the role for the "Responsible Party" may begin during meetings with admission personnel. Personnel may reassure the friend or family member that the signatures on the packet of admissions documents are necessary in order for the resident to receive care, but a mere "formality" when it comes to payment.[18] The family member or other signer may assume he or she is signing merely as a surrogate health care decision maker.[19] It is clear that the nursing homes are eager to get third party signatures even for fully competent residents, particularly where the prospective resident's ability to communicate and make health care choices is already on the decline.[20]

In the majority of instances, the "Responsible Party's" signature is indeed a formality as Medicaid, the resident's income and resources, are available for the nursing home costs. The lawsuits, however, occur when there is a gap in private pay or public assistance and the nursing home starts looking for third parties to backstop the bills. As of July 1, 2003, the Department of Public Welfare reports that Pennsylvania's average monthly nursing home cost for private pay care is $5,559.25, and therefore even a small gap can produce a ghastly surprise for the family member or friend acting as Good Samaritan for someone entering a nursing home.[21]

CASE LAW SIGNALS NATIONAL PROBLEMS WITH "RESPONSIBLE PARTY" PROVISIONS

At the time of this writing, there were no Pennsylvania appellate cases considering "Responsible Party" language in nursing home agreements. Two recent unreported cases from other jurisdictions, however, suggest the concern that should exist about these provisions—and demonstrate the courts' divided response to the problems.

In *Holloway* v. *Riley's Oak Hill Manor, Inc.*,[22] an Arkansas intermediate appellate court af-

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[17] Theories alleged include: oral contract, unjust enrichment, assumpsit, open account, stated account, quantum meruit, liability of the spouse under the doctrine of "necessities," liability under Pennsylvania's filial responsibility statute, and breach of fiduciary duty, in addition to various allegations of express, written contractual liability. Copies of recent complaints are on file with the author. While alternative pleading is a modern phenomenon and often a safe practice, the variety of inconsistent theories expressed in these suits suggests the lack of confidence the nursing homes themselves have in their own contract language.

[18] "Defendant avers that she was informed that it was a routine form that had to be signed to permit admission and care for [her aunt]." *Daughters of Sarah Nursing Home Co., Inc.* v. *Frisch*, 565 N.Y.S.2d 532, 532 (N.Y. Ct. App. 1991) (finding genuine issues of material fact preclude summary judgment as to whether niece was aware at time she signed nursing home forms of financial obligations).

[19] Consumer guides frequently emphasize the need for a "responsible party." One guide describes the "responsible party" merely as "a person who the nursing home can call about your care and/or finances." *See* Missouri Division of Senior Services, *Admission Agreement*, CONSUMER HANDBOOK FOR RESIDENTS AND FAMILY OF LONG TERM CARE FACILITIES, available at http://www.health.state.mo.us (last visited July 17, 2003).

[20] As one observer notes following his qualitative research project, "[w]hen any willing and available family member or friend can be located, facilities typically accept that person as surrogate decision-maker for the resident. Often there is no specific inquiry into the source of that person's formal authority." Marshall B. Kapp, *The 'Voluntary' Status of Nursing Facility Admissions: Legal, Practical and Public Policy Implications*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 10 (Winter 1998).

[21] PA Dept. of Public Welfare Policy Clarification PMN-10991-440.

[22] *Holloway* v. *Riley's Oak Hill Manor, Inc.*, 2002 WL 31259803 (Ark. Ct. App. 2002).

firmed a trial court's ruling that the adult son became contractually bound to pay for his elderly mother's nursing home care, by signing his name on the line for "Responsible Party" in admissions documents that provided "The patient and/or responsible party agrees to pay a daily rate of [blank] and the Nursing home will accept this agreement in full consideration for care and services rendered."[23] By contrast, in *Special Care Nursing Services, Inc.* v. *Fox*,[24] a Massachusetts appellate court ruled that the adult granddaughter who signed on the line for "Client/Responsible Party" was not contractually bound for the uninsured cost of her grandmother's nursing home care, despite the provision of the same document that stated "I agree to assume responsibility for and guarantee the payment of any and all sums that become due [to the extent not paid by insurance, Medicare or Medicaid]."[25] In neither case did it appear the elder person signed or was able to sign the admission documents and, despite thorough exposition of the issues in the opinions, neither decision was released for official publication.

On a superficial level, the two cases can be distinguished. In the Massachusetts case, the granddaughter wrote "granddaughter (coguardian)" on a line below her signature in a box that permitted her to identify her "relationship" to the client.[26] The court concluded that disclosure of her "representative" capacity and the fact that she had been appointed as her grandmother's guardian prevented the "Service Agreement" from being interpreted as her personal guarantee of payment.[27] In the Arkansas case, there was no written description of the son's relationship to the patient, nor was there, apparently, any preprinted line for him to identify his role in signing.[28]

On a deeper level, however, these fact patterns are identical. Even if the older person has done some planning, it is the rare instance where a family as a whole preplans for long-term care. Few children, much less grandchildren and other members of the extended family, have any understanding of the elder parent's finances until well after the moment of crisis arrives. Most admissions to nursing homes have no involvement by attorneys, despite the growing speciality of Elder Law to provide legal assistance in this arena. Families may be reluctant to negotiate, or to appear to question the facility about alternatives. Most admissions agreements are signed by families in practical—if not legally recognized—duress.

Liability may well turn on whether the court is persuaded the contract is an illegal mandatory guarantee or a guarantee made voluntarily and knowingly. In additional opinions, both officially and unofficially reported, courts show some reluctance to hold family members, particularly distant family members,[29] contractually liable. Courts can and do examine carefully the context in which the nursing home agreements are signed by "Responsible Parties."[30] The courts look for misrepresentations by the facility's personnel leading to nonresident signatures.[31] Some purported contractual agreements to pay are unenforceable because of a lack of consideration for the third party's signatures on the documents.[32] Recently in New York, the Attorney General was successful in negotiating agreements with a number of New York nursing homes to cease using form contracts creating third party guar-

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[23] *Id.* at *1.

[24] *Special Care Nursing Services, Inc.* v. *Fox*, 1998 WL 61902 (Mass. App. Div. 1998).

[25] *Id.* at *1.

[26] *Special Care Nursing Services, Inc.*, at *1.

[27] *Id.* at *1 n.2 ("[N]otwithstanding Special Care's inclusion of the words 'assume responsibility for and guarantee the payment' in paragraph 4, the contract is plainly one for services and not one of guaranty.").

[28] *Holloway*, at *1.

[29] *Slovik* v. *Prime Healthcare Corp.*, 838 So. 2d 1054 (Ala. Civ. App. 2002) (noting that evidence of documents signed by step-son as personal representative did not support conclusion there was contractual obligation to pay for step-father's nursing home care). *But see St. Francis Home* v. *Sharon*, 1993 WL 388290 (Wis. Ct. App. 1993) (concluding son's promise as responsible party was "clear and unambiguous," precluding parole evidence).

[30] As one court noted, the burden of proof is on the nursing home to show that a party signing as "responsible party" is "voluntarily" waiving the protections of federal law not to be "required" to serve as a guarantor. *Manor of Lake City, Inc.* v. *Hinners*, 548 N.W.2d 573, 575 (Iowa 1996), *appeal after remand*, 576 N.W.2d 592 (Iowa 1998). *See also Beach Manor* v. *Dolsak*, 1982 WL 5963 (Ohio Ct. App. 1982) (finding contract not enforceable on summary judgment because of issues of fact regarding signer's understanding of admission agreement).

[31] *Podolsky* v. *First Healthcare Corp.*, 58 Cal. Rptr. 2d 89 (Cal. Ct. App. 1996) (finding that proposed nursing home agreement was deceptive insofar as agreement lacked any information about protections enjoyed by prospective guarantors under federal and state law).

[32] *See Holloway* v. *Riley's Oak Manor, Inc.*, 2002 WL 31259803 (Ark. Ct. App. 2002) (contrasting unenforceable promise to pay past nursing care debt, with enforceable promise to pay for future treatment).

antee obligations.[33] However, it is important for the attorney advising the admission process to be aware of the *limited* protection provided by the federal statutes and regulations, which have *not* been interpreted by courts as imposing an absolute bar on contracts creating third party liability.[34]

AN ALTERNATIVE THEORY OF CONTRACTUAL LIABILITY: FAILURE TO KEEP PROMISE TO USE RESIDENT'S ASSETS TO PAY FACILITY

In the *Holloway* and *Fox* cases discussed above, the decisions turned on whether there was a clear contractual promise to pay as a principal or guarantor. In another recent, reported case, the issue considered is slightly different. In *Sunrise Healthcare Corp.* v. *Azarigian*,[35] the issue before an intermediate appellate court in Connecticut was whether the "Responsible Party" is personally liable for breach of contract by failing to comply with a provision, which the court interpreted as a promise to use the resident's resources solely for purposes of paying the nursing home.

In *Azarigian*, the court concluded that a daughter, signing as "Responsible Party," under a Power of Attorney was contractually, personally liable for more than $75,000 in nursing home expenses, when her mother did not qualify for Medicaid.[36] The court found that the contractual obligation did not rely on prohibited guarantee language, but instead was based on an express separate promise, permitted by federal law, that the signer would preserve her mother's assets for nursing home care.[37]

Vicki Azarigian held a power of attorney for her mother, dated February 1994.[38] She signed the nursing home contract as "Responsible Party" and her capacity as power of attorney was known to the home from the beginning.[39] One month after the December 1995 admission of her mother, the daughter made gift transfers from her mother's accounts totaling close to $50,000 as part of a pre-existing estate plan, and she hired a private companion for her mother at the nursing home at a cost of $31,760.[40] The daughter continued to pay the nursing home from private sources through the end of December 1996.[41]

In March 1997, the daughter applied for Medicaid on her mother's behalf. Her mother died in February, 1998, and more than a year later, the state denied Medicaid, citing disqualifying "transfers" from her mother's accounts.[42] In addition to the gifts transferred by the daughter as a part of the mother's estate plan, transfers that alone did not disqualify her mother for Medicaid, the mother's husband had used $285,000 to fund a trust in August 1995.[43] In holding the daughter liable for the accrued costs, the opinion does not discuss whether the daughter was aware of the trust, or its implications, when she signed her mother's contract.

The case is important because it makes a distinction between prohibited guarantees and

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[33] *See NY State Attorney General's Office Gets Nursing Homes to Revise Policies*, ROCHESTER DAILY RECORD, March 18, 2003, at 1, *available* at 2003 WL 16076580.

[34] *Compare Daughters of Sarah Nursing Home Co., Inc.* v. *Frisch*, 565 N.Y.S.2d 532 (N.Y. App. Div. 1991) (finding that factual issues regarding niece's awareness of key terms of contract at time of signing precluded summary judgment) *with Daughters of Sarah Nursing Home Co., Inc.* v. *Lipkin*, 535 N.Y.S.2d 790 (N.Y. App. Div. 1988) (holding that son was personally liable as guarantor by signing as "responsible party"). *See also Manor of Lake City, Inc.* v. *Hinners*, 548 N.W.2d 573 (Iowa 1996) (remanding for new trial with instructions on effect of federal law on whether guaranty was created, finding that son did not volunteer to be personally liable); *Podolsky* v. *First Healthcare Corp.*, 58 Cal. Rptr. 2d 89 (Cal. Ct. App. 1996) (holding that third party guaranties are permitted under federal law if not deceptive or otherwise in violation of Unfair Trade Practices laws, but remanding for further fact finding).

[35] *Sunrise Healthcare Corp.* v. *Azarigian*, 821 A.2d 835 (Conn. App. Ct. 2003).

[36] *Id.* at 842.

[37] *Id.* at 840. The court found the contract to be unambiguous, and in compliance with federal law, in that it expressly prohibited personal liability as a guarantor or surety, while lawfully providing that if the Responsible Party has control over or access to resident's income or assets "the responsible party agrees that these funds shall be used for resident's welfare, including but not limited to making prompt payment in accordance . . . with the terms of this agreement." *Id.*

[38] *Azarigian*, 821 A.2d at 837.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] The father died in January 1996, close to the time of his wife's admission to the nursing home. "The parties agree that if the revocable trust had not been attributed to [the mother], she would have been eligible for Title XIX assistance." *Azarigian*, 821 A.2d at 837 n.3. Apparently, under Connecticut law any period of ineligibility created by the daughter's transfers alone would have been exhausted by date of application for Medicaid. *Compare* 55 Pa. CODE §178.104.

permitted promises to use or protect the resident's assets for nursing home care.[44] The case is also troubling because rather than distinguishing between the gifts that arguably were not used "for the resident's welfare," from the money spent for a personal attendant that was providing care, the court held the daughter liable for the entire cost of nursing home care during the period of ineligibility.[45] Despite references to the daughter's "misconduct," the court does not really explain why her conduct, limiting her own transfers as agent to those that would not have disqualified the mother for Medicaid, was not good faith. There was no discussion of whether the daughter knew or should have known of the pre-admission trust created by the stepfather. Instead the court holds the daughter liable for the effect of the stepfather's transfers regardless of her knowledge or lack thereof, and takes a hard line on interpreting her promise to use the funds for the resident's welfare as a promise to use the mother's assets *first* for nursing home care. The court concludes that "[a]ny use of [her mother's] assets that goes beyond fulfilling her basic needs is, therefore, in violation of the contract."[46]

PRACTICE TIPS FOR LAWYERS ADVISING POTENTIAL "RESPONSIBLE PARTIES"

In light of recent contract claims, family members and their lawyers need to exercise caution when presented with a nursing home admission agreement that asks for a signature of a "Responsible Party." The cautious lawyer may consider the following practice points when advising prospective agents who are unable or unwilling to guarantee payment:

- When possible and appropriate, only the resident should sign the agreement[47];
- To test whether or not such provisions truly are *mandatory*, and therefore improper under federal law, the third party signer should seek to strike out any provisions in the contract that purport to impose a financial obligation as a "Responsible Party"—much less as an actual "guarantor"[48];
- When third party signatures are provided, the signing party should clearly specify in writing, on the nursing home agreement, that he or she is signing in the limited role of "agent for" or "guardian for" the named resident[49]; and
- The third party signer should be cautioned that despite language in the nursing home agreement that purports to limit liability to the resident's income and assets, and despite signing as mere "agent," the signer faces potential liability for post-admission actions taken by the signer if those actions can be characterized as a failure to preserve and use the resident's income or assets for the nursing home. Look for specific contractual promises to this effect. This personal liability is different and separate from any liability or non-liability as a primary obligor or guarantor, regardless of the interpretation of federal laws prohibiting mandatory guarantees.

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[44] *Azarigian*, 821 A.2d at 840.

[45] However, the court does appear to limit the daughter's liability to the amount of money she transferred from her mother's assets. *Azarigian*, 821 A.2d at 840.

[46] *Id.* at 841. Was the Connecticut court making a clear distinction between liability as a guarantor of payment versus liability for breaching a separate promise to use the resident's assets to pay for care? A test of the court's holding would be created by facts that show a "Responsible Party" signer made no post-admission transfers of the institutionalized person's funds, but outside facts nonetheless caused that person's ineligibility for Medicaid. There would then seem to be no room to argue that the third party signer was breaching an express promise to use the resident's funds for care. *See* e.g., *Gladeview Health Care Center* v. *Grande*, 2003 WL 22040626 (Conn. Super. Ct. Aug. 7, 2003) (distingishing *Azarigian*).

[47] Having only the resident sign the admission agreement does not insulate agents acting under a Power of Attorney or a guardianship from personal liability to the principal for failing to use the resident's income or assets for the benefit of the resident. *See*, e.g., 20 PA. CONS. STAT. ANN. §5601(e) (Supp. 2003) (imposing fiduciary duty on agents under power of attorney including obligation to exercise powers for benefit of principal).

[48] As one commentator notes, "[e]ntry into the home is dependent on whether or not the home chooses to admit the prospective resident." Lawrence H. McGaughey, *Reviewing A Nursing Home Admissions Contract*, 68-Aug. N.Y. ST. B.J. 34-35 (1996). There is often a real, or perceived, absence of bargaining power for the families.

[49] In some jurisdictions, the agent must clearly indicate not only the agent's role but the name of the principal. *See Faith Manor* v. *Armer*, 1991 WL 259567 (Ohio Ct. App. 1991) (noting that"[i]t has long been held that an agent is personally liable on contracts executed in her own name, even if she describes herself as an agent. . . . To escape liability, the agent must indicate the name of the principal for whom she acts.").

CONCLUSION

As a practical matter, few community spouses, much less children, grandchildren, nieces, or neighbors, can afford to volunteer for an open-ended and costly contingent liability. Admittedly, there is little sympathy for the occasional "bad apple" family member who signs a nursing home agreement as a responsible party and then willfully ignores any obligation to use the resident's private funds for the resident's care.[50] Active criminal conduct may be involved. But such bad apples are rarely around for the nursing home to sue once gaps in payment sources come to light. The worrisome suits are those such as *Azarigian*, where the agent is trying to use the resident's resources for the resident's care, and has spent down the resources in lawful ways while waiting for the inevitable need to apply for Medicaid.

Despite an obvious goal of the federal Nursing Home Reform Act to curb manipulative nursing home admissions practices, in many instances facilities are writing contracts that can mislead third parties about their liability. Courts should be willing to go beyond the contract language to examine the context in which family members or other third parties are signing as "Responsible Parties." Finally, Pennsylvania and other states can and should take legislative or administrative action to put teeth into the "no mandatory guarantee" language of the federal laws, by adopting tougher state standards governing third party liability arising from nursing home agreements,[51] and that, as they say in the world of scholars, will be the focus of a law review article for another day.

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[50] *See* e.g., *Presbyterian Med. Center* v. *Budd*, ___ A.2d ___, 2003 WL 22025849 (Pa. Super. Ct. Aug. 29, 2003) (finding home can assert claim against daughter for cost of mother's care under filial responsibility/support law at 62 Pa.C.S.A. §1973, where daughter diverted mother's assets to own accounts).

[51] *See* 42 U.S.C. §1395i-3(c)(5)(B)(i) and 42 U.S.C. §1396r(c)(5)(B)(i), specifying there is no federal preemption of stricter state standards for admissions policies.