

William J. Kovatch, Jr.

Attorney at Law, PLLC

Estate Planning
Special Needs Planning

Newsletter



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Beware of Nursing Home Contracts

It is already a stressful time. Mom's health has deteriorated to the point where she needs nursing home care. You may already be scared and worried. Maybe you feel guilty because you've had to go back on a promise never to put mom in a nursing home.

To add to the stress, now you face all of the financial and legal decisions that come with admitting a parent into a nursing home. How exactly will the bills be paid? Maybe you've made the application for Medicaid, and now wait while a decision is made.

Into this mix, add the nursing home itself. The nursing home may be concerned with how it's going to be paid. Sometimes, the nursing home will take this opportunity to put a contract in front of you with some harsh and egregious clauses.

For example, you may have power of attorney. This gives you the legal ability to sign contracts on behalf of mom. But, a power of attorney does not create any obligations or liabilities in and of itself. That is, a person with power of attorney who signs a contract on behalf of mom does not bear any legal responsibility to pay the bill out of his or her own pocket.

Some nursing homes try to get around this by including a clause that holds you personally responsible to pay mom's bills. Sometimes, the admission officer will even tell you that you are just admitting mom, don't worry about paying the bills yet.

Another egregious clause may say that if there is any violation of the agreement, the nursing home has the right to kick mom out, and drop her off at your home. If you sign a nursing home with

William J. Kovatch, Jr., Attorney at Law, PLLC provides elder law services. The practice of elder law includes the representation of the elderly and the disabled in connection with:

- estate planning (wills and trusts)
- estate administration
- the application for public benefits such as Medicaid
- advance medical directives
- the creation of powers of attorney
- guardianship
- conservatorship,
- disability planning
- long-term care planning.

William J. Kovatch, Jr. is a member of the National Academy of Elder Law Attorneys, and admitted to practice law in:

- The District of Columbia
- New Jersey
- New York
- Pennsylvania
- Virginia

this clause, you'll find that some nursing homes will use this to squeeze money out of you when they get impatient waiting for a Medicaid decision. No matter what mom's health may be, the most egregious of the nursing homes will threaten to just drop her off unless you pay now.

These types of clauses are of questionable enforceability. The nursing homes are almost always in the superior negotiating position. They are the ones who draft the agreement, and present it as a take it or leave it proposition. You are already under stress, and may feel the need to act quickly so mom can get the care she needs. Some people may feel powerless to do anything about these contracts. When one party to a contract has such superior bargaining power, and abuses that power to present contract with clauses so egregious they "shock the conscience," the law may invalidate those clauses under a doctrine called "unconscionability."

You should take the opportunity to take the nursing home admission contract to an attorney for review. You should not just accept the worst of the clauses without negotiation. Cross the language out, and propose new language. An attorney may be able to help you through the negotiation by arguing to the nursing home that these clauses would not be enforceable anyway.

Even if you have signed a contract with one of these clauses, you do not necessarily have to give in to every whim of the nursing home. Again, by having an attorney assist you by arguing the unenforceability of the clauses, you may be able to convince the nursing home to back down.

When admitting a parent to a nursing home, you need to be vigilant. Don't be willing to accept just anything the nursing home puts in front of you. Read the contract carefully, ask questions, and, if feasible, get an attorney to review the contract with you. ■

New Fairfax Circuit Court Guardianship Rules

As of October 2, 2009, the Fairfax Circuit Court will apply new rules to cases involving infant settlements and the appointment of a guardian and/or conservator. Under the new rules, a case will not be placed on the calendar for a hearing, until the lawyer files the report of the guardian *ad litem*, the medical records, and the proposed order.

Prior to the new rules, an attorney could file the petition along with the medical report, a proposed order appointing a guardian *ad litem*, and the Praecipe. The case would then be placed on the calendar for a hearing, and the guardian *ad litem* appointed. The practice had been for the guardian *ad litem* to file a report with the court on the Wednesday before the hearing, and then fax a copy of the report to the judge's chambers. However, because some judges would simply read the guardian *ad litem*'s report on the bench during the hearing, some guardians *ad litem* would simply bring the report to court on the hearing date, without filing it before the hearing.

Chief Judge Dennis Smith expressed his concern that circuit court judges had limited bench time, and should not be required to use that bench time to read the guardian *ad litem*'s report. The Chief Judge proposed the new rules in order to ensure that all of the information is made available to the judge well in advance of the hearing. Chief Judge Smith has frankly admitted that the new rules will mean that a guardianship case will take at least three weeks in Fairfax. ■

This newsletter is for informational purposes only, and not meant to constitute legal advice. Quality legal advice requires a thorough look at the facts and circumstances surrounding your situation.