Elder Ethics

How supported decision-making could protect incapacitated seniors.

BY MICHAEL WALD AND ELI D. PIERCE

Elder law attorneys are frequently hired to help senior parents obtain Medicaid. For attorneys unfamiliar with the rules, seniors must meet a minimum income test and a minimum resource test to be eligible to collect Medicaid. The income test is relatively easy; a technique called a qualifying income trust, also known as a Miller Trust, can be used to artificially deflate income. For the resource test, the Medicaid applicant may have no more than $2,000 in assets, with some not counted, such as a homestead. All transfers of assets made within 60 months of the Medicaid application are considered—what is known as a look-back period.

The ideal scenario goes like this: A senior says, in essence, "I want to give everything I own to my children so that I appear to be impoverished, and, thus, eligible for government assistance after 60 months." Of course, there is no problem when the parent proposes this while having full cognitive capacity, with or without the children in attendance, and engages the lawyer, acknowledging that the result of transferring assets to the children means giving the assets up forever. In truth, this is not what normally happens.

This is the more likely case: Father died a few years ago leaving everything to Mother. Mother, now 75, is in declining health and dependent on care from her children. She may even be in the initial stages of dementia. It is anticipated that Mother will need to enter a nursing home in the near future. She has enough assets to pay for a nursing home for only two years and may not even survive that long. Mother has two adult children. They stand to inherit all that is left but don't want to spend it on nursing care. The children are the ones who initiate the visit to the attorney, with Mother in tow, to see how to best preserve their inheritance.

Conventional wisdom among elder law attorneys in the United States is that the elder person is *always* the client. Of course, this poses some practical issues, among them: If the mother is your client, she may not have the capacity to consent to your engagement.

If the mother has given someone a power of attorney, the agent is likely to be one of her children. Agents under a power of attorney are fiduciaries, with all the attendant fiduciary duties—the highest duties in the law. If the engagement is about preserving the estate of the mother for the benefit of the children, their fiduciary duty against self-dealing would prohibit them from hiring the attorney on the mother's behalf.[1]

One reason for the conventional wisdom in this area is that the mother is the one paying the attorney's bill. Even if the children are engaging the attorney primarily to preserve their inheritance, the mother's estate is being used to fund legal advice, whether the mother knows it or not. So, the thinking goes, the duty is to the mother. This is the old "follow-the-money" approach. But is this conventional wisdom correct or can the attorney ethically represent the children? Does the bill payer truly determine who the client is?

There is a crying need for clarification of the ethical rules in this increasingly common scenario. For now, we have Texas Disciplinary Rule of Professional Conduct 1.06(b) to guide us.

Rule 1.06(b) addresses situations when an attorney is prohibited from representing a client due to a conflict of interest. It is relevant insofar as it reminds us of the importance of identifying the client and establishing the scope of the representation.

In the mother's case, to avoid a possible conflict of interest, an attorney must—at the outset of the attorney's discussion with her or her children—make it known whom the attorney represents. If the attorney is representing the mother, it should be made clear to the children that the attorney's obligation is to pursue her wishes. The reverse is true if the attorney represents the children.

Nothing in the current ethics rules supports the notion that the attorney's obligation flows to the person paying for services. In fact, TDRPC 1.08(e) allows a third party to compensate an attorney for representation, provided that the client consents, that the arrangement does not compromise the attorney's duty of loyalty and independent judgment to the client, and that the client's information remains confidential. There are many situations where a third party pays for attorney services and the obligation still runs to the client. In the family law arena, parents frequently pay for services rendered to juveniles. The attorney's obligation is still to the client-child, even to the point of not disclosing details of representation to the parents.

Everyone is entitled to an attorney if he or she can afford one. For civil matters in which a person is incapac-

itated, there are procedures for appointing an attorney ad litem. These currently exist only in the context of a legal "case." A system for ad litems in the absence of a case or controversy might be beneficial for the protection of incapacitated persons like the mother.

The assumption that elder law attorneys always represent the elderly is more fiction than fact. Continuing to operate under this convention ignores the reality that the attorney is frequently being asked to violate the elder person's rights without his or her consent and may even be an accessory to violations of fiduciary duties.

There is nothing in the current ethics rules that prevents the attorney from being up-front and honest when acknowledging that he or she is representing the children, not the elder. Continuing down the path of the current system means only that we as a legal community are ignoring what is happening, placing form over substance. The mother may sign an engagement or waive conflicts, but if she isn't fully informed and able to consent, these are meaningless. With the appointment of an ad litem, there would be a check and balance in place to make sure that both parties are represented by counsel.

Some states have attempted to address many of the complicated issues that arise in elder law matters. Since 2010, lawmakers have passed 151 adult guardianship bills.[2] Most of the legislation comes from states enacting the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which deals not only with the elderly but also with all physically and/or mentally incapacitated persons who cannot properly care for themselves or their property. However, even with the expansive legislation that has taken place in the past five years, there is still a woeful lack of protection for the elderly outside of formal court proceedings.

One idea that potentially addresses the issue is known as a supported decision-making agreement, which is new to Texas. Senate Bill 1881, signed by Gov. Greg Abbott on June 19, 2015, provides for this technique. Its stated purpose is to "recognize a less restrictive alternative to guardianship for adults with disabilities who need assistance with decisions regarding daily living but who are not considered incapacitated persons for purposes of establishing a guardianship. ..." An adult with a disability may enter into a supported decision-making agreement with a "supporter," which is an adult who the adult with a disability authorizes to do any or all of the following:

(1) provide supported decision-making, including assistance in understanding the adult's life decisions, without making those decisions on behalf of the adult;

(2) assist the adult in accessing information relevant to a life decision;

(3) assist the adult in understanding that information; and

(4) assist the adult in communicating the adult's decisions.

The agreement must substantially be in the form provided by the act, yet it may also be "in any form not inconsistent with" the statutory form. The agreement should be signed by the adult and the supporter in the presence of two witnesses (at least 14 years old) or a notary.[3]

Using supported decision-making, the mother would receive support from a trusted individual, network of individuals, or entity to make personal, financial, and legal decisions that must be followed by third parties. This system, however, is designed only for persons not considered incapacitated for purposes of establishing a guardianship.

The benefits of a supported decision-making system could easily be extended to situations involving an incapacitated adult, such as the mother. Canada has adopted supported decision-making under British Columbia's Representation Agreement Act.[4] This creates a presumption that allows an incapacitated individual to enter into a representation agreement, unless the individual is specifically found incapable of doing so.[5] In such a scenario, the mother would be able to enter into a supported decision-making agreement without the stress of a legal proceeding and could ensure that a trusted individual or entity is looking out for her well-being if her children attempt to impoverish her to qualify for public assistance.

Although this may add another layer of complexity to an already difficult area, it could help protect our elderly citizens. Who will speak for you when you can't speak for yourself? **TBJ**

NOTES

1. *See* Tex. Estates Code § 751.101 and *Smiley v. Johnson*, 763 S.W.2d 1, 3 (Tex. App.—Dallas, 1988).
2. American Bar Association Commission on Law and Aging, State Adult Guardianship Legislation: Directions of Reform (2010-2014).
3. Act of June 19, 2015, 84th Leg., R.S. ch. 1357 (2015).
4. Representation Agreement Act, R.S.B.C., ch. 405 (1996), available at http://www.qp.gov.bc.ca/statreg/stat/R/96405_01.htm.
5. RAA, supra note 226, at § 1(3), 2(8).

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