

THE WOLF AT THE DOOR: FILIAL RESPONSIBILITY UNDER DELAWARE LAW

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I. INTRODUCTION

How to pay for healthcare, particularly long-term care, is one of the biggest issues facing the United States. A growing concern is whether the financial burdens of long-term care for indigent persons should be placed on their family members or society. A recent decision by an appellate court in Pennsylvania addressed the legal issue of who should bear the financial burden of paying for a poor person's long-term care.¹ The Pennsylvania decision brings filial responsibility laws front and center as a means of holding adult children financially responsible for the support of their indigent parents.² Filial responsibility laws are also becoming a means for private and public agencies to seek reimbursement for the expense of such care.³

Delaware is one of the twenty-eight states that have filial responsibility laws.⁴ The core statutory provision, which states adult children have a reciprocal duty to support their indigent parents, is located in Delaware's interrelated statutory scheme set out in Title 31 (Welfare Assistance) and Title 13 (Domestic Relations). This article examines the rights and abilities of state Medicaid agencies to seek reimbursement from adult children under their filial responsibility laws. It further explores the concept of third-party healthcare providers suing adult children under Delaware's filial responsibility statute⁵ to pay for care not covered by Medicaid or private medical insurance. Ultimately, this article predicts whether the Delaware Supreme Court, if faced with this issue on appeal, would uphold the use of the statute for such a purpose. There is no Delaware case law resolving this precise issue; thus, it would be an

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1. *Health Care & Ret. Corp. of Am. v. Pittas*, 46 A.3d 719 (Pa. Super. Ct. 2012).

2. *Id.* at 721.

3. *See Dep't of Mental Health v. Beil*, 357 N.E.2d 875, 876 (Ill. App. Ct. 1976) (explaining that the state health department brought a claim against a husband to recover charges for medical treatment provided to his wife).

4. Allison E. Ross, *Taking Care of Our Caretakers: Using Filial Responsibility Laws to Support the Elderly Beyond the Government's Assistance*, 16 *Elder L.J.* 167, 174 (2008).

5. DEL. CODE ANN. tit. 13, §§ 503, 505 (2009).

issue of first impression. By examining the statutory construction of Delaware's filial responsibility statute, as well as Pennsylvania's approach to the same issue, it is not only conceivable, but also likely, that the Delaware Supreme Court would permit third-party healthcare providers to utilize the statute as a means of recovering costs from adult children who have the ability to pay.

II. HISTORICAL CONTEXT OF FILIAL RESPONSIBILITY LAWS

The current filial responsibility laws in the United States are largely based on the Elizabethan Poor Relief Act of 1601 ("Act").⁶ The Act essentially required family members to be the primary source of support for their indigent and juvenile family members.⁷ Furthermore, the Act permitted public assistance to become available only if family members could not afford to provide support.⁸ Many American welfare systems were fundamentally based on the ideals of the Act.⁹ Over time, many American statutes began to include provisions requiring children to provide support for their needy parents. Currently, the majority of states have filial responsibility laws.¹⁰ These statutes vary widely in their specific provisions. Many statutes provide for governmental enforcement of the duty.¹¹ Others, like Delaware, are silent on who has standing to sue.

Prior to the 1960s, government agencies often used filial responsibility statutes to obtain reimbursement for public funds paid on behalf of poor persons. Private individuals used the statutes to procure the financial support that was owed to them. However, the use of filial responsibility statutes to secure reimbursement for healthcare expenses began to markedly decline after Congress enacted the Medicaid and Medicare programs.¹²

After Medicaid was enacted in 1965, the motivation for states to enforce their filial responsibility statutes was severely lessened. This was due to the Federal Act's prohibition of considering an applicant's resources, as well as

6. Poor Relief Act, 1601, 43 Eliz. 1, c. 2 (Eng.); Matthew Pakula, *A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly*, 39 FAM. L.Q. 859, 861 (2005).

7. Pakula, *supra* note 6, at 861.

8. See Terrance A. Kline, *A Rational Role for Filial Responsibility Laws in Modern Society?*, 26 FAM. L.Q. 195, 197 (1992).

9. *Id.* E.g., Laws of the State of Delaware, ch. CCXXV, § 6, 546-47 (1797); Acts of the General Assembly of the Province of New Jersey, ch. CXXXVIII, § 15, 227-28 (1761); Laws of the Colony of New York, ch. MDC, § XIX, 755 (1888).

10. Pakula, *supra* note 6, at 862.

11. See 23 PA. CONS. STAT. § 4605 (Supp. 2012). Some states permit parents, public agencies, the state, welfare authorities, creditors, and others to bring claims. Pakula, *supra* note 6, at 863.

12. Shannon Frank Edelstone, *Filial Responsibility: Can the Legal Duty to Support Our Parents Be Effectively Enforced?*, 36 FAM. L.Q. 501, 508 (2002); George F. Indest III, *Legal Aspects of HCFEA's Decision to Allow Recovery from Children for Medicaid Benefits Delivered to Their Parents Through State Financial Responsibility Statutes: A Case of Bad Rule Making Through Failure to Comply with the Administrative Procedure Act*, 15 S.U. L. REV. 225, 233 (1988).

those of a spouse or minor child, for eligibility purposes.¹³ In its final report on the bill, the Senate Finance Committee declared that states could not require contributions to an applicant's medical care from family members beyond a spouse, parent of a minor child, or a parent of an adult child who is blind or totally disabled.¹⁴ In 1977 and 1978, the Medicaid regulations were amended to expressly prohibit requests for reimbursement from anyone who was not the spouse of the person, or parent of the child, for whom benefits had been paid.¹⁵ In response to the amendments, many states—attempting to guarantee the receipt of federal funding—entirely stopped enforcing their filial responsibility laws.¹⁶ To ensure compliance with the federal scheme, some states even repealed their filial responsibility statutes.¹⁷

III. THE CONFLUENCE OF A RECESSION AND AN AGING POPULATION

Delaware has one of the fastest aging senior populations (age sixty and over) in the nation.¹⁸ According to the Delaware State Plan on Aging, there are approximately 182,390 persons living in Delaware who are age sixty and older—26,000 of whom are suffering from Alzheimer's disease.¹⁹ Almost nine percent of the seniors living in Delaware “are considered to be the ‘oldest old’ at age 85 and older.”²⁰ It is predicted that by 2020, the senior population will account for one-fourth of the State's total population.²¹ The “oldest old” segment of this population is predicted to grow by 147.5% in the same time period.²² This exponential growth is due, in part, to migration of seniors to Delaware.²³ As a result of this migration pattern, it has been projected that the “oldest old” population within Sussex County alone will increase 311.7% by 2020.²⁴

The per capita cost of health care rises as people age. State governments struggle to pay for health care for seniors and other needy persons. As such, Medicaid has become a significant part of every state's budget, and the pace of

13. 42 U.S.C. § 1396a(a)(17)(D) (2006); Edelstone, *supra* note 12, at 508.

14. S. REP. NO. 89-404, at 78 (1965).

15. Indest, *supra* note 12, at 248-49.

16. Edelstone, *supra* note 12, at 508.

17. Kline, *supra* note 8, at 200.

18. *Delaware State Plan on Aging: Oct. 1, 2012 – Sept. 30, 2015*, DELAWARE HEALTH & SOC. SERVS. 4 (May 25, 2012) [hereinafter *State Plan on Aging*], http://dhss.delaware.gov/dhss/dsaapd/files/state_plan_on_aging_12_15.pdf (noting that the nation's senior population grew 10% between 1996 and 2006 and that Delaware's senior population grew by 24% in that same time period).

19. *Id.* at 4, 36.

20. *Id.*

21. *Id.* at 4.

22. *Id.*

23. *Id.* See also Mary Joan McDuffie & John E. Stapleford, *Implications of the Gray Wave Crashing into Delaware*, CAESAR RODNEY INST. CTR. FOR ECON. POLICY & ANALYSIS 29, http://www.caesarrodney.org/pdfs/Gray_Wave_Report_5-112.pdf (last visited Apr. 5, 2014) (finding that tax breaks for seniors “boost the net in-migration of retirees to Delaware[]”).

24. *State Plan on Aging*, *supra* note 18, at 4.

national Medicaid spending is brisk. Since 2000, Medicaid enrollment rose 49% across the nation and 44% in the mid-Atlantic region.²⁵ In comparison, Medicaid enrollment in Delaware soared by almost 70% in the same period.²⁶ The budget for Medicaid spending for fiscal year 2012 was approximately \$681 million, which was a 17.9% increase from 2011.²⁷ In his 2013 budget, Delaware Governor Jack Markel included a request for a \$22 million increase in Medicaid spending in order to meet an expected increase in Medicaid enrollment.²⁸ Medicaid enrollment was 195,000 for 2012, and that number was expected to grow to over 209,000 in 2013.²⁹

Until the mid-1990s, Medicare reimbursed nursing homes for the actual cost of the care provided to each patient.³⁰ In 1996, Congress passed the Balanced Budget Act, which implemented a prospective payment system.³¹ Rather than provide reimbursement for the actual costs incurred, Medicare began to provide reimbursement in accordance with pricing formulas.³² As a result, many nursing homes began to claim losses.³³ The consequences of reimbursement shortfalls are varied, but commonly include higher rates for patients who pay out-of-pocket, a lower quality of care, understaffing, quick turnover of nurses' aides, shortages of nurses, and higher reported incidents of elder abuse and lawsuits.³⁴ The effects of the prospective payment systems are still lingering today, especially because of the country's struggling economy. Delaware has already expressed the need to cut costs by reducing personnel, limiting programs, and emphasizing care in the home as opposed to care in a facility.³⁵

Less federal funding means Delaware will have to tighten the number and type of medical assistance programs made available to its citizens. As the Medicaid and Medicare reimbursement rates continue to fall, hospitals and nursing homes will be forced to bear more of the burden, necessarily absorbing the increasing costs associated with the provision of medical assistance to the poor and elderly. The pressure to make up these reimbursement shortfalls is greater than ever.

25. McDuffie & Stapleford, *supra* note 23, at 26.

26. *Id.*

27. Doug Denison, *Budget Breakdown: Delaware Medicaid spending*, DOVER POST (Mar. 9, 2011, 12:01 AM), <http://www.doverpost.com/article/20110309/NEWS/303099985/0/SEARCH>.

28. Randall Chase, *Del. gov proposes \$3.5B budget with no tax hike*, BOSTON GLOBE (Jan. 27, 2012), http://www.boston.com/news/education/k_12/articles/2012/01/27/del_gov_proposes_35b_budget_with_no_tax_hike/.

29. Denison, *supra* note 27.

30. Thomas Day, *Guide to Long Term Care Planning – About Nursing Homes*, NAT'L CARE PLANNING COUNCIL, http://www.longtermcarelink.net/eldercare/nursing_home.htm (last visited Apr. 5, 2014).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *State Plan on Aging*, *supra* note 18, at 6-7.

IV. SHOULD ADULT CHILDREN BE FORCED TO REIMBURSE MEDICAID?

Congress began limiting the budget for Medicaid spending in the early 1980s as a means of controlling the federal deficit. In February 1983, the Health Care Financing Administration (HCFA) promulgated Medicaid Manual Transmittal No. 2, which authorized States to enact legislation of general applicability, such as filial responsibility statutes, in order to seek reimbursement from adult children and other more distant relatives.³⁶ Legally, the Transmittal was premised on the idea that states would not violate federal law if they proceeded under the auspices of a state statute rather than under the Medicaid Act.³⁷ To date, there are no reported cases upholding a state Medicaid agency's use of a filial responsibility statute to obtain reimbursement from adult children.³⁸ Several attorneys general have written opinions stating that the use of a filial responsibility statute in this way would directly violate federal law.³⁹ At least one scholar has taken the position that because the Transmittal is still on the books, the possibility remains that state Medicaid agencies will seek reimbursement from adult children in the future.⁴⁰

A well-reasoned argument has been made that the Transmittal is unenforceable because it violates the Supremacy Clause of the United States Constitution.⁴¹ However, opposing arguments have indicated that such a constitutional argument would fail.⁴² Nonetheless, in the current social and economic environment of the United States, the federal deficit continues to grow uncontrollably. A long-lingering recession and a rapidly aging population will inevitably require those who provide the elderly with long-term medical care to look for ways to remain economically viable. It seems as though the issue of reimbursement from adult children will remain a threat as long as this current recession lasts.

36. *Indest*, *supra* note 12, at 251-52.

37. *See id.* at 252.

38. Edelstone, *supra* note 12, at 508.

39. *See Indest*, *supra* note 12, at 333-52.

40. Katherine C. Pearson, *Re-Thinking Filial Support Laws In A Time of Medicaid Cutbacks—Effect of Pennsylvania's Recodification of Colonial-Era Poor Laws*, 76 PA. B. ASS'N Q. 162, 169 (2005).

41. *Indest*, *supra* note 12, at 254 (arguing that state filial responsibility statutes directly conflict with the federal Medicaid Act and, therefore, cannot be enforced by the states which are constitutionally required to enforce federal law); *but see* Pearson, *supra* note 40, at 169 (“[T]he existing Medicaid law does not appear to prohibit the agency from later using a filial responsibility statute to seek a support order on behalf of the ‘indigent’ person receiving [Medicaid] nor taking the role as a creditor seeking reimbursement.”).

42. *See* Lynda Yamamoto, *Overcrowded Prisons and Filial Responsibility: Will States Utilize “Support of the Indigent” Statutes to Solve the Baby Boomer and Prison Crises?*, 41 RUTGERS L.J. 435, 462-65 (2009). Many courts have similarly found that Constitutional challenges on the bases of equal protection and procedural due process were unfounded. Statutes imposing filial responsibility have been deemed constitutionally valid time and time again. *Id.*

V. THIRD-PARTY ENFORCEMENT OF FILIAL RESPONSIBILITY STATUTES

In 2005, Pennsylvania recognized the correlative trend between the expanding Medicaid caseload and the declining economic environment. Pennsylvania responded to this trend by amending the Public Welfare Code, through Act 42, to limit the availability of public financing for nursing home and home-based care.⁴³ The Pennsylvania legislature also enacted Act 43 to shift the State's filial responsibility law to the Domestic Relations Code.⁴⁴ This shift effectively supplemented the current support laws, relating to parents' duty to support each other and their children, by highlighting the court's authority to determine the support obligations of adult family members.⁴⁵ As professor Katherine C. Pearson noted, the passage of these two Acts in 2005 portends a trend in public policy regarding the means of financing for long-term care, especially for the elderly.⁴⁶

This trend is reflected in the Pennsylvania Superior Court's 2012 decision in *Health Care & Retirement Corp. of America v. Pittas*.⁴⁷ In that case, Mr. Pittas' mother was in a car accident and sustained injuries which required rehabilitative and nursing care.⁴⁸ For six months, she was a resident of Health Care and Retirement Corporation of America (HCR).⁴⁹ After her recovery, Mrs. Pittas returned to Greece, leaving behind an unpaid bill in the amount of \$92,943.41.⁵⁰

HCR presented the bill for payment to Mr. Pittas, Mrs. Pittas' adult son, who refused to pay.⁵¹ The parties submitted the case to arbitration for resolution.⁵² Mr. Pittas was successful in arbitration, and HCR appealed the arbiter's decision to the trial court.⁵³ HCR proceeded under Pennsylvania's filial responsibility statute, "Relatives' Liability,"⁵⁴ to argue that adult children are legally responsible for their indigent parents' medical and nursing home bills.⁵⁵ After only a three-day trial, the trial court ruled in HCR's favor. The court ruled that Mr. Pittas was indeed responsible for the unpaid bill.⁵⁶ Mr. Pittas then appealed the decision to the Pennsylvania Superior Court.⁵⁷ Pennsylvania's filial responsibility statute provides that:

43. Pearson, *supra* note 40, at 162.

44. *Id.*

45. *Id.*

46. *Id.*

47. 46 A.3d 719 (Pa. Super. Ct. 2012).

48. *Id.* at 720.

49. *Id.*

50. *Id.*

51. *See id.*

52. *Id.*

53. *Pittas*, 46 A.3d at 720.

54. 23 PA. CONS. STAT. § 4603 (2008).

55. *See Pittas*, 46 A.3d at 720.

56. *Id.*

57. *Id.* at 720-21.

- (a) Liability.--
- (1) Except as set forth in paragraph (2), all of the following individuals have the responsibility to care for and maintain or financially assist an indigent person, regardless of whether the indigent person is a public charge:
- (i) The spouse of the indigent person.
 - (ii) A child of the indigent person.
 - (iii) A parent of the indigent person.
- (2) Paragraph (1) does not apply in any of the following cases:
- (i) If an individual does not have sufficient financial ability to support the indigent person.
 - (ii) A child shall not be liable for the support of a parent who abandoned the child and persisted in the abandonment for a period of ten years during the child's minority.⁵⁸

The Superior Court, which is the intermediate appellate court in Pennsylvania, held that the plain language of the statute placed the burden of proof on HCR, as the plaintiff, to demonstrate that: (1) Mrs. Pittas was indigent; (2) Mr. Pittas, her adult son, had the means to support his mother; and (3) Mr. Pittas had sufficient resources to pay the debt of \$92,943.41.⁵⁹ Ultimately, the Superior Court upheld the trial court's decision, and ruled that Mr. Pittas was required to compensate HCR for the unpaid medical expenses incurred by his mother.⁶⁰

Whether Pennsylvania's current filial responsibility statute provided HCR with standing to bring an action against Mr. Pittas was not an issue in the case. The issue of standing, however, was directly addressed in *Presbyterian Medical Center v. Budd*.⁶¹ In *Budd*, the decedent was a resident of the plaintiff's nursing home, and she incurred significant medical expenses.⁶² The decedent's daughter made transfers from her mother's estate totaling over \$100,000, and consequently, her mother (the decedent) had insufficient resources to cover her medical expenses.⁶³ Presbyterian Medical Center sued the decedent's daughter for the balance of her mother's unpaid bill under the statutory predecessor of the current filial responsibility law.⁶⁴ The court held that a nursing home had standing to bring a support action against a child.⁶⁵

58. 23 PA. CONS. STAT. § 4603(a)(1-2).

59. *See Pittas*, 46 A.3d at 722-24. Mr. Pittas failed to rebut HCR's evidence that he could afford to support his mother by not providing sufficient documentation of other obligations he maintained, which rendered him unable to afford to pay the bill. *Id.* at 723. Furthermore, his testimony regarding his assets and liabilities was so general that the trial court ruled that his testimony was not credible. *See id.*

60. *Id.* at 724

61. 832 A.2d 1066, 1076 (Pa. Super. Ct. 2003).

62. *Id.*

63. *Id.*

64. *See id.*

65. *Id.*

Furthermore, the court ruled that the mother's indigence was a result of the transfers made by her daughter.⁶⁶ Accordingly, the court concluded that PMC had established a cause of action against Ms. Budd sounding in Pennsylvania's support law.⁶⁷

VI. FILIAL RESPONSIBILITY IN DELAWARE

A. *The Statutory Scheme*

In Delaware, the availability of public assistance and the duty to support family members are statutorily related. The statutory scheme for state-provided public assistance, including medical assistance, is found in Delaware's State Public Assistance Code, beginning at Section 501 of Title 31.⁶⁸ There are three categories of assistance: (1) Aid to Families with Dependent Children; (2) General Assistance; and (3) Medicaid Assistance.⁶⁹ Eligibility for Medicaid is determined on a case-by-case basis.⁷⁰

The intent of the Delaware regulations concerning the availability of public assistance is, among others, to hold parents responsible for the support of their children.⁷¹ This duty is reciprocal in nature, such that children are also responsible for their indigent parents.⁷² Section 511 of Title 31 expressly refers to the filial responsibility of relatives for each other, in accordance with Section 501(a) of Title 13.⁷³ No provision of Title 31 is to be construed to relieve the duty of support among family members.⁷⁴ However, with respect to public assistance eligibility determinations, the Department of Health and Social Services (DHSS) is not to consider the provisions of Section 501(a) of Title 13, which sets out the statutory duty to support family members.⁷⁵ There is one exception to this mandate, however, which allows the consideration of an individual's financial responsibility for a spouse and/or child.⁷⁶

Under certain circumstances, DHSS has the right to seek reimbursement for any public assistance funds paid out to an individual.⁷⁷ Pursuant to Section 522 of Title 31, DHSS has the right of subrogation to recoup payments made

66. *Budd*, 832 A.2d at 1077.

67. *Id.*

68. DEL. CODE ANN. tit. 31, §§ 501-23 (2006).

69. *Id.* at § 505.

70. See 42 U.S.C. § 1382(a)-(c) (2006) (defining what constitutes an "[e]ligible individual," outlining the method for calculating eligibility, and providing the amount of benefits available to eligible individuals); 16 DEL. ADMIN. CODE § 2100-1.0(1.1)-(1.6) (2012) (describing the eligibility requirements for those with developmental disabilities seeking services).

71. DEL. CODE ANN. tit. 31, § 501.

72. *State v. Sharon H.*, 429 A.2d 1321, 1329 (Del. Super. Ct. 1981).

73. DEL. CODE ANN. tit. 31, § 511(a) (2006).

74. *Id.*

75. *Id.*

76. *Id.* at § 511(b). This limitation on considering the resources of family members beyond the spouse or parent parallels the federal law concerning determining eligibility for Medicaid under 42 U.S.C. § 1396a(a)(17)(D) (2006).

77. See DEL. CODE ANN. tit. 31, § 522(a) (2006).

to an individual suffering from a personal injury if the individual subsequently receives an award or settlement covered by liability insurance.⁷⁸ Individuals receiving welfare payments must assign their right to receive support from family members, under Section 501(a) of Title 13, to DHSS, and they must also file a support action against the obligor.⁷⁹

DHSS has a limited right of reimbursement for Medicaid payments paid out on behalf of eligible residents.⁸⁰ In the event of an over payment or a duplicative payment from another agency, DHSS has the right to recover such payment by filing a civil action.⁸¹ Under Title 16 of the Delaware Administrative Code, DHSS may seek reimbursement by filing claims against the estates and real property of Medicaid recipients who are age fifty-five and older.⁸² Liens against real property are permitted if a decedent was unmarried, and no minor, blind, or disabled child who was residing in the home survived the decedent.⁸³ DHSS may place a lien on real property when a single individual is a resident of a full-time nursing care facility, and the individual has been institutionalized for more than sixty days.⁸⁴

There are exceptions to the general recovery rules, which, in certain circumstances, prevent DHSS from seeking recovery.⁸⁵ For example, no recovery is permitted from an adult child if the adult child was the decedent's caregiver and lived in the decedent's home for at least two years preceding the decedent's admission to a long-term care facility.⁸⁶ The same prohibition against recovery applies to a sibling of a decedent if the sibling was the caregiver and resided in the decedent's home for one year preceding admission.⁸⁷

B. Filial Responsibility

Delaware's filial responsibility statute is similar to Pennsylvania's in that it names the class of persons (spouse, parent, and child) who have a support responsibility for a "poor person."⁸⁸ However, unlike Pennsylvania, Delaware places the burden of proving a "poor" person's inability to afford the sought after support on the obligor (adult child).⁸⁹ The pertinent statutory provisions provide that:

78. DEL. CODE ANN. tit. 31, § 522(b).

79. *Id.* at § 504(a).

80. *See id.* at § 503(b).

81. *See id.* at §§ 503(b), 513.

82. 16 DEL. ADMIN. CODE § 5100-20500.4 (West, Westlaw through amendments included in the Delaware Register of Regulations, Volume 17, Issue 9, dated Mar. 1, 2014).

83. *Id.* at § 5100-20500.5.1.

84. *Id.* at § 5100-20500.6.

85. *Id.* at § 5100-20500.5.

86. *Id.* at § 5100-20500.5.2.

87. *Id.*

88. DEL. CODE ANN. tit. 13, §§ 503, 505 (2009).

89. *See id.* at § 503.

Except as expressly provided in §§ 501 and 502 of this title, the duty to support a poor person unable to support himself/herself rests upon the spouse, parents, or children, in that order, subject to § 504 of this title as to expenses described therein. If the relation prior in order shall not be able, the next in order shall be liable, and several relations of the same order shall, if able, contribute according to their means.⁹⁰

The duties of support specified in §§ 501 through 504 of this title shall be performed according to the following order of priority:

- (1) Duty to support one's own minor child;
- (2) Duty to support a spouse;
- (3) Duty to support a woman pregnant with child conceived out of wedlock;
- (4) Duty to support a stepchild or the child of a person with whom the obligor cohabit[ates] in the relationship of husband and wife;
- (5) *Duty to support a poor person.*⁹¹

Generally, actions filed pursuant to Delaware's filial responsibility statutes involve claims by the classes of people that are owed a duty of support against the persons who owe the duty.⁹² In Delaware, there are no reported decisions in which a nursing home has used Sections 503 and 505 of Title 13 to pursue a claim against an adult child for payment of a poor parent's unpaid bill. Furthermore, until 1992 there were no reported cases of businesses filing claims under the filial responsibility statutes to collect unpaid expenses.

In *Dutton v. Wolhar*, the defendant-debt collector sought to use the statutes as an affirmative defense.⁹³ Both plaintiffs' parents owed significant debt to a drug store and the defendant attempted to collect the debt by way of threatening letters.⁹⁴ In response to the threatening letters, plaintiffs filed suit contending the collection tactic used by the defendant violated the Fair Debt Collection Practices Act.⁹⁵ The defendant interposed an affirmative defense, using Section 503 of Title 13, to argue that children are responsible for their poor parents' debt.⁹⁶ The District Court rejected the defendant's assertion of Section 503 as an affirmative defense: the court ruled the defendant failed to make a showing of record that he was entitled to the benefit of Section 503, and as a result, failed to satisfy the pleading standard required by the Federal Rules of Civil Procedure.⁹⁷ The court went on, in dicta, to comment that it

90. See DEL. CODE ANN. tit. 13, § 503 (2009).

91. *Id.* at § 505 (emphasis added). Section 503 is titled "Duty to support a poor person" and Section 505 is titled "Priority among dependents."

92. See, e.g., *Dalton v. Clanton*, 559 A.2d 1197, 1199 (Del. 1989); *Helen B.M. v. Samuel F.D.*, 479 A.2d 852, 853 (Del. Fam. Ct. 1984).

93. *Dutton v. Wolhar*, 809 F. Supp. 1130, 1134, 1136 (D. Del. 1992).

94. *Id.* at 1133.

95. *Id.* at 1132.

96. *Id.* at 1136.

97. See *Dutton*, 809 F. Supp. at 1137 ("Defendants here have not provided any support in the record for their assertion that [Section 503] applies Further, they made no showing

had serious doubts as to the constitutionality and applicability of the statute as an affirmative defense.⁹⁸

As there seems to be a trend, at least in Pennsylvania, for nursing homes to pursue adult children for their indigent parents' debt under the filial responsibility statute, an interesting question is raised as to whether the Delaware filial responsibility statute affords nursing homes the same opportunity. It is a violation of federal and state law for a nursing home to compel a child to be a third-party obligor as a *condition of admission*, unless the child knowingly and voluntarily consents.⁹⁹ Accordingly, in Delaware the filial responsibility statute is the only means by which a nursing home may make a child responsible for an indigent parent's debt. What, then, must a nursing home prove to establish a *prima facie* case and ultimately be successful under Delaware's statute?

1. Jurisdiction and Standing

The Delaware Family Court has exclusive jurisdiction over all support cases.¹⁰⁰ Thus, it will have subject matter jurisdiction over any cause of action premised on the filial responsibility statute. The Court must also have personal jurisdiction over any defendant named in an action. Personal jurisdiction can be obtained by: (1) service and process; (2) the defendant personally appearing; (3) counsel entering an appearance on behalf of the defendant; or (4) Delaware's long-arm statute.¹⁰¹ The long-arm statute allows a plaintiff to serve out-of-state defendants who contract, do business, commit torts, have an interest in real property, or provide for insurance on persons or property in Delaware.¹⁰² In *Helen B.M. v. Samuel F.D.*, the Delaware Family Court held that at least one party to the support action must be a resident of Delaware.¹⁰³ The court also held that, despite the provisions of the long-arm statute, the defendant lacked sufficient minimum contacts with Delaware and personal jurisdiction over him could not be appropriately exercised.¹⁰⁴

Unlike the filial responsibility statutes in many states, the current Delaware statute does not expressly provide standing to any particular person or entity.¹⁰⁵ The plain language of the statute, however, implies that the following persons have standing to bring a support action: minor children; a spouse; a woman pregnant out of wedlock; and a poor person.¹⁰⁶ The question of

that plaintiff's mother was a 'poor person' or that defendants had first sought satisfaction of the debt from the plaintiff's mother's spouse or parents.").

98. *Dutton*, 809 F. Supp. at 1137.

99. Emily A. Donaldson, *Filial Responsibility Laws: Requiring Children to Support Aging Parents*, 192 ELDER L. ADVISORY 1, 1 (2007).

100. DEL. CODE ANN. tit. 13, § 507 (2009).

101. *See* DEL. CODE ANN. tit. 10, § 1065 (2009).

102. DEL. CODE ANN. tit. 10, § 3104 (2013).

103. *See Helen B.M. v. Samuel F.D.*, 479 A.2d 852, 854 (Del. Fam. Ct. 1984).

104. *See id.*

105. *See* DEL. CODE ANN. tit 13 §§ 501-509 (2009).

106. *Id.* at § 503.

standing is whether a third-party entity, such as a nursing home, has standing to bring an action under Sections 503 and 505 of Title 13. In *Murphy v. United Services Auto Ass'n*, the court explained that in order to establish standing:

(1) the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.¹⁰⁷

In the context of long-term care, a nursing home suffers a loss under two distinct circumstances: (1) when a resident is unable to self-pay; and (2) when a resident qualifies for Medicaid. Why the first circumstance constitutes a loss is obvious. The second constitutes a loss because the Medicaid reimbursement rate often does not fully cover the shortfall amount between the resident's income and the facility's monthly rate.¹⁰⁸ A nursing home that provides care to a poor person, and which remains completely or partially unpaid, has suffered an *injury in fact*—it is owed money that the poor person is contractually bound to pay. This injury in fact is *actual* because the amount owed has been incurred and is outstanding. The injury is *directly traceable* to the poor person—but for the person not paying the bill, the debt would not be outstanding. A finding that a nursing home has standing would not be contrary to the statute's purpose. The intended purpose of statutes like Delaware's is to place the burden of support upon a relative who can pay rather than on the state or the community.¹⁰⁹ Therefore, the Delaware Supreme Court would likely find that a nursing home has standing to file suit against an adult child for the unpaid medical expenses of an indigent parent under Sections 503 and 505 of Title 13.

2. Specific Cause of Action

Having determined that the nursing home will have standing, and assuming the Delaware Family Court has personal jurisdiction over the defendant, what, then, are the elements for the specific cause of action? First, the plaintiff-nursing home must file a petition alleging that (i) the defendant owes a duty of support to his or her parent under Section 503; and (ii) the defendant has refused or failed to provide such support. Second, there must be sufficient evidence that the parent is a "poor" person under the statute. While Delaware courts have had "great difficulty in setting specific rules defining

107. *Murphy v. United Services Auto Ass'n*, No. Civ.A. 04C-07-003RFS, 2005 WL 1249374, at *2 (Del. Super. Ct. May 10, 2005) (internal citations omitted); *see also* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

108. *See supra* notes 30-35 and accompanying text.

109. *See* *Helen B.M. v. Samuel F.D.*, 479 A.2d 852, 855 n.2 (Del. Fam. Ct. 1984).

indigency[.]”¹¹⁰ Black’s Law Dictionary defines the term “indigency” as “[t]he state or condition of a person who lacks the means of subsistence[. . .].”¹¹¹ Another court has defined the term “indigent” to include, but not be limited to, “those who are completely destitute and helpless.”¹¹² That definition also includes persons with some limited means, but means which are ultimately insufficient in relation to the person’s particular needs.¹¹³ Third, the plaintiff must show that it first submitted the debt for payment to the poor person’s spouse and then the poor person’s parents, in that order, before submitting it to the adult child.¹¹⁴ Finally, it must be shown that the defendant-child is financially able to pay the bill.¹¹⁵

Assuming there is sufficient evidence to satisfy the above elements, the nursing home will have met the burden of establishing a *prima facie* case. The burden of proof then shifts to the defendant, who must prove, by a preponderance of the evidence, that there is “just cause” for refusing to pay the bill.¹¹⁶ “Just cause” has been defined as any plausible basis for failing or refusing to take action.¹¹⁷ Many filial responsibility statutes exempt from liability an individual who is unable to financially support the poor person.¹¹⁸ The exemption may also include instances where the poor person abandoned the adult child for some length of time in his or her minority.¹¹⁹ A financial inability to support a poor person is a standard defense in Delaware case law.¹²⁰

VII. CONCLUSION

Whether nursing homes will pursue adult children under Section 503 of Title 13 for the unpaid portion of the long-term care provided to seniors remains to be seen. There is no question that long-term care facilities are absorbing the costs, and carrying the burden, caused by public agency shortfalls. There are, however, unintended consequences of placing that

110. *Potter v. State*, 547 A.2d 595, 599 (Del. 1988).

111. BLACK’S LAW DICTIONARY (9th ed. 2009).

112. *Presbyterian Med. Ctr. v. Budd*, 832 A.2d 1066, 1075 (Pa. Super. Ct. 2003).

113. *See id.* Cf. *Dalton v. Clanton*, 559 A.2d 1197, 1202 (Del. 1989) (finding that the person in need was able to function in the work force and was not considered a “poor person” despite earning approximately \$196 per week).

114. DEL. CODE ANN. tit. 13, § 505 (2009).

115. *See id.* at §§ 505, 506.

116. *Id.* at § 506.

117. *See* BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “good cause” as “[a] legally sufficient reason”). *See also* *Vann v. Town of Cheswold*, 945 A.2d 1118, 1122 (Del. 2008) (en banc) (citing Black’s Law Dictionary to similarly define “just cause” in the context of employment termination).

118. *E.g.*, 23 PA. CONST. STAT. ANN. § 4603(a)(2)(i) (West 2013).

119. *Id.* at § 4603(a)(2)(ii). Some states include affirmative defenses, such as abandonment, in the filial responsibility statutes. *E.g.*, CAL. FAM. CODE §§ 4410-11 (West 2014).

120. *See* *DE v. S.M.E.*, No. CN02-07783, 2003 WL 22475831, at *1 (Del. Fam. Ct. Aug. 28, 2003) (allowing both parents to argue they were not financially able to support their child).

economic burden on family members, specifically adult children. First, requiring children to pay their parents' nursing home bills, and thus curtailing their ability to financially prepare for their own care, increases the likelihood that adult children will seek public assistance later. Second, it appears that pursuing adult children for reimbursement of the shortfall amount stemming from the care provided to their poor parents is akin to cannibalizing the nursing homes' target markets. Nursing homes must survive long enough to provide long-term care to adult children when they are elderly and require such care. Despite these issues, third-party service providers, who provide long-term care to seniors, will have both standing and the ability to establish a *prima facie* case against adult children, thereby increasing the likelihood that the Delaware Supreme Court will uphold such a use of Delaware's filial responsibility statute.